Love’s Labor’s Lost: Marry for Love, Copyright Work Made-for-Hire, and Alienate at your Leisure

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by
Llewellyn Joseph Gibbons1

Our court shall be a little Academe,
Still and contemplative in living art.

—William Shakespeare2

What's love got to do, got to do with it
What's love but a sweet old fashioned notion

—Tina Turner3

Abstract

Although only two courts have decided cases involving whether under state law an author-spouse’s copyright is community property, some commentators are treating this question as settled law. There are no cases deciding these issues in non-community property states or under state laws protecting the property interests of cohabiting couples. This article will examine whether state domestic relations laws governing the allocation of copyright interests, including economic rights, are preempted by federal law. Because the articles concludes that under principles of federal preemption, the interests in the author-spouses copyrights are not subject to transfer by operation of state law; this article will then propose conceptualizing the marriage “partnership” as a legal business entity partnership and then explore whether this new business partnership understanding of marriage is consistent with the principles of both business entity law and copyright law. Finally, this article will evaluate whether treating marriage as a legal business partnership may not achieve the goals of community property allocation upon marital dissolution in a manner consistent with the statutory and constitutional purposes of copyright.

I. Introduction

This article will consider who owns a copyright created by an author-spouse (or cohabiting partner) during the marriage, whether it is the separate property of the author or community property of the relationship then analyze whether substituting the romantic sui generis institution of the chivalric complementary community property marriage partnership with an economic institution of marriage as a business entity partnership may yield a result that is more consistent

1 Associate Professor, University of Toledo College of Law. As always, the opinions expressed in this Article as well as the many errors and omissions are solely the responsibility of the author.
2 William Shapesspeare, Love’s Labour’s Lost, 1.1.13.
with the statutory norms of copyright law. While this article will focus on the copyright issues that community property jurisdictions raise in the context of dissolution proceedings, the potential application of its thesis is much wider; and in principle, may apply equally as well in common law jurisdictions using an equitable distribution model; in states providing some legal protections for cohabitating individuals, for example, a meretricious relations state such as Washington; or in states following the California Supreme Court’s seminal holding in *Marvin v. Marvin*.6

Under any of these domestic relations paradigms, state courts face questions of federal preemption when forced to allocate an author-spouse or author-cohabitant’s copyright assets in the course of adjudicating property claims arising from the winding-up of a legally cognizable relationship.7 Copyright rights are statutorily vested by Congress (and perhaps the United States Constitution) in the author of the work, and Congress has limited the power of states to involuntarily divest an author of the copyright to a work. Also, under federal legislation such as the Defense of Marriage Act (DOMA), whether a state recognizing same-sex marriages may use that legal relationship as a colorable basis on which to allocate federally created intellectual property rights, including copyrights, is a significant and as yet unanswered question.8

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5 Under Washington law, “a ‘meretricious relationship’ is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *Soltero v. Wimer*, 150 P.3d 552, 555 (Wash. 2007). Only property that would be deemed *community property* in a marriage is subject to a just and equitable distribution upon dissolution of a meretricious relationship. *Id.* & n. 3 (emphasis added). So, potentially, the problems that community property laws pose for the post-marital allocation of copyrights are also posed by Washington’s meretricious relationship law. See Gavin M. Parr, *What Is A “Meretricious Relationship”?: An Analysis Of Cohabitant Property Rights* Under *Connell v. Francisco*, 74 WASH. L. REV. 1243, 1252 (1999)(describing the meretricious relationship as having a “pseudo-community property character.”).

6 See *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (“In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that *conduct demonstrates an implied contract, agreement of partnership or joint venture*, or some other tacit understanding between the parties. The courts may also employ the doctrine of *quantum meruit*, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.”)(emphasis added); *HOWARD O. HUNTER*, *MODERN LAW OF CONTRACTS* § 24:7 (2011)(discussing cases following *Marvin* in Nevada, Maryland, Missouri, Arizona, Wisconsin, District of Columbia, New Jersey, Oregon, and Colorado).

7 See *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* [*Principles*] §6.03(3) & § 6.05 (2002)(“Domestic-partnership property should be divided according to the principles set forth for the division of marital property in § 4.09 and § 4.10.”). Further discussion of meretricious relationships, *Marvin v. Marvin* cohabitation agreements, and the *Principles* would unnecessarily lengthen an already exceedingly verbose law review article.

Conversely, federal courts unfamiliar with state domestic relations laws may be forced to weigh in and rebalance delicate economic issues decided by state courts in the course of emotionally wrought state domestic relations proceeding. Family law is an area that constitutionally and jurisprudentially has been terra incognito to the federal courts. The interstitial complexities of state domestic relations laws and federally created copyrights rights require a *tertium quid* solution. This Article proposes a solution that recognizes the respective competencies of state and federal courts, and a solution that avoids potential issues of federal preemption: courts should reject romance for reality and view the creation and allocation of copyright during a marriage or similar cohabitation relationship under pragmatic principles of business law and treat the relationship as a business partnership.

Two institutions that are infused with a cultural patina of romance are marriage and copyright. Most readers will have little difficulty viewing the institution of marriage through the rosy lens of romance. Fewer readers will as readily concede that copyright is also a romantic institution. Societal tropes of the creative processes: the suffering, impoverished, eccentric artists and authors of all stripes working in garrets. In a marriage with a creative spouse, these two romantic archetypes reinforce each other: the supportive-worker-spouse and the creative-dysfunctional-leach spouse. The meme of the long suffering emotionally exhausted and financially supportive spouse who endlessly toils to permit the cerebral, emotionally distant, and demanding spouse to be creative colors societal understanding of the marital relationship. The romance matures into a marriage-partnership then the marriage culminates in divorce with a so-called innocent spouse who provided economic support, a creative spouse, and copyright dispute. The reality is that once one strips away the patina of romantic stereotypes burnished through the media and the yarns of poets, what remains are two economic institutions. This Article will use as the model relationship the romantic creative spouse; the spouse who “stays at home” and engages in individual creative endeavors that result in copyrighted works. Any discussion of the higher order self-actualizing purposes that marriage avowedly serves to others more suited for such a discussion: poets, theologians, philosophers, and of course, psychiatrists. Rather, it will focus on marriage as an economic construct that supplies the basic necessities of life.

Our societal norm of the perfect idyllic relationship is reflected in a complementary marriage; for all others, there are second-class *ad hoc* ersatz-quasi-legal-institutions. Individuals who are unfortunate enough to be unmarried (or at least not married to each other) and cohabiting may find that if the court considers the relationship otherwise meritorious and if the court can legally excise the sexual element from the relationship, then the court may exercise its discretion and create some legal rule that protects one individual in the cohabitation

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12 See, e.g., Marvin v. Marvin, 557 P.2d 106, 113-14 (Cal. 1976); Van Brunt v. Rauschenberg, 799 F. Supp. 1467, 1471 n.1 (S.D.N.Y. 1992) (“held that whether the services contracted for were of a personal or commercial nature was irrelevant (as long as not exclusively sexual) where the agreement is express.”).
from other’s post-cohabitation avarice. This article proposes at least in the context of copyright ownership rejecting the default norm of complementary marriage in a community property state as rubric for allocating copyright interests in dissolution proceedings and recommending instead that business institutions and commercial norms may be the superior alternative to effectuate copyright policies promoting the progress of science and the useful arts. Once love and romance is removed from marriage, courts could reify marriage into a well-established legal and economic entity, a legal partnership. At least for copyright law, the praxis of a community property state marriage is a legal partnership conceptualized under the principles of agency or business association law. Removing romantic-marriage from the equation leaves a traditional legal and economic institution that is congruent with both the purposes of state community property law and with federal copyright law. Marriage and its dissolution should be treated by courts as the creation and then winding-down of partnership; the copyright assets created and held during the marriage are partnership assets, and upon dissolution of the partnership, these assets should be allocated as are any other assets at the dissolution of a partnership. Courts will then not have to create sui generis principles of law to govern copyrights before, during, or at the dissolution of marriage rather courts will merely apply a well-developed body of existing partnership law in a slightly new context.

Courts have had centuries of experience addressing the economic rights and obligations of a couple at the dissolution of their marriage when the marital assets consisted of mostly tangible property. Modern wealth is no longer necessarily based on the title to real estate or the ownership of tangible objects, but rather on intangible rights, including intellectual property or in new forms of property. While the law of real and personal property is largely a state body of law, often the law governing intangible rights in the area of copyright is federal law. Individual states may be roughly divided into two groups; those states with the economic relationship

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13 See, e.g., Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976)(“In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.”); Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987) (citing numerous cases and authorities for the above proposition). The more the cohabitation relationship mimics the complementary marriage norm, the more likely a court is the exercise its equitable powers regarding the allocation of post-cohabitation property rights. See Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995)(“Relevant factors establishing a meretricious relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (2002)(listing factors that parallel the normative behavior of those in a traditional heterosexual marital relationship).

14 I am assured by many married friends this often takes place at the wedding between the “I” and the “do” and never later than the wedding reception, and one prominent happily married Australian barrister assured me that the question assumes a fact not in evidence.

15 Throughout this Article the author will strive to ensure that the terms partner or partnership are stripped of their romantic connotations and only refer to either the individuals comprising a legally recognizable separate business entity or the entity itself.

16 See, e.g., Stockton v. Knock, 15 P. 51 (Cal. 1887); Trimble v. Trimble, 15 Tex. 18 (1855), Palmer v. Palmer, 1 Paige Ch. 276 ( N.Y. Ch. 1828).


between the spouses is defined by principles arising out of the common law, and those states whose marital laws governing the economic relationship between the spouses arise out of the civil law ("community property states"). While these are two distinct bodies of family property law, the two systems have some similarities and some common law jurisdictions borrow "community property" definitions of marital property. So, judicial decisions in a community property jurisdiction may be persuasive authority in common law states. Although, there are only eight community property states; they differ greatly among themselves. Federal and state courts in the context of copyright disputes have faced the vexatious problem of allocating federal rights in copyrights created during a marriage. Copyrights are property rights that are created under federal law and whose initial ownership is governed by federal law. Strong Congressionally declared federal public policies relating to copyrights strive to create a national uniform system. On the other hand, marriage is a uniquely state institution, and federal and state courts have indulged in every permissible presumption in order to avoid finding state laws governing marriage, marital property, and its status at the dissolution of the marriage preempted by federal law. In order to do justice, if not law, courts have been remarkably creative in finding novel procrustean interpretations of copyright law in a vain attempt to harmonize Congresses’ statutory commands with sui generis state community property law principles. As a solution, this Article urges a rethinking of marriage outside the narrow bands of holy matrimony and romantic love and to ask “what’s love got to do with it?”

19 The following states are “community property” states: Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin. See William Bassett, California Community Property Law § 1:4 (2011 ed.). For the purposes of the Copyright Act, Puerto Rico, a civil law jurisdiction, is considered a state. 17 U.S.C. § 101. Alaska may also treat marital assets as a community property state, but only if the spouses agree in writing. See Alaska Stat. §§ 34.77.020-34.77.995. Moreover, some non-community property states recognize community property rights that were created while the married couple was living in a community property state. See, e.g. John Parker Huggard, North Carolina Estate Settlement Practice Guide § 30:8 (2011).

20 See, e.g., In re Marriage of Heinze, 631 N.E. 2d 728, 731 (Ill. App. 1994) (Illinois (common law jurisdiction) definition of marital property “very similar to California definition of community property” dividing royalties to books written during marriage.).

21 In re Marriage of Heinze, 631 N.E. 2d 728, 731 (Ill. App. 1994) (Illinois, a common law jurisdiction, definition of marital property is “very similar to California definition of community property” dividing royalties to books written during marriage.).


25 See Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) (“family law must do ‘major’ damage to ‘clear and substantial’ federal interests before state law is overridden.”); United Ass’n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U. S. and Canada Local 198 AFL-CIO Pension Plan v. Myers, 488 F. Supp. 704, 707 (D.C. La. 1980) (“We start with the proposition that the delicate relationships of husband-wife, parent-child and family-property arrangements are traditionally matters of exclusive state concern. No provision of Article I of the Constitution confers power upon the Congress to legislate in these sensitive state fields. Any general federal law attempting to regulate such relationships would be constitutionally infirm. If the Tenth Amendment reserved any powers to the states, it must be the power to legislate the rules applicable to marriage, separation and divorce, community property and succession.”), aff’d. 645 F.2d 532 (5th Cir. 1981).

Without love, what is left of marriage is an economic partnership. This Article concludes that a less romantic view of the commerce of the marital relationship and a more commercial view of marriage as a business entity will better effectuate the public policies concerning marriage as an economic institution and the use of copyrights constitutional polices to promote the progress of science and the useful arts. Courts should not change their understanding of the general laws governing copyright rather the court should adopt a realistic understanding of marriage as the legal and functional equivalent of a business entity partnership and to treat the author-spouse’s copyrighted works as a work-made-for-hire under the Copyright Act. Naturally changes to existing copyright legislation would be a much simpler solution than conceptualizing the centuries old marriage norms to conform to modern principles of partnership and copyright law. So far, Congress has shown little inclination to change the existing Copyright Act norms. Further, the preemption problems presented by this article as justification for this solution may be skirted through the use of prenuptial or postnuptial agreements. Alternatively, the federal courts could craft a rule of federal common law to displace state law in this area. Finally, state legislatures or state courts could determine as a matter of state law that copyrights are separate property or otherwise out of the marital estate when awarding marital property. All of these solutions are as or more improbable as the one propounded in this Article.

II. Copyright

Since the enactment of the 1976 Copyright Act, the legal ownership of a copyright has been problematic in the state law context because state laws governing “ownership” of a copyrighted work created during marriage may deviate significantly from the federal norm of copyright ownership. Under the 1976 Copyright Act, copyright automatically subsists in original works authorship fixed in a tangible medium of expression by or under the authority of the author, at the moment of fixation, and is immediately vested in the author. The standard of originality under copyright law is extremely low and most expressive works easily cross this threshold. Consequently numerous copyrighted works are created during a marriage. The vast majority of these have no economic value and their ownership will not be disputed. Although it conveys significant advantages, registration of the work is not required to obtain a copyright. However, at least for U.S. works, registration is an element of the claim of copyright infringement. Congress not only specified that the copyright should vest in the author (without defining who is

27 See Rodrigue, 55 F. Supp. 2d at 547.
29 To simplify the model discussed in this article, the copyrighted works described in the article were all initially created under the 1976 Act and published post-January 1, 1978. See GOLDSTEIN ON COPYRIGHT § 4.0
30 17 U.S.C. § 102(a) & § 101 (definition of the term “fixed”).
34 17 U.S.C. 102(a).
an author); Congress also created different statutory author forms (e.g., individual authors, joint-authors, work-made-for-hire authors, work-for-hire, and collective work authors), and specified specific processes and formalities to convey subsequent legal ownership in the copyright. Further, there are three express sections of the 1976 Copyright Act that preempt state laws. These three sections further confound the relationship between state and federal law and displace the federalism norm that state law governs family property law.

The statutory norm for the transfer of a copyright ownership, other than by operation of law, is that the transfer is voluntary, in writing, and signed by the author or the author’s agent. To be the owner of a copyright, one merely has to have an exclusive claim to any part of one or more of the rights granted to the author under § 106. However, the devil is in the details or in this case, in § 101, the definition section. “A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, [excluding] a nonexclusive license.” “Ownership” under copyright law is not congruent with the common lay usage of the term “ownership,” for example many non-copyright lawyers would not view a mortgage or a pledge of collateral under U.C.C. Article 9 as a transfer ownership; however, these transactions are considered transfers of ownership under the Copyright Act. Under copyright law, the ownership of the intangible statutory bundle of rights granted to the author under § 106 is legally distinct from the ownership of the tangible work which instantiates or fixes the copyright. In addition to what is commonly understood under the rubric of the term “ownership,” terms such as “assignment,” “conveyance,” or “alienation,” so-called lesser grants of rights, such as a mortgage or hypothecation are also considered as transfers of copyright ownership.

Section 201(d) provides that the ownership of a copyright may be transferred by any means of conveyance, operation of law, bequeathed, or may pass as personal property through intestate section. The “operation by law” provision of § 201(d) is specifically limited by §201(e) which expressly provides that

37 17 U.S.C. § 201(a)(b)& (c); 17 U.S.C.§ 101 (definition of “joint work” and “work for hire”).
39 See 17 U.S.C. §301 and § 201(e).
40 17 U.S.C. § 201(a) & 201(e); Effects Associates, Inc. v. Cohen, 908 F.2d 555, 556-57 (9th Cir. 1990). Transfers of permission to use the copyright that is less that “ownership” such as a non-exclusive license may be done orally or in any other manner that conveys the copyright owner’s assent to the use of the copyrighted work. See id.
41 17 U.S.C. § 101 (“Copyright owner, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.”). A narrow grant of an exclusive right to show a motion picture (§106(3) public performance right) in a specific classroom (room 1010) at the College of Law to a limited number of law students (not more than 20) between 7:30 and 9:30 pm on October 3, 2011 constitutes a transfer of copyright ownership as long as there is a signed writing. See 17 U.S.C. § 101 (“transfer of copyright ownership” is an . . . , exclusive license, . . . of a copyright . . . whether or not it is limited in time or place of effect[,]”); Effects Associates, Inc. v. Cohen, 908 F.2d 555, 556-57 (9th Cir. 1990).
“[w]hen an individual author's ownership of a copyright, or of any of the
exclusive rights under a copyright, has not previously been transferred voluntarily
by that individual author, no action by any governmental body or other official or
organization purporting to seize, expropriate, transfer, or exercise rights of
ownership with respect to the copyright, or any of the exclusive rights under a
copyright, shall be given effect under this title, except as provided under title 11
[bankruptcy proceedings].”

By its own terms, § 201(e) preempts all state laws purporting to transfer copyright ownership
prior to the first voluntary grant by the individual author. Consequently, after the first
voluntary transfer of a copyright by the author, the transferred copyright becomes merely another
species of personal property that can be appropriated or transferred by operation of law from
subsequent owners of the copyright.

III. Copyright as an Asset In Divorce

Property during marriage may be held either separately in that it belongs solely to the
individual spouse or communally in that it belongs to the marital community and upon
dissolution of that community, the property must then be partitioned. If states treated
copyrights as separate property owned solely by the author-spouse then there would be no federal
preemption issues. However, cases such as Worth and Rodrigue erroneously found that the
copyright to works created during marriage through operation of state law were vested in the
marital estate and subject to division upon dissolution of the marriage. Because, Worth and
Rodrigue are cited uncritically, without analysis, and even with approval in the domestic
relations literature, this section will analyze these two cases in greater depth than may otherwise
be warranted as a predicate to demonstrate that the solution proposed in this Article is in
response to a serious conflict between federal copyright law and state domestic relations law. As
noted by one commentator, “[i]n recent years, all state courts [including those in equitable
distribution jurisdictions] that have addressed the issue have either assumed or have explicitly
held that copyrights, and the royalties therefrom, are marital (or community) property to the
extent that the copyrighted work or profits therefrom were generated by spousal labor during
marriage[,]” this a national issue and is worth discussing in some detail. Therefore, this section
will first review the dilemma posed by adjudicating copyright ownership and interpreting the
Copyright Act in the context of a community property state marriage dissolution proceeding It
will the review, In re Marriage of Worth and Rodrigue v. Rodrigue, the two leading cases on the
role of state law and copyright ownership in the context of marriage dissolution in a community

49 A leading commentator contends that a "transfer of ownership of copyright may be effectuated by “operation of
law” rather than by “conveyance,” such operation of law must be triggered by the express or implied consent of the
author.” 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[a]. Thus a § 204(a) transfer by
operation of law, unless voluntary, is constrained by § 201(e)’s prohibition against involuntary transfers. Bates, 781
F. Supp. at 205.
50 See Judith T. Younger, Marital Regimes: A Story Of Compromise And Demoralization, Together With Criticism
51 2-23 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.07
property state, analyze marital rights in a copyright created during the marriage, and discuss the Copyright Act’s three express preemption provisions, 17 U.S.C. §301 and 17 U.S.C. §201(e), and conclude that existing interpretations of the Copyright Act and state laws purporting to transfer copyrights between married or cohabiting partners are preempted.\(^5\)

A. Exclusive Federal Court Copyright Jurisdiction, Exclusive State Court Marriage Dissolution Proceedings

First, before discussing the two paradigm cases of In re marriage of Worth and Rodrigue v. Rodrigue regarding the ownership of copyrights in the context of a community property divorce proceeding, one must realize that many of the ownership issues presented by federal copyright law in a state divorce proceeding will never be properly adjudicated by a court of competent jurisdiction unless the underlying copyright dispute in the state-court case is ultimately determined by the United States Supreme Court. Federal courts have exclusive jurisdiction, if the controversy requires a construction of the Copyright Act.\(^5\) Under the test established in T.B. Harms Co. v. Eliscu, an action arises under the Copyright Act “if the complaint is for a remedy expressly granted by the Act . . . or asserts a claim requiring construction of the Act . . . [or,] perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.”\(^5\) Issues of authorship under copyright law, whether consent to marry constitutes a voluntary prospective transfer of the copyright, and whether there is a valid transfer of the copyright by operation of state law are questions that require an authoritative construction of the Copyright Act; and therefore, the federal courts have exclusive subject matter jurisdiction.\(^5\) Unfortunately, while construction of the Copyright Act is exclusively vested in federal courts, construction of state family law statutes and adjudication of divorce proceedings are exclusively vested in the state courts.\(^5\)

The statutory provisions giving federal courts exclusive jurisdiction over disputes arising under the Copyright Act, and the prudential policies permitting the federal courts to avoid resolving family law matters that are best left to state court judges, are not impermeable barriers to a resolution of copyright issues in community property states.\(^5\) The questions of copyright ownership that appears as part of the marital dissolution proceedings may also be brought as a declaratory judgment action in federal court, subsequently litigated separately as part of a

\(^5\) See William F. Patry, 2 Patry on Copyright § 5:116.
\(^5\) Harms, 339 F.2d at 828
\(^5\) Cf. Merchant v. Levy, 92 F.3d 51, 56 (2d Cir. 1996)(whether a work is a work-for-hire requires a construction of the Copyright Act); Goodman v. Lee, 78 F.3d 1007, 1011-12 (5th Cir. 1996)(jurisdiction was proper because the plaintiff sought to establish co-authorship under the Copyright Act, which necessitated interpretation of the ownership provisions of the Act).
\(^5\) See generally United States v. Lopez, 514 U.S. 549, 563-565 (1995) (limits on Congress’s power under the Commerce Clause to regulate family life). The federal court’s prudential reluctance to involve themselves in state domestic relations matters is of long standing. See, e.g. Barber v. Barber, 62 U.S. 582 (1858); Ex parte Burrett, 136 U.S. 586, 594 (1890)(domestic relations disputes are a judicially crafted exception to diversity jurisdiction).
\(^5\) Cf. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)(whether illegitimate children were statutory heirs under the 1909 Copyright Act).
B. In re Marriage of Worth

_In re Marriage of Worth_ presented the first opportunity for either a state or federal court to opine on the ownership of the copyright (under the 1976 Copyright Act) of a work created during the term of the marriage in a community property state. In _Worth_, the parties had already agreed to allocate their respective interests in the royalties resulting from the copyrighted works created during the marriage. The author-spouse then commenced an unsuccessful copyright infringement action against the producers of the “Trivial Pursuit” board game. The by-then divorced-spouse commenced an action in the California state court seeking an order for one-half

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59 _See_ Bradford R. Clark, _Ascertaining The Laws Of The Several States: Positivism And Judicial Federalism After Erie_, 145 U. Pa. L. Rev. 1459, 1544 (1997) (“forty-three states now permit at least some federal courts to certify unsettled questions of state law to the highest court of the state for authoritative resolution.”)


61 _See_ 1-6A Nimmer on Copyright § 6A.02. For example, if a state court awards copyright ownership to the spouse other than the actual author under federal law then the issues of ownership may be re-ligated in a subsequent infringement action because ownership of the copyright is one element of a _prima facia_ case of copyright infringement. See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 360 (1991).


63 _See_ infra, sections ______

64 _See_ Wolff v. Wolff, 768 F.2d 642, 645-46 (5th Cir. 1985).

65 _See_ California has a _sui generis_ law statutory law of community property. See BASSETT, _supra_ note xx, at § 1:4.


of the proceeds, if any, from what ultimately was an unsuccessful copyright infringement action.\textsuperscript{68}

The \textit{Worth} court was then called upon to reconcile California’s community property law that all property acquired during a marriage is community property with § 201(a) of the 1976 Copyright Act “vesting initial” ownership of the copyright in the individual author(s).\textsuperscript{69} California’s community property law is based on well-established partnership model in which each spouse makes a contribution and shares alike in the wealth or assets accumulated during the term of the marriage.\textsuperscript{70} Copyright law on the other hand reflects a constitutional and statutory policy determination that if authors are granted a limited period of exclusivity to exploit the market for the copyrighted work, this economic incentive will promote the progress of arts and sciences by encouraging authors to be more productive and to disseminate their works to the public.\textsuperscript{71} First the \textit{Worth} court relied on the terms of the stipulated judgment that the divorced-spouse would be entitled to one-half of the copyright royalties to conclude that the author-spouse also conceded that the copyrights were community property.\textsuperscript{72} The \textit{Worth} court apparently conflated ownership of the work with the ownership of the copyright by holding that “if the artistic work is community property, then it must follow that the copyright itself obtains the same status.”\textsuperscript{73} The \textit{Worth} court then concluded that both the copyrights and the tangible benefits from the copyright are community property. The \textit{Worth} court without analysis considered the “vests initially” provision of § 201(a) \textit{in pari materia} with § 201(d)(1) which provides that copyrights may pass by operation of law without considering either explicitly or implicitly the § 201(e) limitation that such a transfer must be voluntary, and then concluded that California’s community property laws simultaneously with the Copyright Act vesting the author-spouse with the copyright, transferred an interest in the copyright to the non-author spouse.\textsuperscript{74}

Having concluded that federal law possibly permitted the transfer of a copyright from the vested-author to the community property estate, the \textit{Worth} court considered whether an author’s incorporeal copyright was the type of \textit{intangible} property that could be assigned through community property law.\textsuperscript{75} Some intangible assets such as a professional license were excluded in allocating community property because community property only exists prior to the dissolution of the marriage.\textsuperscript{76} The \textit{Worth} court strived to distinguish a professional license to practice law, medicine, or a skilled-trade acquired during marriage from a copyright by holding that “A copyright has a present value based upon the ascertainable value of the underlying

\textsuperscript{68}See \textit{Worth v. Selchow & Righter Co.}, 827 F.2d 569 (9th Cir. 1987); In re Marriage of Worth, 195 Cal. App. 3d 768, 771 n. 1 (1987).
\textsuperscript{69} In re Marriage of Worth, 195 Cal. App. 3d 768, 773-74 (1987).
\textsuperscript{70} In re Marriage of Worth, 195 Cal. App. 3d 768, 773 (1987).
\textsuperscript{71} \textit{Stewart v. Abend}, 495 U.S. 207, 228-29 (1990); \textit{Sony Corp. of America v. Universal City Studios, Inc.}, 464 U.S. 417, 429 (1984) (the limited monopoly conferred by the Copyright Act “is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”).
\textsuperscript{72} In re Marriage of Worth, 195 Cal. App. 3d at 775. Perhaps, a better interpretation is that the stipulated judgment represented fair economic terms on which to end a marriage rather than an acknowledgement of ownership of the property within the marriage.
\textsuperscript{73} In re Marriage of Worth, 195 Cal. App. 3d 768 (1987)
\textsuperscript{74} See \textit{Rodrique v. Rodrigue}, 55 F. Supp. 2d at 537 n. 2 (“The only reported case [Worth] on the subject concluded, with little analysis that the Copyright Act does not preempt community property law.”); In re Marriage of Worth, 195 Cal. App. 3d 777.
\textsuperscript{75} In re Marriage of Worth, 195 Cal. App. 3d at 775.
\textsuperscript{76} In re Marriage of Worth, 195 Cal. App. 3d at 775.
artistic work. Its value normally would not depend on the post-marital [sic] efforts of the authoring spouse but rather on the tangible benefits directly or indirectly associated with the literary product.”

This last bare assumption regarding the ease of valuing a copyright and the lack of a need to cultivate a copyright’s long term asset value is without citation and does not appear to comport with common sense or common business practices. Further, this assumption regarding copyright valuation is inconsistent with the facts in the Worth case-itself. The issue in the Worth case was, were the value of a copyright to change because of a court judgment in a post-dissolution copyright infringement action would the non-author spouse be entitled to a share of that judgment. In Worth, because of alleged copyright infringing acts by a third-party post-dissolution, the parties were now looking to a state court to allocate economic rights that may accrue should the author-spouse eventually prevail in a federal court copyright infringement action.

In California, state law based claims to income derived from licensing a copyright have been raised in other family law contexts such as whether copyright income should be considered in calculating child support. In Boutz v. Donaldson, an author-spouse contended that the Copyright Act precluded a state court from considering the author’s income from copyrighted works as income for the purposes of determining child support. The author-spouse contended erroneously that because copyrights are initially vested in the author under 17 U.S.C. § 201; copyrights are exclusively governed by 17 U.S.C. § 301 rather than by the common law or statutes of any state; and because 17 U.S.C. § 201(e) precludes a state from seizing a copyright, states are preempted from considering copyright income as an element in determining child-support obligations. The Donaldson court relied on Worth and held that income from the exploitation of a copyrighted work may be considered in determining the amount of a child support award. The Donaldson holding is less intrusive to the copyright rights of the author-spouse than the holding in Worth. In Donaldson, the Court merely permitted the court to consider the royalty income, if any, while the Worth court shared the ownership of the copyright itself. Remember that § 201(e) expressly only prohibits involuntary transfers of a copyright, while not dispositive, the author-spouse had previously “consented in [the] original marital settlement agreement to include … copyright income for purposes of child support.”

In Donaldson, the copyright income was a result of a voluntary transfer of the copyright. The author-spouse’s specious contention in Donaldson taken to its logical extreme would prohibit states from considering income derived from a federal copyright for state income tax purposes.

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77 In re Marriage of Worth, 195 Cal. App. 3d at 775.
79 In re Marriage of Worth, 195 Cal. App. 3d at 771; See also Rodriguez v. Rodriguez, 218 F.3d 432, 434 (5th Cir 2000). Further, because of the length of the copyright term, life of the author plus fifty years (now seventy years), see 17 U.S.C. §§ 302-305, there is a potential for new uses and new markets that were not considered at the time of the divorce. Cf. Bosey & Hawkes Music Pub. Ltd, v. Walt Disney Co., 145 F.3d 481(2d Cir. 1998) (The 1940 movie Fantasia when re-released in home-video format (between 1991 and 1998) grossed more than $360 million).
82 Donaldson pre-dated the U.S. Court of Appeals for the Fifth Circuit’s decision in Rodrigue.
Also, this contention would immediately fail in the context of the Internal Revenue Code; as
Congress has expressed a clear and unambiguous statutory intent to tax copyright revenues.84

C. Rodrigue v. Rodrigue

Twelve years after Worth in Rodrigue v. Rodrigue, the federal courts were first called upon
to interpret copyright ownership in light of state (Louisiana) community property law and to
reconcile the obvious conflict between federal copyright law and state community property
law.85 The district court was unable to harmonize the blatant conflict between state community
property law and federal law and held that Louisiana’s state community property law purporting
to transfer a copyright was preempted by federal law;86 however, by unbundling and shuffling
the bundle of sticks that comprise the author’s copyright, the Court of Appeals was able to
achieve some measure of harmonization between state and federal law and found that there was
no federal preemption.87

1. Rodrigue v. Rodrigue (U.S. District Court)

The district court in Rodrigue v. Rodrigue started with the basic proposition that when
divorce terminates the marriage, property belonging to the couple was subject to Louisiana’s
laws governing co-ownership.88 The non-author spouse contended that by operation of Louisiana
community property law § 201(d) of the Copyright Act made her a co-owner of the author-
spouse’s copyrights that subsisted during the marriage.89 The non-author spouse further asserted
a claim for an accounting for the use of copyrighted images that were created during the
marriage in subsequent new derivative works painted after the dissolution of the marriage.90 If
the copyright to these original works properly vested in the couple as community property then
any subsequent re-use of the copyrighted images should result in a royalty payment to the non-
author spouse as a co-owner of the copyright to the original work.91 Louisiana law provided that
until the community property is partitioned “[e]ach spouse owns an undivided one-half interest
in the community property and its fruits and products.”92 The author-spouse unnecessarily
conceded before the district court that the divorced-spouse was entitled to an accounting for
artworks created during the marriage; however, the author-spouse maintained that the divorced-
spouse had no right to royalties from use of the reoccurring images in subsequent post-divorce-
partitioned artworks.93 The author-spouse disputed the divorced-spouse’s claim to a percentage

85 See Rodrigue v. Rodrigue, 55 F. Supp 2d 534,540-46 (E.D. La. 1999)(finding federal preemption of Louisiana community property law), rev’d on other grounds, 218 F.3d 432, 439 (5th Cir. 2000)(straining to construe Louisiana community property law as consistent with the Copyright Act). The Rodrigues commenced their action in federal court as a declaratory judgment to adjudicate the disputed the ownership of the copyright to works created by George Rodrigue during the marriage. Id. at 434.
86 Rodrigue, 55 F. Supp 2d at 547
87 Rodrigue, 218 F.3d at 436-47.
88 Rodrigue, 218 F.3d at 433-34.
89 Rodrigue, 218 F.3d at ______.  
90 Rodrigue, 55 F. Supp 2d at 536 n. 1 The “Blue Dog” and “Jolie Blonde” images. Id.
92 Rodrigue, 218 F. 3d at 435.
93 Rodrigue, 55 F. Supp 2d at 536.
of the value of the post-dissolution artworks and contended that federal law vests the copyright solely in the author of the work, and that there was no subsequent transfer of the copyright because Louisiana law does not authorize such a transfer. Additionally, any state law purporting to make such an involuntary transfer was preempted under § 201(e). The district court in a cogent opinion with exhaustive citation to persuasive authority concluded that any attempt to transfer the author-spouse’s copyright to the other spouse by an operation of state law was preempted either under § 201(e) or under the general copyright preemption provision § 301(a). Because the Court of Appeals agreed with the district court that there was an actual conflict between state and federal law, but the appeals court found that there was only a “facial” conflict between federal copyright law and state law, and because the appeals court accepted the district court’s analysis while rejecting its conclusion that the conflict needed congressional action, this article will not further discuss the district court’s sound analysis.

2. Rodrigue v. Rodrigue (U.S. Court of Appeals for the Sixth Circuit)

The judgment of the district court in Rodrigue was reversed on other grounds. On appeal, the United States Court of Appeals for the Sixth Circuit through a myopic textual analysis of the Copyright Act engaged in a Solomon-like maneuver to avoid finding more than a facial conflict between state and federal law. The Rodrigue Court first interpreted the text of § 201(a) quite literally to only convey the exclusive right to the § 106 copyright without vesting the corresponding economic rights in the author. Under this interpretation, only the § 106 exclusive rights of reproduction, adaptation, publication, public performance, and public display were initially vested in the author. Ignoring a long line of United States Supreme Court precedent, the Rodrigue Court then carefully noted that § 106 does not use the term “owner” or “ownership” nor does it refer to the concomitant economic rights of copyright ownership.

94 Rodrigue, 55 F. Supp.2d at 536.
95 Rodrigue, 55 F. Supp.2d at 543.
96 Rodrigue, 55 F. Supp.2d at 540-43
97 Rodrigue, 218 F.3d at 434-35.
98 See Rodrigue, 218 F.3d at 442 (“In the end, we disagree with the district court only to the extent that it held the conflict between Louisiana community property law and federal copyright law irreconcilable absent congressional intercession.”).
99 Rodrigue, 218 F.3d at 435; Francis M. Nevins, To Split or Not to Split: Judicial Divisibility of the Copyright Interests of Authors and Others, 40 FAMILY L. Q. 499, 517 (2006)(describing the Rodrigue Appeals court as “boldly innovative and diabolically clever”); Dane S. Ciolino, How Copyrights Became Community Property (Sort of): Through the Rodrigue v. Rodrigue Looking Glass, 47 LOY. L. REV. 631, 632 (2001)(describing the Court as “constructing a curious new regime”). This author was also unable to locate this resolution as one argued by either party in the briefs before the court of appeals.
100 Rodrigue, 218 F.3d at 436. These property law principles may be sui generis to Louisiana as a civil code jurisdiction and severely Rodrigue as persuasive authority in the Fifth Circuit much less nationally. See Nivens, 40 Fam. L.Q. at 517-18.
101 Rodrigue v. Rodrigue, 218 F.3d at 435-36.
102 Rodrigue v. Rodrigue, 218 F.3d at 435-36. See Quality King Distr., Inc. v. L’anza Research Intern., Inc., 523 U.S. 135, 141 (1998); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (describing the author as “owner” of § 106 rights); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546 (1985)(“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright.”). Cf. 17 U.S.C. § 109(a) (First sale doctrine describing the holder of § 106 rights as a copyright owner). It seems a bit incongruous that the Copyright Act § 201 vests something less than ownership in the author but the author has the ability to grant a greater estate that comprises the all attributes of ownership, including economic rights. This violates the ancient doctrine of nemo dat qui non habet (no one may transfer more than he owns).
Although citing Worth on the issue of the copyright right vesting in the author, the Rodrigue court then sub silentio rejected the Worth court’s holding and found that the author-spouse was the sole author and the other spouse was not a co-author under copyright law.103

Like the Worth Court, the Rodrigue Court did not address the pink elephant in the room whether there was a voluntary transfer under § 201(e).104 Assuming arguendo that the Rodrigue court interpreted § 201(e)(so that there was a voluntary transfer of the copyright) then the logical result of Congress trying to protect dissent authors by shielding their copyright’s from confiscation by the totalitarian government of the USSR was that Congress permitted the author’s to retain control the work’s dissemination, but the copyright royalties, if any, would belong to the USSR under the § 201 transfer by law provision. Even the Rodrigue Court would agree, this would be an absurd result. While Rodrigue is arguably consistent with an allocation of community property under Louisiana law,105 it is unlikely that the Fifth Circuit would have reached the same result or even apply Rodrigue as precedent should the government of the USSR ever had appeared seeking its share of the royalties from the exploitation of the copyrights of dissent Soviet authors. Commentators avoid the nettlesome constitutional and statutory questions presented by § 201(e) by weaving levels of legal fictions that create the illusion of voluntariness that converts ownership the federal copyright vested in solely the author-spouse into a species of community property with shared ownership transferred under state law.106

Dodging the clear preemption question presented by § 201(e),107 the Rodrigue Court then developed a novel and un-briefed theory of the case which used principles of Louisiana property law originally derived from Roman law and divided the author’s copyright into functional property rights such as the “(1) usus-the right to use or possess” “(2) abusus-the right to abuse or alienate,” and “(3) fructus-the right to the fruits.”108 The author-spouse owned the copyrights of usus and abusus while the right of fructus of the copyright was jointly owned by either the spouses or the marital estate.109 The Court then lumped intangible registered and unregistered federal copyrights into the Louisiana state property law category of “registered moveables.”110 Under Louisiana law, if a good is “moveable” only one spouse has the right of use or alienation,

103 Rodrigue v. Rodrigue, 218 F.3d at 436 & n. 16; but see 218 F.3d at 438 n. 26.
104 There is only one citation to § 201(e) in the appellate opinion. See Rodrigue, 218 F.3d at 441 n. 47. There is no analysis of whether there was a voluntary transfer of the copyright to the marital estate. Compare Rodrigue, 55 F. Supp. 2d at 542-44 (analyzing the application of §201(e) in great detail). This issue was raised in the appellate briefs. See Joint Brief of Appellees George G. Rodrigue & Richard Steiner 31-43, 1999 WL 33618614. A charitable commentator may read into the court’s silence that since Louisiana law explicitly permits married couples to opt into one of two property regimes either community property or separate with the community property regime being the default option that was perhaps a colorable argument of voluntary choice. See La. Civ. Code. Art. 2328 and Art. 2329.
106 See 1-6A Nimmer on Copyright § 6A.03; 2 PATRY ON COPYRIGHT § 5:116; GOLDSTEIN ON COPYRIGHT § 5.1.6.
107 See Rodrigue, 55 F. Supp. 2d at 542-44 .
108 Rodrigue v. Rodrigue, 218 F.3d at 437. See Dane S. Ciolino, How Copyrights Became Community Property (Sort of): Through the Rodrigue v. Rodrigue Looking Glass, 47 LOY. L. REV. 631, 632 (2001)(commenting that this issue was neither briefed by the parties nor considered by the district court below). Deciding an appeal sua sponte on grounds that were not briefed by the parties appears to be contrary to normal appellate court practice. See Singleton v. Wulff, 428 U.S. 106, 119 (1976)(“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”).
109 Rodrigue v. Rodrigue, 218 F.3d at 437.
110 Rodrigue v. Rodrigue, 218 F.3d at 437.
but the marital community had the right to the profits arising from the use of property.\textsuperscript{111} The \textit{Rodrique} court noted without deciding that under the Louisiana civil code there may be a fiduciary duty on the author-spouse to prudently manage the copyright and that a breach of this duty may render the author-spouse liable for any “fault, default, or neglect.”\textsuperscript{112}

This procrustean use by a federal appeals court of Louisiana civil law to dismember the author’s copyright may have run afoul of the \textit{Erie} Doctrine.\textsuperscript{113} Under \textit{Erie}, federal courts were to look to the statutes and decisional law of the states and to decide state law issues.\textsuperscript{114} Without citation to either legislative or judicial Louisiana state authority, the \textit{Rodrique} court introduced a peculiar concept into Louisiana law that each spouse would get less than unconditional co-ownership of community property\textsuperscript{115} The \textit{Rodrique} court, while glomming on to selected black letter law provisions the Louisiana statutes, did not consider these provisions as understood in the larger civil law traditions nor attempted to anticipate how the Louisiana Supreme Court would resolve these issues. So, the \textit{Rodrique} court cited to handful of black letter law cases on the trifold nature of property under Louisiana law: \textit{usus}, \textit{abusus}, and \textit{fructus}. Yet, the Court did not appear to understand or appreciate the fundamental nature of each of these property rights. These rights are not severable. Louisiana community property law would vest full co-ownership in both spouses.\textsuperscript{116} Another example of this is the Court’s use of the term \textit{fructus}. The nature of what are the fruits of a property right in Louisiana is much narrower than the use of the term by the \textit{Rodrique} court. The issue in \textit{Rodrique} was the right to royalties or payment for derivative works based on copyrighted works created during the marriage, and the author-spouse retained the rights of \textit{ususus} and \textit{abusus} while the court partitioned the \textit{fructus}. A transfer of copyright ownership is not a fruit of the author’s copyright rather under Louisiana law in could more properly characterized as a product of the author’s copyright because a fruit is a transfer that does not diminish the substance of the underlying copyright.\textsuperscript{117} Once a copyright is transferred is a right that the author no longer possesses if or until the author or statutory exercises a right of termination.\textsuperscript{118} So, the revenue from a sale or transfer of the copyright would belong to the author-spouse under Louisiana law.\textsuperscript{119} As one commentator concluded under Louisiana law

\begin{quote}
Ironically, the [\textit{Rodrique}] court also failed as a matter of state community property law. By vesting only the copyright \textit{fructus} in the community without the
\end{quote}


\textsuperscript{112}Rodrique v. Rodrigue, 218 F.3d at 437 n. 22.

\textsuperscript{113}See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 79 (1938).

\textsuperscript{114}See Dane S. Ciolino, \textit{How Copyrights Became Community Property (Sort of): Through the Rodrigue v. Rodrigue Looking Glass}, 47 LOY. L. REV. 631, 638 n. 36 (2001)(“It is uncertain whether the Rodrigue court was confused about the effect of Louisiana property law in this regard, or simply decided to ignore the law as written and write its own Louisiana marital-property law.”).


\textsuperscript{117}La CIV CODE art. 551.


usus and abusus, the court denied the community the bulk of the economic benefits generated by copyrights—namely, economic benefits flowing from copyright use (usus) and transfer (abusus). Of course, the court easily could have captured these economic benefits for the community simply by declaring all copyrights to be co-owned community property with exclusive management authority in the author-spouse. Nevertheless, it chose not to do so. By fracturing ownership and allocating the dismembered parts the way it did, the court took away much of what it had hoped to give the non-author spouse.120

Of course, if the Rodrigue court declared that all of the Copyright Act’s § 106 rights were community property then its myopic interpretation of § 201’s vesting provision as solely vesting exclusive copyrights rights in the author but not the economic benefit of those rights would fail.

Another apparent misunderstanding is that of whether copyrights are “registered movables” under Louisiana law.121 While the Rodrigue Court is correct that as a matter of the efficient administration of the copyright estate that the economic management and control of the copyright should remain in the hands of the author-spouse,122 the Rodrigue court erred when it held that copyrights are “registered movables.”123 Under Louisiana law, a “registered movable” is one “for which the registration scheme provided by law is one that purports to protect those who rely on the ownership inferences that come from registration or issuance in one’s name.”124 There is no requirement to register a copyright and the vast majority of copyrights are never registered. Although, federal copyright registration conveys significant benefits upon the registration, federal registration is still optional.125 Because, federal copyrights are not necessarily registered movables under Louisiana law, either spouse not just the author-spouse has the right to manage or alienate the copyright for unregistered copyrighted works.126 This point is more than speculative because many of the disputed works before the court in Rodrigue were unregistered copyrighted works.127

The Rodrigue Court held that if the author-spouse creates derivative works based on original works that were created during the marriage, the author-spouse will then have to share the revenue from such new derivative works.128 This holding is problematic under facts such as

122 Compare Rodrigue, 218 F.3d at 435-36.
125 See Johnson v. Jones, 149 F.3d 494, 505 (6th Cir. 1998).
126 See La. Civ. Code Art. 2346 (“Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law.”).
127 See Rodrigue, 55 F. Supp. 3d at 546 n. 15 (“Civil Code article 2351 provides: “A spouse has the exclusive right to alienate, manage, encumber, or lease movables issued or registered in his name as provided by law.” Article 2351 would address the problem only when the author spouse has registered a copyright pursuant to § 410 of the Act. Equal management rules would still apply to unregistered copyrights.” citations omitted).
those in *Rodrique*. In *Rodrique*, the artist created a signature image based on a family pet. The context of a thematic artist, such as in *Rodrique*, determining whether a new work is a derivative work requires a delicate analysis as there must be a nuanced determination of both originality and copying in works with a similar visual appeal. A thematic artist is one who returns to the same theme over and over again. Perhaps the most famous example of a thematic artist is Claude Monet who painted the water lilies in his garden in numerous paintings over a period of 30 years. Under copyright law, the artist will always be free to create new interpretations of the original (in the case of *Rodrique*, the family dog Tiffany) without paying royalties to the divorced-spouse, but should the artist copy a work made during the marriage such a new work would be a derivative work; and under the holding in *Rodrique* the divorced-spouse would be entitled to a share of the proceeds from any economic exploitation of the post-divorce derivative work. “Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement.” However, applying copyright law prohibition against unauthorized derivative works in the context of thematic works is tricky. As the Third Circuit found, “the line between copying and appropriation is often blurred.” In the case of artists who continuously paint on the same theme, it may be extremely difficult to separate intentional or subconscious copying from prior works with new original works based on the same theme.

The *Rodrique* court also gave short shrift to the other contentions of the author-spouse. First, the *Rodrique* court avoided the thorny issue of title and co-ownership created by the *Worth* court by recognizing the Congress vested title in the author spouse. The *Rodrique* Court rejected the author-spouse’s second contention that subjecting economic rights of an author-spouse to different state domestic relations laws will damage the federal policy of predictability and uniformity. As support for this proposition, the *Rodrique* court looked to other provisions of the Copyright Act where Congress had specifically allowed state law to govern or Congress was silent thus permitting state law by default (as long as state law was consistent with the federal purpose). The Court observed that copyrights are conveyed by “individual, non-uniform, state contract laws.” However as a practical matter, state contract law is remarkably uniform. First, the Copyright Act provides a minimal level of contractual formalities such as a signed writing. Second, the federal courts have consistently intervened and created federal common law

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131 See THE NEW YORK TIMES, THE NEW YORK TIMES GUIDE TO ESSENTIAL KNOWLEDGE: A DESK REFERENCE FOR THE CURIOUS MIND 33 (3d ed. 2011)(Monet thematic works include the Rouen Cathedral (1892-94), haystacks (1890-91), and water lilies (over 30 years beginning in 1899)).
137 Rodrigue, 218 F.3d at 441.
138 Rodrigue, 218 F.3d at 441.
139 Rodrigue, 218 F.3d at 441.
to assure that state contract law is congruent with federal copyright policies.\textsuperscript{141} So, state law could not deviate too far from national contract norms. Also, state law requires consideration as an element of a valid contract; yet, federal copyright law is prepared to validate contracts without consideration.\textsuperscript{142} The non-uniform state law contract analogy used by the \textit{Rodrigue} court does not withstand a careful analysis. While contract law among the states is relatively stable and consistent, domestic relations laws that govern the allocation of property vary greatly among the common law equitable jurisdiction states and the community property states, and even within the eight community property states there are significant differences.\textsuperscript{143} While the Appeals Court in \textit{Rodrigue} faced the simple problem of applying the law of one state to allocate property interests in copyrights, in an increasing mobile society, other courts are more likely to be faced with the tormenting problem of allocating under different state laws rights in copyrights that accrued in different states and different points in time.\textsuperscript{144} “[T]he law of the state where a married couple is domiciled at the time property is acquired also determines the division of that property upon divorce.”\textsuperscript{145} Consequently, the allocation of interests in copyrights under state law of a peripatetic married couple at the time of divorce will not only frustrate the divorce court but also Congress’s goal for national uniform copyright law.

The \textit{Rodrigue} court then noted that Congress permitted state law to govern the disposition of copyright as part of testamentary or intestate succession.\textsuperscript{146} Unlike the issues before the \textit{Rodrigue} court where there is no record of Congress considering the role of state domestic relations law in the allocation of copyrights, Congress explicitly considered whether to create a federal testamentary and intestate succession in the Copyright Act and elected to defer to state law.\textsuperscript{147} Whatever copyright incentives Congress intended to grant to the author to promote the progress of science or the useful arts, those incentives cease to serve their purpose upon the death of the author. Further, Congress did specifically by its allocation of posthumous termination of

\textsuperscript{141} See, e.g., Cincom Systems, Inc. v. Novelis Corp., 581 F.3d 431, 436 (6th Cir. 2009)(“when interpreting intellectual property licenses. Federal common law governs “questions with respect to the assignability of a patent [or copyright] license.”); In re Alltech Plastics, Inc., 71 B.R. 686, 689 (W.D. Tenn. 1987)(“The rights of the patent owner to license the use of his invention is a creature of federal common law as is the right of the licensee to have the license construed.”); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199 (7th Cir. 1987) March 26, 1987 (whether clause in contract prohibiting the license to contrast the validity of the copyright was under enforceable under federal common law). Further, federal common law rather than state law governs conflict of law rules. See. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (developing federal common law to decide a conflicts of law issue in a copyright case, where the Copyright Act does not contain a controlling provision).

\textsuperscript{142} See 17 U.S.C. § 205(d).

\textsuperscript{143} Kenneth W. Kingma, Property Division At Divorce Or Death For Married Couples Migrating Between Common Law And Community Property States, 35 ACTEC J. 74, 76 & n. 19 (2009)(for an excellent table summarizing the differences, see id. at 93 (Appendix A)); James R. Ratner, Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn’t Equal Equal, 72 LA. L. REV. 21, 22-24 (2011).

\textsuperscript{144} See In re Kessler’s Estate, 203 N.E.2d 221, 222-23 (Ohio 1964). See generally Kenneth W. Kingma, Property Division At Divorce Or Death For Married Couples Migrating Between Common Law And Community Property States, 35 ACTEC J. 74, 82-83 (2009).

\textsuperscript{145} Kenneth W. Kingma, Property Division At Divorce Or Death For Married Couples Migrating Between Common Law And Community Property States, 35 ACTEC J. at 83 (2009)

\textsuperscript{146} Rodrigue, 218 F.3d at 441.

\textsuperscript{147} GOLDSTEIN ON COPYRIGHT § 5.1.5 & n. 68 (2007 Supplement). Although industry representatives lobbied for a federal copyright foreclosure scheme, Congress found that the benefits from such a system would have limited application and not justify creating such a complex statutory and regulatory regime. \textit{Id.} at n. 68 (citing House Report at 123).
transfer rights protect for the interests of those beneficiaries that Congress rather than the state might chose to privilege under the law of intestate succession or state domestic relations law.

Finally, the Rodrique court even second-guessed Congress’s determination as to the quantitative importance of the Copyright Act’s economic incentives to promote the progress of science and the useful arts. The author-spouse contended that by creating a community property entitlement, the author would have less incentive to create new works or exploit existing works. In its opinion, the Rodrique court did not contend with a long line of United State Supreme Court precedent that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . .”148 Rather, the Rodrique court held that

We decline to assume globally that the commercial and economic interests of spouses during marriage are so at odds that one spouse would be disinclined to create copyrightable works merely because the economic benefits of his endeavors would inure to the benefit of their community rather than to his separate estate. As for a former spouse's lack of incentive following divorce, we perceive the presence of the proverbial stick and carrot. To mix metaphors, the carrot is the half-a-loaf incentive of the author to exploit pre-divorce copyrights to the best of his ability rather than shelve them and receive no benefit whatsoever; the stick is exemplified by the provision of the Louisiana Civil Code that specifies an affirmative duty “to manage prudently” former community property that remains under one spouse's exclusive control. Indeed, that article imposes a higher duty on a spouse managing former community property than the Code otherwise imposes on that same spouse during the marriage or on a third party co-owner who is not a former spouse.149

The economic incentive under copyright law is to motivate the author, whether it is too much, too little, or just right is a policy determination that is constitutionally vested primarily in Congress and not in the federal courts.150 In Eldred v. Ashcroft, admittedly a post-Rodrique case, the United States Supreme Court deferred to a Congressional determination that an increase in value of the copyright to the author from 99.4% of a perpetual copyright term to 99.8% of perpetual copyright term was a policy judgment best left to Congress.151 In Rodrique, the court took the liberty of halving the value of the copyright to the author thus decreasing the economic incentive exploit the existing work or to produce new derivative works.152 As well as imposing a

148 Mazer v. Stein, 347 U.S. 201, 219 (1954); Eldred v. Ashcroft, 537 U.S. 186, 219(2003)(“By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas”) (quoting Harper & Row, Publrs v. Nation Enters., 471 U.S. 539, 558 (1985)); Twentieth Cent. Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984)(“Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’” Mazer v. Stein, 347 U.S. 201, 219 (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-128 (1932); see H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).”).
149 Rodrique, 218 F.3d at 442.
152 Rodrique, 218 F.3d at 442-43.
new duty, totally absent in copyright right, on the author-spouse to manage and exploit the disputed works, despite one of the rights of copyright ownership is the right not to license or use the work.\textsuperscript{153} Even in the relationship between co-authors, Congress did not impose a duty to manage the copyright prudently rather Congress merely imposed a duty of accounting for any profits or royalties from the exploitation of the work.\textsuperscript{154}

The Rodrigue court did not consider whether by dividing the royalties to the copyright, it granted the non-author spouse an independent right to sue for copyright infringement as a beneficial owner of the copyright.\textsuperscript{155} Granting standing to the non-author-spouse to sue for copyright infringement would be a sever limitation on the right of the author-spouse to manage the copyrights and may affect the value of the copyrighted works. Additionally, this result would “impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership.”\textsuperscript{156}

In sum, the Rodrigue court had a myopic view of the mischief caused by its sui generis interpretation of and deference to Louisiana state law or did not fully comprehend the implications that its holding may have on federal copyright law and policy. If state courts or other federal court glom onto the weak analysis of Rodrigue, it will have a snowball effect creating perverse state-law-level copyright incentives depending where the author is domiciled or the spouse chooses to file for divorce.

D. Marital Rights in a Copyright Asset Created During Marriage

Having set the stage with the prior critical analysis of the seminal cases of Worth and Rodrigue, whether state community property laws (or other state laws allocating property rights at the dissolution of a relationship) conflict with the ownership provisions of the Copyright Act is the overarching question discussed in this section. Under the Supremacy Clause, state laws that conflict with either the Constitution or federal laws are preempted.\textsuperscript{157} Federal preemption analysis generally falls under the rubric of express preemption, conflict preemption, and field preemption.\textsuperscript{158} Although, these three forms of preemption are categorically stated; in practice and application, they are quite permeable and indeterminate. Congress may statutorily expressly preempt state laws.\textsuperscript{159} Despite the absence of an express statutory command by Congress preempting state laws, courts may find state laws preempted, if either the state law conflicts with federal law or if Congress intended federal law to occupy the field and to displace all state regulation.\textsuperscript{160} In the case of conflict or field preemption, state law is preempted if either it is impossible to comply with both state and federal law or if “the challenged law stands as an

\textsuperscript{153} Rodrigue, 218 F.3d at 442.
\textsuperscript{154} See Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998) (citation omitted).
\textsuperscript{155} See 17 U.S.C. § 501(b); Moran v. London Records, Ltd., 827 F.2d 180, 183 (7th Cir. 1987)(“a fiduciary relationship arose between the parties, and the assignor became a ‘beneficial owner’ of the copyright with standing to sue infringers should the assignee fail to do so.”); 6 PATRY ON COPYRIGHT § 21:4.
\textsuperscript{156} Community for Creative Non-Violence v. Reid, 490 U.S. at 750.
\textsuperscript{159} Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008).
obstacle to the accomplishment and execution of the full purposes and objects if Congress.”\(^\text{161}\) If the putative conflict is an area that is historically committed to the state regulation then federal courts will not preempt state law unless “that [it] was the clear and manifest purpose of Congress [to preempt state regulation];” further, if there is more than one plausible interpretation of the statute then courts should ordinarily prefer the interpretation that avoids preemption.\(^\text{162}\) In the special case of a conflict between federal law and state family-property law, then the conflict must “do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”\(^\text{163}\) While the preemption test as articulated by the Court is a high bar, especially when the conflict is between federal law and state family-property law, it is by no means an insurmountable standard.\(^\text{164}\) Despite the U.S. Supreme Court articulating a rhetorically high standard of review and stating deference to state courts and state laws in family-matters; in all the recent community property cases considered by the U.S. Supreme Court, the Court found that the challenged state laws were preempted. This history may suggest that in practice the Court actually gives little more than ostensible deference in its conflict preemption analysis to state laws governing questions of family property-law.\(^\text{165}\)

1. Article I, Section 8, Clause 8 Preemption

Any action by a state defining authorship, co-ownership, or allocating either the § 106 copyrights or the economic rights of a copyright owner may conflict with the Copyright and Patent Clause in the United States Constitution. Article I, section 8, clause 8 of the United States Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”\(^\text{166}\) This grant of power appears to be a limited grant of authority to Congress to vest the copyright in authors (or inventors) alone (and not others such as spouses or employers).\(^\text{167}\) “Author” under copyright law is a term of art.\(^\text{168}\) The Constitution does not define

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\(^\text{164}\) Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979)(noting “on at least four prior occasions this Court has found it necessary to forestall such an injury to federal rights by state law based on community property concepts.”). Hisquierdo became the fifth such case; Ridgway v. Ridgway, 454 U.S. 46 (1981), the sixth case; and Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001), the seventh case.


\(^\text{166}\) U.S. CONST. art I sec. 8, cl. 8.

\(^\text{167}\) See William Patry, Copyright and the Community Property: The Question of Preemption, 28 BULL. COPR. SOC’Y 237, 267 (1981); 1-1 NIMMER ON COPYRIGHT § 1.06; 2 PATRY ON COPYRIGHT § 3:19. The work-for-hire doctrine that vests the copyright to a work created by an employee for the employer within the scope of that employee’s employment in the employer as the legal author is based on a series of legal fictions and tenuous assumptions by Congress. See 1-1 NIMMER ON COPYRIGHT § 1.06[C]. Accordingly, it is not clear that Congress may constitutionally involuntarily transfer a copyright from an author much less whether a state court may do so pursuant to state family-property law. See id. However, a very narrow literal interpretation of the “work for hire” doctrine may escape this purported constitutional infirmity. See Hays v. Sony Corp. of America, 847 F.2d 412, (7th Cir. 1988)(in dicta “words of section 201(b) . . . appear to require not only that the work be a work for hire but that it have been prepared for the employer)(emphasis added), abrogated on other grounds, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 406 (1990).
the term “author” nor has Congress. The U.S. Supreme Court stated that “[a]s a general rule, the author is . . . the person who translates an idea into a fixed, tangible expression.”169 This interpretation of the Copyright Clause has been considered by the courts; however, the courts avoided squarely addressing the issue of whether Congress could vest authorship in some entity other than the natural person who engaged in the creative work.170

In Worth, the author-spouse claimed that because federal law vests the copyright solely in the author and state community property laws provide for an equal interest in the copyright, state law is in conflict with federal law and thus preempted. The Worth court rejected as constitutionally mandated a limited definition of author as creator-originator holding that “the term ‘author,’ within the constitutional text, may be construed to include the author's spouse under the principles of co-ownership or transferred ownership we have discussed.”171 While copyright law does not clearly establish the full range of potential authorship, at a bare minimum each individual purporting to be an author must contribute something original to the work.172 This may even be a constitutional requirement.173 In fact statutory copyright law “requires [to be an author] more than a minimal creative or original contribution to the work.”174 By analogy, in the context of the creation of joint-works, courts have rejected joint-authorship when the contribution of a putative joint author did not include original expression.175 Further, Congress has the limited power to grant to authors a body of undefined exclusive rights for a period of time.176 It is not self-evident as one may conclude from the Worth court’s succinct holding that either the constitutional or statutory use of the term author (or even co-ownership) without more may be expanded to include a spouse who makes no original contribution to the copyrighted work.177

169 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). An author is “‘to whom anything owes its origin; originator; maker.’” Id. at 346 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58, (1884)); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (en banc) (“Originality means that the work owes its creation to the author.”); 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.01 (2001) (“[B]ecause an author is ‘the beginner . . . or first mover of anything . . . creator, originator,’ it follows that a work is not the product of an author unless the work is original.”) (footnotes and citations omitted).
170 See, e.g., Childress v. Taylor, 945 F.2d 500, 506-507 n.5 (2d Cir. 1991); Scherr v. Universal Match Corp., 417 F.2d 497, 502 (2d Cir. 1969)(Friendly, J. dissenting); Schmid Bros., Inc. v. W. Goebel Porzellanfabrik KG., 589 F.Supp. 497, 503 (D.C.N.Y. 1984)(‘The Constitution in Article I, § 8, clause 8, authorizes grants to “authors” and not to their employers. An author may, of course, assign to her employer her rights to exploit the work. But an employer, to be regarded as an “author,” must presumably make some significant contribution to the work. The Constitution could hardly have contemplated that mere employment was enough.”).
171 In re Marriage of Worth, 241 Cal. Rptr. at 139 n. 5.
173 See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884); 1-1 NIMMER ON COPYRIGHT § 1.06.
174 Aalmuhammed v. Lee, 202 F.3d 1227, 1233(9th Cir. 2000)(suggesting a higher originality standard for authorship as opposed to that required for copyright to merely subsist).
175 See Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991), but see Gaiman v. McFarlane, 360 F.3d 644, 658-59 (7th Cir. 2004)(“The decisions that say, rightly in the generality of cases, that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren't thinking of the case in which it couldn't stand alone because of the nature of the particular creative process that had produced it.”).
176 See 1-1 NIMMER ON COPYRIGHT § 1.05 & § 1.06[A].
177 See section XX, infra.
In *Rodrique*, the Court did not divide the non-economic attributes of authorship or even the limited § 106 grant of exclusive copyrights, rather the Fifth Circuit relying on a *sui generis* Louisiana state law converted a federally created property right in the § 106 copyright to a state body of severable property rights and then permitted the author to retain ownership and management of the § 106 copyright while dividing under state law any rights to the fruits of exploiting copyright. The constitutional grant of power to Congress to enact copyright laws presupposes that the economic rights would accompany whatever limited copyrights rights that Congress chose to grant the author. A limited period of authorial copyright exclusivity without the accompanying economic rights elevates form over substance and would disserve copyright’s utilitarian incentive to promote progress and the dissemination of knowledge. Author’s copyrights and the associated economic rights are constitutionally (and statutorily) vested in the author as an individual, and state laws that involuntarily transfer them, from the author are constitutionally suspect.


Section 301 has two express copyright preemption provisions, § 301(a) and § 301(f). Section 301(a) is the general preemption provision of the Copyright Act precluding states from granting rights that are the equivalent of § 106 copyrights in fixed works of authorship. Section 301(f) preempts state laws that grant rights that are equivalent of § 106A, the Visual Artists Rights Act (VARA). As will be discussed later, no court has yet considered the effect of § 301(f) preemption of state community property laws. This was a serious omission especially in the context of the *Rodrique* dispute. So, this section will also consider the application of § 106A in the context of the principles of federal preemption and state community property law, and ultimately conclude that both provisions of § 301 preempt state community property law.

a. **Section 301(a)(§ 106 Preemption)**

Section 301(a) is a broad express preemption provision in the Copyright Act. Section 301(a) by its own terms displaces

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178 See 1-6A NIMMER ON COPYRIGHT § 6A.05
179 See Nivens, 40 Fam. L.Q. at 519.
181 See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (“To have a property interest . . .  a person clearly must have more than an abstract need or desire for it . . . . He must, instead, have a legitimate claim of entitlement to it . . . .”); Patterson v. Portch, 853 F.2d 1399, 1405 (7th Cir. 1988) (“Property under the due process clause is any interest to which a government has given someone an entitlement.”)
182 See 17 U.S.C. § 301
184 See infra, section XX.
185 See Community for Creative Non-Violence v. Reid. 490 U.S. at 740 (“the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation.”); United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala., 104 F.3d 1453, 1463 (4th Cir. 1997) (“shadow actually cast by the [Copyright] Act's preemption is notably broader than the wing of its protection.”).
all legal or equitable rights that are equivalent to any of the exclusive rights within
the general scope of copyright as specified by section 106 in works of authorship
that are fixed in a tangible medium of expression and come within the subject
matter of copyright as specified by sections 102 and 103 . . . [and] . . . no person
is entitled to any such right or equivalent right in any such work under the
common law or statutes of any State. 186

Section 301(a) also provides that “Nothing in this title . . . limits any rights or remedies under the
common law or statutes of any State with respect to (1) subject matter that does not come within
the subject matter of copyright as specified by sections 102 and, including works of authorship
not fixed in any tangible medium of expression; . . . (3) activities violating legal or equitable
rights that are not equivalent to any of the exclusive rights within the general scope of copyright
as specified by section 106 . . . ” 187 Unsurprisingly, § 301 presents to the specter of federal
preemption of state laws allocating copyrights in marital dissolution proceedings.

The Worth Court gave short shrift to the author-spouse’s contentions that § 301(a) preempted
the California’s community property laws that allegedly transmuted copyright ownership from
the author-spouse into co-ownership with the non-author spouse. 188 The Worth Court found that
§ 301(a) displaced state statutory and common law copyright laws, and that other state laws such
as those relating to the ownership and division of marital property were not preempted. 189 Yet,
the United States Supreme Court would two years later in Community for Creative Non-Violence
v. Reid rely on § 301(a)’s sweeping preemption of state laws and regulation to justify rejecting
individual state law definitions of employee and creating federal common law definition relying
on the Restatement (Second) of Agency. 190 For preemption purposes, the sweep of § 301(a) may
be broader than its literal language. 191 As the Worth Court’s analysis is at best perfunctory, at
worst merely conclusory, and in any case, without any significant analysis; it does not merit
further discussion.

Section 301(a) conflict-preemption contentions did not fare better on appeal in Rodrigue. The
Court in Rodrigue did not completely analyze possible § 301(a) conflicts with Louisiana state
community property law. 192 For example the Appeals Court in Rodrigue stated with approval
that Louisiana law imposed on the spouse an obligation to manage the fructus of the copyrighted
property prudently. This presupposes a duty to at least exploit the copyrighted work, if not the
more onerous burden of creating new works. 193 Yet, this state imposed obligation may grant a
right that is in direct conflict with the author’s rights under § 106. One of the § 106 rights is the

188 In re Marriage of Worth, 241 Cal. Rptr. at 137.
189 In re Marriage of Worth, 241 Cal. Rptr. at 140.
190 See Community for Creative Non-Violence v. Reid. 490 U.S. at 740 (“the Act's express objective of creating
national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation
191 See Barndt v. County of Los Angeles, 259 Cal. Rptr. 372, 403-04 (Cal. App. 1989)(“An artist does not work
well under compulsion, and the court might find it difficult to pass judgment upon the performance rendered.”).
192 See Rodrigue, 55 F. Supp. 2d at 540 (rejecting § 301(a) preemption).
193 See Dane S. Ciolino, How Copyrights Became Community Property (Sort of): Through the Rodrigue v. Rodrigue
Looking Glass, 47 LOY. L. REV. 631, 632 (2001)(“Perhaps most surprisingly, a non-author spouse now may be able
to compel an author-spouse to, among other things, create and distribute new works based on community copyrights
if a ‘prudent administrator ’ would do so.”). Cf. Simon & Schuster, Inc. v. Members of New York State Crime
Victims, 502 U.S. 105, 115-16(1991)(“A statute is presumptively inconsistent with the First Amendment if it
imposes a financial burden on speakers because of the content of their speech.”).
negative right, a right not to publish, license or to otherwise exploit the work, and the positive right to choose when and how to introduce the work to the public. Further, any attempts to force an author to create new works raise serious first amendment concerns regarding compelled speech, as well as involuntary servitude concerns.

b. Section 301(f) ($106A Preemption)

Although Worth and Rodrigue addressed the division of $106 economic rights with the non-author-spouse, courts have not yet considered author-spouse’s limited moral rights under the Visual Artists Rights Act (VARA), §106A. The exercise of the economic rights, if conveyed through state community property, may be inconsistent with the exercise of the author’s moral rights. “VARA was designed to protect the moral rights of artists in their works. Moral rights protect an artist's interest in the proper use of the artist's name and in maintaining the physical integrity of the artist's work.” The economic rights under §106 are legally distinct from the moral rights (or VARA rights) under § 106A. The author of a work of visual art enjoys rights that are similar, but are not strictly equivalent, to the European or civil law concepts of moral rights. The author has the right of attribution, and the right to prevent the artist's name from being associated with a work that the artist did not create. Under VARA, the author also possesses the right to prevent the use of the author’s name when the author's work is distorted or mutilated, if use of the author's name would be prejudicial to the author's honor or reputation. Furthermore, the author also enjoys the right to prevent an intentional distortion or


196 See Wooley v. Maynard, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”), See Barndt v. County of Los Angeles, 259 Cal. Rptr. 372, 403-04 (Cal. App. 1989)(“An artist does not work well under compulsion, and the court might find it difficult to pass judgment upon the performance rendered.”); Cagle v. Hybner, Not Reported in S.W.3d, 2008 WL 2649643 at *20 (Tenn. App. 2008).

197 Rodrigue, 218 F.3d at 443. The Worth case was decided in 1987, and VARA was not enacted until 1990. See Pub. L. 101-650, Title VI, § 603(a), Dec. 1, 1990, 104 Stat. 5128.

198 The copyrighted works in Worth (books) were not eligible for VARA protection. See 17 U.S.C. § 101 (definition of a work of visual art). The disputed paintings in Rodrigue would appear to be VARA protected works. See id.


202 17 U.S.C. § 106A. VARA excludes “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; . . . (B) any work made for hire; or (C) any work not subject to copyright protection under this title.” Id.

mutilation of a work that would be prejudicial to the author's honor or reputation; and the right to “prevent any destruction of a work of recognized stature, [or an] intentional or grossly negligent destruction of that work . . .”\(^{205}\)

VARA protects only a “work of visual art” which is defined as

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.\(^{206}\)

Section 301(f)(1) preempts state laws that purport to grant legal rights that are the equivalent of VARA.\(^{207}\) Any moral rights within the subject matter of VARA are governed exclusively by VARA, and thus, “no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.”\(^{208}\) Yet, common law and statutory remedies are not limited with respect to “activities violating legal or equitable rights that are not equivalent to any of the rights conferred by [VARA] with respect to works of visual art.”\(^{209}\) VARA governs not only an author's rights of attribution and integrity in the work,\(^{210}\) but also the transfer and waiver of those moral rights.\(^{211}\)

The facts as provided in the Rodrigue court’s opinion are consistent with a determination that the author-spouse’s paintings were VARA protected works.\(^{212}\) The § 106 economic rights were allocated by the federal court with the non-author spouse having an equal share.\(^{213}\) Further, the Rodrigue court in dicta citing state law instructed the author-spouse to manage the § 106 economic rights prudently; and this instruction applied to both the economic rights of relating to the works made during his marriage but also to the economic rights to any subsequent post-divorce derivative works.\(^{214}\)

\(^{205}\) 17 U.S.C. § 106A.


\(^{208}\) 17 U.S.C. § 301(f)(1).


\(^{213}\) Compare Rodrigue, 218 F.3d at 443 with 17 U.S.C. § 101 (definition of a work of visual art).

\(^{214}\) Rodrigue, 218 F.3d at 443 (citing La. Civ. Code § 2369.3). The Louisiana standard for evaluating prudent management is not readily clear to one not trained in the civil law (such as the author) but it seems to be interpreted as a failure to act prudently in a manner consistent with the mode of use of the property immediately prior to termination of the marriage, and bad faith is not an element of “damage caused by [the spouse’s] fault, default, or neglect.” See Saacks v. Saacks, 942 So.2d 1130, 1136 (La. App. 2006). See Katherine Shaw Spaht, Co-Ownership of Former Community Property: A Primer On The New Law, 56 LA. L. REV. 67, 698 & n. 149 (1996)(“The slight fault is that want of care which a prudent man usually takes of his business.”); See generally KATHERINE S. SPAHT AND RICHARD D. MORENO, 16 LA. CIV. L. TREATISE, MATRIMONIAL REGIMES § 5.22 (3d ed. 2011).
While the §106 economic rights are defeasible, the § 106A moral rights vest solely in the author and while they may be waived in writing, unlike economic rights, moral rights may be waived but not transferred or assigned, *arguendo* even by operation of state law.\(^{215}\) The potential conflicts between the prudent profit maximizing exploitation of the economic rights and the moral rights of the author may be made clearer using two examples. Assuming that works with the artists’ name and signature are more valuable than works without them, the § 106 economic rights rational under *Rodrigue* would require the artist to accept attribution and sign these works under some theory of the author’s duty to manage the copyright estate prudently. However, if for some reason the artist thought that the work was flawed or otherwise was prejudicial to the artist’s reputation, under § 106A the author could decline to sign or attribute the work.\(^{216}\) A prudent author may desire to sell or dispose of a second rate or flawed work without placing her name on it. These works would not have the same economic value as the original works protected under VARA or individually signed by the author. Thus, placing the use and management of the work in the hands of the author, and splitting the economic benefits of their exercise with a fiduciary like duty the non-author spouse may conflict with the author’s individual voluntary exercise of § 106A moral rights that are by statute vested solely in the author.

Moreover an author, but not a copyright owner, has the legal right to protect a VARA work of visual art from “any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” or “to prevent any destruction of a work of recognized stature.”\(^{217}\) A prudent economic use of a bronze statue may be to sell it for its scrap metal value or to permit an artwork to be divided into smaller units for retail sale.\(^{218}\) Most of people cannot afford to purchase a recognized Picasso lithograph for $100,000, but some may be willing to spend $100 for a one-square-inch section of the lithograph in order to be the “owner” of a Picasso.\(^{219}\) Under § 106 and the holding of the *Rodrigue* court, this desecration of a work of art would be an economically income maximizing exchange under § 106; in other words, a prudent exploitation of the economic rights of the copyright owner. However in the case of a VARA protected work, the author clearly has a separate and independent moral right to prevent this mutilation.\(^{220}\) Application of the *Rodrigue* court’s holding in the context of § 106 and § 106A results in, for example the author-spouse granting of a right in the bronze statue to a scrap metal dealer as scrap under § 106 then as the owner of the moral rights informing the scrap metal dealer that it may not destroy or mutilate the statue. This rather silly example presents a clear conflict between the shared § 106 economic rights and the individual author’s exercise of the


\(^{220}\) See 17 U.S.C. § 106A, 5 Patry on Copyright § 16:20
author’s exclusive § 106A moral rights. Under federal law, the analysis would fare no better if the state court orders the artist to waive the artist’s moral rights for the economic benefit of the non-author spouse since an order of a court protecting state law allocation of economic rights would come into conflict with the personal moral rights vested solely in the author by Congress.

3. 17 U.S.C. §201(e) (Involuntary Transfer Preemption)

Section § 201(e) should have been given the popular name “the Russians are coming and the Sky is Falling Act of 1973.”\textsuperscript{221} Section 201(e) explicitly provides that

\begin{quote}
“[w]hen an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11 [bankruptcy proceedings].”\textsuperscript{222}
\end{quote}

While it was the intent of Congress to preclude the U.S. courts from recognizing the appropriation of a copyright by a foreign government; by its own terms, the clear language of § 201(e) preempts state laws, including the common law, from involuntarily transferring copyright ownership.\textsuperscript{223} In 1973, the then-Union of Soviet Socialist Republics Union (USSR) joined the Universal Copyright Convention.\textsuperscript{224} Congress feared that dissent Soviet authors would be intimidated into transferring their copyrights, that their copyrights would be expropriated (nationalized), or that their copyrights would be confiscated through some sham judicial process by the USSR.\textsuperscript{225} The government of the USSR would then use its ownership of copyrights to


\textsuperscript{222} 17 U.S.C. §201(e).

\textsuperscript{223} Scott M. Martin and Peter W. Smith, The Unconstitutionality of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It, 39 AM. U. L. REV. 59, 91 (1989). See also 2 PATRY ON COPYRIGHT § 4:76 (“Any involuntary transfer should be void under the plain language of section 201(e”); 3-10 NIMMER ON COPYRIGHT § 10.04 (“By its terms Section 201(e) is not limited to acts by governmental bodies and officials. It includes acts of seizure, etc., by any "organization" as well. It is, moreover, not limited to such acts by foreign governments, officials, and organizations.”).

\textsuperscript{224} Scott M. Martin and Peter W. Smith, The Unconstitutionality of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It, 39 AM. U. L. REV. 59, 91 (1989).

\textsuperscript{225} Scott M. Martin and Peter W. Smith, The Unconstitutionality Of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It, 39 AM. U. L. REV. 59, 91 (1989). See S. 1359, 93d Cong., 1st Sess. 58, 119 Cong. Rec. 9387 (1973). Senator John McCellan considered the USSR’s adherence to the Universal Copyright Convention as a stratagem to suppress works “of literature which does not meet with Communist approval.” Id. In March 1973, Senator McClellan introduced legislation that was the inspiration for section 201(e) of the 1976 Copyright Act. That bill provided that any copyright would “remain the property of the author . . . regardless of any law, decree or other act of a foreign state or nation which purports to divest the author or said other persons of the United States copyright in his work.” Id. The same principle also appeared in H.R. 2223, 94th Cong., 1st Sess., § 104(c) (1975). See also Francis M. Nevins, When an Author's Marriage Dies: The Copyright-Divorce Connection, 37 J. COPYRIGHT SOC’Y 382, 383-86 (1990).
petition U.S. courts to enjoin the publication of dissent works.\textsuperscript{226} There was no evidence that the USSR ever attempted to use whatever putative claim it may have had to the works of its citizens to enforce its rights under copyright law. Besides, the Universal Copyright Convention would not have required U.S. courts to recognize the USSR’s appropriation of an author’s copyright.\textsuperscript{227}

Any attempt at using copyright law to censure the publication of a copyrighted work would raise serious First Amendment questions as well as questions regarding the prudential policies underlying equitable remedies.\textsuperscript{228} Copyright law is not a robust enough tool to censure ideas. Copyright only protects expression and not ideas being expresses so even an injunction would only stop the dissemination of the dissent-work and not the ideas contained in the work. If Congress repealed or clarified the scope of § 201(e), the many preemption problems discussed in this article might be eliminated.\textsuperscript{229} A copyright could then be reduced to just another species of personal property that could then be disposed of through either a voluntary transfer or an involuntary transfer by operation of state law. However, despite numerous revisions to the Copyright Act, and vituperative criticism by courts and commenters, Congress has demonstrated no inclination to repeal § 201(e).

One significant weakness in the \textit{Worth} Court’s opinion is that it did not consider §201(e) of the Copyright Act when analyzing whether § 201 preempted California’s community property laws at least in so far as whether California law purported to convert a copyright ownership of the authoring spouse to a copyright co-owned with the non-authoring spouse. Surprisingly, the \textit{Worth} court also did not consider whether the author-spouse’s agreement to a stipulated judgment that “The parties agree that future royalties from the books . . . listed on the Petition, along with all reprints shall be paid equally to Petitioner and Respondent. . . . The parties agree that the court shall reserve jurisdiction over any issues that may subsequently arise regarding the distinction between a re-edition or complete reworking of any book which is community property.” was sufficient to legally effect a voluntary transfer under § 201(e).\textsuperscript{230} Commentators and other critics may wish to give the \textit{Worth} court the benefit of the doubt and speculate that the stipulated judgment was why the court did not opine on the vexatious problems presented by § 201(e).\textsuperscript{231} Unfortunately, in \textit{Rodrigue} the § 201(e) issues were clearly raised in the district court

\begin{footnotesize}
\begin{enumerate}
\item[230] In re Marriage of Worth, 241 Cal. Rptr. 135 at 137; Rodrigue, 55 F. Supp. 2d at 547.
\item[231] See 2 \textsc{Patry on Copyright} § 5:116 & n.6.50 (citing Siegel v. Warner Bros. Entertainment, Inc., 542 F. Supp. 2d 1098, 1131, 1132 (C.D. Cal. 2008)(consent judgments are voluntary).
\end{enumerate}
\end{footnotesize}
opinion and again briefed on appeal, there was no reason apparent why the Appeals Court in 
Rodrique did not squarely face the troublesome question of the “voluntariness” of the copyright 
transfer by operation of state.\(^{232}\)

Despite the first rule of statutory interpretation that courts do not look to the legislative 
history unless the text of the statute is unclear, the leading commentators rely on the legislative 
history in order to divine what Congress intended by § 201(e).\(^{233}\) “The House Report states that 
Section 201(e) would not inhibit transfers of ownership pursuant to proceedings in bankruptcy 
and mortgage foreclosures, because in such cases the author, by his overt conduct in filing in 
bankruptcy, or hypothecating a copyright, has consented to such a transfer.”\(^{234}\) This lack of 
statutory formalities is inconsistent with the text analogous provisions of the Copyright Act; for 
example under § 202, a transfer of ownership has to be executed in a signed writing, and § 101 
defines a transfer of ownership to include a mortgage.\(^{235}\) A mortgage is a voluntary agreement 
and under copyright law it is also a voluntary transfer of ownership so that in the case of default 
the mortgagor could sell the copyright without contravening § 201(e).\(^{236}\) And of course, 
Congress later added Chapter 11 bankruptcy proceedings which are now included as an express 
exception in § 201(e). Also the bankruptcy estate only consists of works that have already been 
created and not prospective work to be created in the future.\(^{237}\) Considering that § 201(e) does 
not expressly require a writing, commentators contend that any voluntary conduct or course of 
conduct that is sufficient to demonstrate an intent to transfer a § 106 copyright is sufficient under 
§ 201(e).\(^{238}\) There may be some small subset of transfers by law where there is consent but no 
writing. Curiously, Congress made no separate or special provision for actions brought by the 
Internal Revenue Service or for state insolvency proceedings.

To cut this discussion short, leading commentators speculate that by voluntarily entering into 
a marriage an author also then voluntarily agrees to one (or more) of the following: co-ownership 
(tenants-in-common) under Worth, a sharing of the frutus of the copyright under Rodrigue, or 
 tertium quid, some new, and as yet unknown, ownership status(es) to be devised later.\(^{239}\)

\(^{232}\) One may read into the Rodrigue opinion that because only the § 106 rights were vested in the author, and not the 
concomitant economic rights that there was no transfer therefore no reason to discuss whether there was a voluntary 
transfer under § 201(e).

\(^{233}\) See 1-6A Nimmer on Copyright § 6A.03; 2 Patry on Copyright § 5:116; Goldstein on Copyright § 5.1.6.

\(^{234}\) Id. 10-04. See also 2 Patry on Copyright § 5:116; Goldstein on Copyright § 5.1.6.

\(^{235}\) See 17 U.S.C. § 204 & § 101. See also 17 U.S.C. § 106A(e)(1)(VARA waiver must be in writing); Martin v. City 
of Indianapolis, 192 F.3d 608, 614 (7th Cir. 1999).


\(^{237}\) See 1 Patry on Copyright § 1:83 (“The first substantive amendment to the Act occurred in November 1978, 
when Section 201(e) was revised to permit involuntary transfers under the Bankruptcy Code.’ citing Act of Nov. 6, 

\(^{238}\) See 1-6A Nimmer on Copyright § 6A.03; Goldstein, Patry. The danger of a doctrine of ambiguous 
consent vitiates Congresses’ intent to protect authors. Cf. Scheer v. Universal Match Corp., 417 F.2d 4978, 501-02 
(2d Cir. 1969)(finding sculptural work created by two on-duty enlisted soldiers during the draft-era U.S. Army as 
the “suggestion” of a superior officer, the Deputy Post Commander, to be done as part of a “voluntarily formulated 
employment relationship” thus resulting in a work-for-hire).

\(^{239}\) 1-6A Nimmer on Copyright § 6A.03; Allowing mere conduct without even an express oral agreement to 
determine voluntariness under § 201(e) seems to be at odds with the purposes behind § 204(a), and inconsistent with 
the purposes of the Copyright Act. See Effects Associates, Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990); Davis v. 
Blige, 505 F.3d 90, 108 (2d Cir. 2007)(“the purpose of the writing requirement in the Copyright Act of 1976 was “to 
protect copyright holders from persons mistakenly or fraudulently claiming oral licenses”); Warner Bros. Pictures v.
Allowing mere conduct without even an express oral agreement to determine voluntariness under § 201(e) seems to be at odds with the purposes behind § 204(a), and inconsistent with the purposes of the Copyright Act. To indulge in the fiction that consent to marry also constitutes an unknowing but voluntary prospective voluntary consent to alienate copyrights in works that have not yet been conceived renders the voluntary element of § 201(e) transfer vacuous, if not nugatory. The irony of this argument is demonstrated in the context of individuals marrying in a common law jurisdiction and then later moving to a community property jurisdiction. In the case of a relocating-couple, court must either indulge in this fiction and to conclude the decision to remain married in a community property state is sufficient voluntary conduct to constitute a voluntary waiver of § 201(e) rights or find that the copyright remained vested in the author. In jurisdictions recognizing post-cohabitation property rights analogous to those recognized in Marvin v. Marvin or meretricious relationships in Washington state, the conduct of sharing bed and board might suffice as conduct by which a court may infer a voluntary transfer of a copyright under § 201(e). Finally one may speculate, whether courts would find that the reverse is true and indulge in the legal fiction that changing one’s domicile from a community property state constitutes a disavowal of any continued intention to make a voluntary copyright transfer for works created after domiciling in a common law jurisdiction, or this is a conduct ratification that there was never an initial intent to voluntarily transfer the copyright either co-ownership or to share the economic proceeds through operation of law with the non-author spouse.

4. Federal Conflict or Field Preemption

Absent a conflict between state law and the Constitution, state and federal law, or an express preemption of state regulation by Congress, state regulation may still be preempted by federal law if “[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”; “the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”; or “the state policy may produce a result inconsistent with the objective of the federal statute.”

Congress’ regulation of copyright is comprehensive and plenary. The Copyright Act might better
be called a copyright code.\textsuperscript{245} Congress comprehensively legislated in all aspects of the life of a copyright from its “birth” to its “death” and ultimate entry into the public domain. Congress defined scope of the subject matter of copyright and for the initial vesting of the copyright.\textsuperscript{246} Congress excluded U.S. government works from copyright protection.\textsuperscript{247} Congress provided for the exclusive rights that define the copyright.\textsuperscript{248} Congress then limited those rights,\textsuperscript{249} and implemented compulsory licenses.\textsuperscript{250} Congress established the process for transferring copyrights, limitations on transfers of copyrights, and termination of transfers of copyrights.\textsuperscript{251} Congress created a registration process for copyrights, including a method for recording transfers of ownership or other interests in the Copyright Act that preempts state recordation systems.\textsuperscript{252} Congress provided for the rights of the author’s survivors.\textsuperscript{253} Congress defined and penalized copyright infringement, including both the civil and criminal penalties.\textsuperscript{254} Congress established the term of copyright protection.\textsuperscript{255} Congress even defined terms such as “children,” “widow” and “widower;” legal status categories that Congress traditionally left by default to the individual states.\textsuperscript{256} Finally, Congress ousted state courts from all copyright disputes arising under the Copyright Act and vested exclusive jurisdiction in the federal courts.\textsuperscript{257}

Moreover in the Copyright Act, when Congress wished to defer to the states, it did so unequivocally, for example the Copyright Act defined the term “widow” or “widower” in reference to individual state law.\textsuperscript{258} But, Congress did not look to individual state law to define


\textsuperscript{246} 17 U.S.C. § 102; 17 U.S.C. § 103; 17 U.S.C. § 201; Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1241 (2010)(“Congress has crafted a comprehensive statutory scheme governing the existence and scope of “[c]opyright protection” for “original works of authorship fixed in any tangible medium of expression.”").

\textsuperscript{247} 17 U.S.C. § 105

\textsuperscript{248} 17 U.S.C. §106; 17 U.S.C.§ 114

\textsuperscript{249} 17 U.S.C. § 107-122

\textsuperscript{250} 17 U.S.C. § 111, § 115, § 116, § 117, and § 118.

\textsuperscript{251} 17 U.S.C. § 204; Gillespie v. AST Sportswear, Inc., Not Reported in F. Supp. 2d, 2001 WL 180147 at 7 (S.D.N.Y. 2001)(“Copyright Act prescribes a comprehensive scheme for the licensing of copyrighted works.”).

\textsuperscript{252} 17 U.S.C. § 401-§412; In re Peregrine Entertainment, Ltd., 116 B.R. 194, 202 (C.D. Cal. 1990)(“the comprehensive scope of the federal Copyright Act’s recording provisions, along with the unique federal interests they implicate, support the view that federal law preempts state methods of perfecting security interests in copyrights and related accounts receivable.”); Fodere v. Lorenzo, Slip Copy, 2011 WL 465468 at *2 (S.D. Fla. 2011)(“ Title 17 of the United States Code lays out a comprehensive scheme for the registration and protection of copyrights in the United States.”).

\textsuperscript{253} 17 U.S.C. § 203.


\textsupersciput{255} 17 U.S.C. § 302-§305.

\textsupersciput{256} See De Sylva v. Ballentine, 351 U.S. 570, 580 (1956); Fierro v. Reno, 217 F.3d 1, 3-4 (1st Cir. 2000).

\textsupersciput{257} 28 U.S.C. § 1338(a) (“[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating . . . copyrights . . . Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.”).

\textsupersciput{258} 17 U.S.C. § 101 (“The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.”).
the term “children.”259 Congress rejected state intestate succession or even voluntary bequests by the author of the author’s copyright termination rights,260 but permitted the copyright itself to be bequeathed or pass through state intestate succession.261 While the recodification provisions of the Copyright Act govern disputes regarding subsequent transfers of the copyright, “state law governs all other aspects of copyright mortgages, including construction, effect, and foreclosure.”262 Congress enacted three specific statutory preemption provisions that preempt state law.263 Finally, when asked to interpret the Copyright Act, federal courts usually do not refer to the laws of one particular state rather they often create federal common law.264

Copyright is an area of federal law where national uniformity is paramount.265 Applying the laws of different community property states (or equitable distribution states) will result in a chaotic law of post-dissolution copyright ownership.266 This cacophony of conflicting laws will rise to a crescendo as common law, equitable distribution jurisdictions, as well as the jurisdictions that provide some property protection to cohabiting couples join in the chorus of state courts opining on copyright ownership.267 Congress enacted a comprehensive statutory copyright scheme that both expressly and implicitly displaced state law either through an express preemption or through conflict or field preemption. Copyright law is now a significant foreign relations issue, and the Copyright Act has been amended to conform to the United States’ treaty obligations under the Universal Copyright Convention, under the Berne Convention, and TRIPS. In the arena of international relations it is particularly important that the United States speaks with one consistent voice.268 In the Copyright Act, Congress specifically excluded the states from regulating in many areas, such as some aspects of family law, areas in which the state’s police powers were historically paramount in our federal system. Congress defined family law terms for Copyright Act purposes in a manner, which may be inconsistent with a state’s definition of the term. Congress has displaced state law dealing with the transfer of copyrights, and instead enacted specific provisions that might be described as the micromanagement of

262 GOLDSTEIN ON COPYRIGHT § 5.1.5 & n. 68 (2007 Supplement). Although industry representatives lobbied for a federal copyright foreclosure scheme, Congress found that the benefits from such a system would have limited application and not justify creating such a complex statutory and regulatory regime. Id. at n. 68 citing House Report at 123.
263 17 U.S.C. § 201(e) & 17 U.S.C. § 301(a) & § 301(f).
264 See, e.g., CCNV v. Reid, 490 U.S. 730, 740; Cincom Systems, Inc. v. Novelis Corp., 581 F.3d 431 (6th Cir. 2009);
266 Compare Worth, 241 Cal. Rptr. at 777 (divorced spouses are co-owners of the copyright) with Rodrigue, (author-spouse has ownership-management rights but must share fruits of the copyright) . See generally William Patry, Copyright and Community Property: the Question of Preemption, 28 BULL. COPR. SOC’Y 237, (1981)(comparing Texas and California community property statutes); Nivens, 40 Fam. L.Q. at 517-18 see generally, Kingma, supra note XX.
268 Cf. Zschernig v. Miller, 389 U.S. 429, 440 (1968)(states may not establish their own “foreign policy” through their probate courts”).
bequests and intestate succession. Uniform Commercial Code Article 9 provisions yield to federal law regarding perfecting a security interest in a registered copyright. Courts have repeatedly referred to the 1976 Copyright Act as a comprehensive scheme. Consequently, in addition to the express preemption provisions of the Copyright Act, and the apparent conflict between state laws govern property at the dissolution of a relationship and the Copyright Act or the Constitution, there is a clear in intent by Congress to occupy the field of copyright law and to displace most state law in the area.

E. Preemption, Community Property, and Termination of Transfer Rights (17 U.S.C. § 203)

Regardless of what a state court may decree as part of the property settlement, Congress has vested in the author-spouse, the widow(er), and children, the ultimate right to terminate that transfer. One of the rights of an author under copyright law is the right to terminate the transfer of copyright ownership, including lesser non-ownership rights such as a non-exclusive license. Importantly, for this analysis of preemption “[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.” If the author-spouse through the voluntary act of marriage is presumed to have granted through the operation of state law an interest in the copyright, under this provision the author-spouse may now terminate that transfer under 17 U.S.C. § 203 upon not less than two nor more than 5 years notice thirty-five years after the initial transfer. In the context of community property law, it is not clear when the transfer originally took place. If under state law the non-author spouse accrued an “operation by law transfer” upon the creation of a work during marriage then that would start the thirty-five year period. However, if the transfer does not take place until the entry of the court order allocating the individual interest in the copyright that would then be the starting point to determine when the thirty-five year period commenced. Probably, the better interpretation of when the transfer occurs under community property law is that the transfer to the community takes place upon the fixation of the copyrighted work.

270 See U.C.C. § 9-104(a); §9-109(c)(1); §9-302(3); §9-311(a); §9-302(4), and §9-211(b)(cites are to both the then-existing and currently revised Article 9); In re Peregrine Entertainment, Ltd., 116 B.R. 194, 200 (C.D. Cal. 1990); In re World Auxiliary Power Co., 303 F.3d 1120(9th Cir. 2002).
272 17 U.S.C. § 203(a)(5); 17 U.S.C. § 304(c)(5)(pre-1978 works); See generally 7 PATRY ON COPYRIGHT § 25:74 & nn. 5-6. A related section § 203(b)(5) may a first flush superficially limit the application of § 203(a)(5). Section 203(b)(5) provides that “Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.” Yet, the legislative history clearly states “Nothing contained in this section or elsewhere in this legislation is intended to extend any license or transfer made for a period of less than thirty-five years. Likewise nothing in this section or legislation is intended to change the existing state of the law of contracts concerning the circumstances in which an author may terminate a license, transfer or assignment. Section 203(b)(6) provides that unless and until termination is effected under this section, the grant, “if it does not provide otherwise,” continues for the term of copyright. The quoted language means that the agreement does not provide for a term of less than thirty-five years.” Senate Report 94-473, 1975 WL 370212, 125. So, § 203(b)(5) would not provide an state law exception in marital dissolution proceedings or community property states to the author’s termination rights.
273 Of course, if state law or the agreement permits the rights may be terminated prior to the thirty-five year period. See Walthal v. Rusk, 172 F.3d 481, 483 (7th Cir. 1999); but see Rano v. Sipa Press, Inc., 987 F.2d 580, 585 (9th Cir. 1993), disagreed with, Korman v. HBC Florida, Inc, 183 F.3d 1291, 1295 (11th Cir. 1999).
This could lead to ludicrous results where a spouse of many years finds that the copyrighted work is transferred out of the marital estate and a brand new trophy spouse may enjoy the fruits of the copyright for many years to come. Yet, it is a more principled rule of assuming the copyright was either separate property (then it never enters into the marital estate) or that it exists in the ether of property law to be characterized and transferred only when a court so orders. Whatever rights the divorced spouse may claim under state law, federal law is clear that the termination right may be exercised only by the author, the author’s statutory heirs under the Copyright Act, or if there are no surviving statutory heirs the author’s executor of the author’s estate by providing the transferee with appropriate notice complying with the Copyright Act’s statutory formalities.

The termination of transfer right presents numerous problems in the allocating of copyrights in a divorce preceding all of which raise issues of preemption. First, regardless of the status of the copyright under state law as marital property, whatever state courts order as part of a divorce proceeding, or even if the divorce settlement is voluntary, the author-spouse has an unwaiverable federal right to terminate the transfer of the copyright. Second, regardless of the intent of the author or the courts, if the author does not survive into the period in which he or she may elect to terminate the transfer then the termination right statutorily vests in the then-author’s widow(er) and children (per stirpes) and not in the divorced spouse. Under copyright law, it is the widow(er) or children who may exercise these rights rather by-then divorced spouse. Consequently, even if by operation of law, a copyright becomes part of the community property estate, it will remain there at the sufferance of the author-spouse, and a state court’s ability to manage the copyright assets, as part of the divorce proceeding is extremely limited.

F. Summary of Copyright Preemption

Despite the leading cases of Worth and Rodrigue, whether a copyright can be conveyed through operation of law in a community property state is still an open question. In its opinion,

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277 See 17 U.S.C. § 203(a)(5); N & D E Co., Inc. v. Gustings, Not Reported in F. Supp., 1992 WL 77581 at *4 (E.D. La. 1992). To show the silliness of state law in this area, one could make a rather specious argument that if the parties are still married the terminated copyright was divested from the community by federal law then immediately re-vested in the community property estate by operation of state law. Although under these circumstances, there would be no question that this was an involuntary transfer of the copyright by operation of law.
279 Under the Copyright Act, the question of who is an eligible widow(er) is determined in reference to state law. 17 U.S.C. § 101 (“The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.”). States seem to preclude a divorced spouse from the privileges of widow(er)hood. See, e.g., In re McCarthy's Estate, 73 P.2d 910, (Cal. App. 1937); In re Chomsky's Estate, 101 N.Y.S.2d 60, (N.Y. Sur. 1950); Opdahl v. Johnson, 28 N.E.2d 308, (Ill. App. 1940). See also Howard B. Abrams, Two The Law of Copyright § 12:21 (2011); Francis M. Nevins, 40 Fam. L.Q. at 510-12.
280 See William F. Patry, 2 Patry on Copyright § 5:116. California has a sui generis law statutory law of community property. See Bassett, supra note xx, at § 1:4. In Rodrigue, the Fifth Circuit relied on a unique aspect of Louisiana civil law, and Louisiana is the only civil law jurisdiction in the United States. Accordingly, these cases regarding community property may be only instructive in their specific jurisdictions. See Francis M. Nevins, To Split or Not to Split: Judicial Divisibility of the Copyright Interests of Authors and Others, 40 Fam. L.Q. 499, 517-
the Worth Court did not consider §201(e) when it analyzed whether the general principles of § 201 preempted California’s community property laws at least in so far as California law purported to convert the sole copyright ownership of the authoring spouse to one co-owned with the non-authoring spouse. On appeal, avoiding the § 201(e) issue, the Rodrigue Court found instead focused on § 106’s exclusive copyrights as a property right bundle of sticks. The Rodrigue Court fragmented copyright ownership into the right to manage or control the alienation or licensing of the copyrighted work as legally distinct from the economic benefits that flow from the alienation or licensing of the work. The Rodrigue Court converted a copyright estate of tenancy in its entirety into a new previously unknown legal estate possibly a pseudo-“profit a prendre” with a half-benefit to the non-author spouse through the use of Louisiana community property law. The author-spouse retained the right to manage the copyrighted work but had to share the economic proceeds with the non-author spouse. No court has yet addressed federal preemption under § 106A, the Visual Artists Rights Act in the context of a state community property dissolution proceeding. Consequently, jurists, scholars, and commentators are left to speculate; and at a significant cost, family law practitioners, estate planners, and attorneys for the creative content industries are left to engage prophylactic planning for theoretical possibilities and eventualities regarding how each state community property law and the law governing copyright ownership may develop over time, in different federal circuits, and different state courts. Finally, state court judgments regarding copyright ownership may have to be re-litigated in federal court before questions regarding title are authoritatively settled.

IV. Love and Marriage and Partnership

Principles of sound copyright law and policy, and the law of federal preemption, require that copyright law and state law be harmonized in order to promote both the progress of science and the useful arts as commanded by the Constitution but also finality in the state proceedings that terminate both the social and economic relationship subsumed in the marital construct. This section will explore the nature of a business partnership and whether the economic aspects of the duality of the marital relationship may be instantiated or distilled into the legal form of a partnership. Marriage has or is at least reputed to have a dual nature. Marriage represents to some a spiritual, moral, or romantic institution that is the legal embodiment of the symbolic or

18 (2006). Lawyers with clients having assets in community property jurisdictions are advised to consider whether to address intellectual property assets, especially copyrights and patents, in a prenuptial or postnuptial agreement. Regardless of whether it is a community property jurisdiction or a common law equitable distribution jurisdiction, lawyers licensing copyrights or purchasing copyright assets may wish to obtain consent from all parties in the marital community. See, e.g. Rodrigue v. Rodrigue, Not Reported in F. Supp., 1996 WL 109309 at *2 (E.D. La. 1996)(spouse trying to void contract because “was not aware of, did not agree to the contents of the agreement and the amendment nor did [spouse] renounce [spouse’s] right to concur in the alienation of the community owned artwork.”); section XX, infra (discussing spousal-cohabitant rights in patents).

281 In re Marriage of Worth, 241 Cal. Rptr. at 140.

282 Rodrigue v. Rodrigue, 218 F.3d 432, 436-37 (5th Cir. 2000).
spiritual union of two people becoming one flesh. But, marriage is also an institution in which two distinct individuals enter into a commercial relationship.

The social and economic duality of marriage coupled with its historic religious underpinnings has rendered marriage a fetish to the judiciary and legislatures. Judicial and legislative anxiety has resulted in courts and legislatures conflating, love, marriage, and the economic union of two people resulting in a *reductio ad absurdam* fallacy that sex plus money equals of necessity: prostitution unless sex takes place under the fig leaf like cover of marriage. Consequently, through the fallacious exercise of a synecdoche, the judicial understanding marriage then must of necessity reduce marriage to “sex + commercial-relationship=prostitution.” This inordinate fear of reducing marriage to sex and money has rendered many a jurist or legislature impotent. In cohabitation arrangements outside of marriage, courts have in have used contract or business entity principles to analyze cohabitation agreements to create default rules regarding property acquired during the period of cohabitation. Courts have been willing to recognize these new legal relationships, such as a meretricious relationship and then endow it with quasi-community property status regarding any property acquired during the relationship but only to the degree that the courts could segregate the non-sexual nature of the exchanges between the parties to the relationship from its sexual nature. So board but not bed is valid consideration.

A. Partnership as Marriage and Marriage as a Business Association

Marriage is composed of a unique unquantifiable human relationship, an economic relationship that produces goods and services for intra-family or household consumption (internal production), and most importantly for this article, an economic relationship that produces goods and services for external trade (external production) in order to promote the economic well-being of the first two relationships. This article contends that the external production aspect of marriage is analogous to a business partnership.

Perhaps, a hypothetical could make this point clearer. Assume three individuals with different skill sets, Toby is a talented writer; Lexi has fiscal resources; and Annie is a skilled typist. Lexi, Annie, and Toby agree that Lexi will provide Toby with financial support (capital

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283 See Barber v. Barber, 62 U.S. 582, 588-89 (1858); Genesis 2:24 (Revised Standard Version)(“Therefore, a man leaves his father and his mother and cleaves to his wife, and they shall become one flesh.”); see generally, Robert P. George, *Marriage and The Liberal Imagination*, 84 Geo. L.J. 301 (1995); see also BARBARA ENGLER, PERSONALITY THEORIES: AN INTRODUCTION 352 (8th ed. 2009)(Marriage as meeting a higher order need).

284 *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)(“Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”).

285 *Cf.* Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976)(“The courts should enforce express contracts between nonvarital [sic] partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”).


287 In re Lindsey, 678 P.2d 328 (Wash. 1984); In re the Marriage of Pennington, 971 P.2d 98 (Wash. App. 1999)(factors: (1) whether there has been continuous cohabitation; (2) the duration of the relationship; (3) the purpose of the relationship; (4) the pooling of resources and services for joint projects; and (5) the intent of the parties”). See generally Gavin M. Parr, *What Is A “Meretricious Relationship”?: An Analysis Of Cohabitant Property Rights Under* Connell v. Francisco, 74 Wash. L. Rev. 1243 (1999).

288 If you are trying to figure out who the author is writing about the names belong to two cats.
contribution), Annie will provide secretarial support (in kind contribution), and Toby will write the book and when the book is published, they will split the profits from the book and the book’s
derivative works. The book is published; each takes a one-third share of the royalties and
deposits the check into a separate bank account. There is no reason why this would not be a
partnership. Eventually, Lexi and Toby fall in love and get married. This marriage would not
convert a business partnership composed of Lexi, Toby, and Annie into some non-business entity
enterprise.\footnote{One way of conceptualizing this relationship is as investment in human capital. See generally GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION ____ (2d ed. 1975).} Lexi and Toby would have a marriage partnership; and Lexi, Toby, and Annie will
be partners in a separate legal entity business partnership. Lexi and Toby would still receive
their respective shares of the profits. This result should not change if by operation of state law
the profits from the partnership become community property jointly held by both spouses—in
common or if the number of partners is reduce from three partners to two partners, Toby and
Lexi, and then have same individuals serve as both spouses and as legal business partners.

Once the fundamental economic nature of marriage has been disclosed, the question is
whether this economic institution may be understood in light of analogous institutions.\footnote{See Martha M. Ertman, Marriage As A Trade: Bridging The Private/Private Distinction, 36 HARV. C.R.-C.L. L.
REV. 79, 117-18 (2001).} The expression of marriage as a partnership is more than a polite metaphor rather at its core it
expresses a truth that marriage may be a legal business entity partnership.\footnote{The IRS the least romantic of the many phlegmatic federal agencies recognizes the family partnership, and there are
special statutory provisions for family partnerships and recognizes the sui generis nature of the intra-family
commercial transaction. See 26 U.S.C. § 704(e), Also, many non-traditional families use a legal business-entity
partnership as an alternative to or in order to strengthen personal domestic partnership agreements. See Jennifer
Tulin McGrath, The Ethical Responsibilities Of Estate Planning Attorneys In The Representation Of Non-
Traditional Couples, 27 SEATTLE U. L. REV. 75, 85-86 (2003). Some commentators suggest marriage is more
analogous to a closely held corporation. See Martha M. Ertman, Marriage As A Trade: Bridging The Private/Private
Distinction, 36 HARV. C.R.-C.L. L. REV. 79, 117-18 (2001).} Partnership law recognizes that a husband and wife may
be business partners.\footnote{Revised Uniform Partnership Act (RUPA) § 202; see also id. § 101(6); Uniform Partnership Act (UPA) § 6(1).} A neutral examination of the economic aspects of marriage suggests that
it can be properly understood under the laws governing a business partnership. Therefore, this
section will explore the salient operational economic and normative characteristics of marriage to
evaluate whether a marriage in a community property state may also constitute a legal business
partnership. The author concedes that this is a heavy burden to meet; regardless of the economic
reality of an intra-family economic transaction, courts are extremely reluctant to treat the
customary social and financial intra-family exchanges as evidence of commercial transactions on
which to build a de facto business-partnership. Even if, if the same objective economic behavior
in an arm’s length transaction would be evidence of a partnership. In determining whether a
business entity is a partnership, courts should look to the underlying economic reality of the
institution rather than treating the parties understanding of the relationship as dispositive. Just as

\footnote{See, e.g., Lobato v. Paulino, 8 N.W. 2d 873, 876 (Mich. 1943)(“A partnership is an association of two or more persons (which may include husband and wife) to carry on as co-owners a business for profit.”); Gammill v. Gammill, 510 S.W.2d 66, 68 (Ark. 1974); Chocknok v. State, Commercial Fisheries Entry Com’n, 696 P.2d 669, 673 n.4 (Alaska 1985). At common law, spouses could not be business entity partners. See Lord v. Parker, 85 Mass. 127, 128 (1861).}
courts have moved beyond legal marriage as the *sine qua non* of legally protected relationships and now protect cohabiting individuals, they should be willing to move beyond the social relationship construct to determine that the economic realities underlying the social relationship are dispositive as to whether there is also business partnership.

1. Two or More Partners

The first element of the test to determine whether an association legally qualifies as a partnership is that a partnership requires two or more persons. This element is readily satisfied by most marriages or relationships.\(^{294}\)

2. Co-ownership

However, proving the remaining two elements that the individuals in the marriage are “co-owners” and that a marital unit constitutes a “business for profit” are more problematic. The second element in determining whether a marital relationship may be characterized as a partnership is whether the economic relationship among the participants is one of co-ownership over the assets. The essential elements of co-ownership are profit and loss sharing, control over the business, contributions to equity, and property-co-ownership.\(^{295}\) This element is significant in that it distinguishes the salient character of the partnership form in which partners assume liability, from other potentially complex economic relationships that may at times mimic the partnership form, such as creditor-debtor, employer-employee, landlord-tenant, or franchisor-franchisee but without the necessary substantive qualitative similarity to meet the statutory definition.\(^{296}\) These non-partnership arrangements may provide for a share of the royalties (profits) from the on-going business entity; but usually, there is no sharing of control over property, no sharing of the risk of loss, no sharing of the liabilities of the business, or no agency that permits the other party to legally bind the business.

a. Agreement to share profits and losses is “prima face” evidence of a partnership

Only poets and economists may care to speculate on whether most marriages are profitable. However, a partnership does not actually have to generate a profit as long as the parties enter into the relationship with an expectation of earning and sharing the profits. A necessary corollary of the expectation of earning profits is the realization of the risk that the partnership may also incur losses and how losses are allocated among the partner-participants.\(^{297}\) There is no requirement there be an explicit agreement to share losses rather courts may infer a

\(^{294}\) See RUPA § 101(8) (definition of person); Unif. Marriage & Divorce Act § 201; S 6.03 Determination That Persons Are Domestic Partners (“domestic partners are two persons of the same or opposite sex, not married to one another”).

\(^{295}\) UPA §6(1); RUPA § 202(a) J. WILLIAM CALLISON AND MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 5:11 (2011).


sharing of the risk of loss from the agreement to share profits or from the partnership relationship.\textsuperscript{298} The traditional wedding vow “to have and to hold from this day forward, for better or for worse, for richer, for poorer” explicitly recognizes this economic reality of the marriage.\textsuperscript{299} Parties to a marriage explicitly agree to share profits and losses.\textsuperscript{300} Courts have distinguished the payment of profits from a partnership as wages as distinct from the receipt of profits as a return on investment.\textsuperscript{301} A receipt of profits as a return on investment is evidence of a partnership while payment of wages is merely evidence of employment.

Historically, in the marriage context, the critical distinction is between “sharing gross returns as a family, which was not evidence of partnership, and a “division” of profits, which would be evidence of partnership.”\textsuperscript{302} In \textit{Spence v. Tatum}, there was no attempt to segregate business assets from personal assets, and the court found that the use by a spouse of the “partnership” checking account to pay family bills and personal expenses such as a hairdresser, restaurant meals, and maid service was not sufficient to make the spouse a business partner.\textsuperscript{303} Further, her share was drawn from the “gross profits” of the business.\textsuperscript{304} This appears to be an historical anachronism and vestigial legacy of the fiction marriage that marriage produced one legal entity and one person. It may also have been based in a chivalric desire to shield family assets from the imprudent business activities of a other spouse. Courts have failed to articulate any rationale to support this distinction between the economic joint-economic activities of the wed and the unwedded in determining whether identically objectively measured activities should be considered differently depending on the marital status of the parties in the transaction.\textsuperscript{305}

The better interpretation of modern partnership law would harmoniously interpret family law and partnership law. The Uniform Partnership Act § 18(a), presumes that the contribution of each partner is equal and that each partner will share equally of the partnerships profits and surplus unless the partners agree otherwise.\textsuperscript{306} Community property law makes the same assumption regarding marital assets.\textsuperscript{307} There is no inherent conflict, and this factor weighs in favor of finding a business partnership.

b. Mutual right of control or management of the business

One of the salient attributes of partnership is the mutual right to control or management the business.\textsuperscript{308} The control does not have to be extensive, and it is sufficient to retaining minor

\textsuperscript{299}See Williams v. Williams, 543 P.2d 1401, 1402 (Okl. 1975)(declining to enforce the ecclesiastical vows of marriage).
\textsuperscript{301}Paulino, 8 N.W.2d at 876.
\textsuperscript{302}Spence v. Tatum, 960 F.2d 65, 68 (8\textsuperscript{th} Cir. 1992).
\textsuperscript{303}Spence v. Tatum, 960 F.2d 65, 67-68 (8\textsuperscript{th} Cir. 1992).
\textsuperscript{304}Spence v. Tatum, 960 F.2d 65, 67-68 (8\textsuperscript{th} Cir. 1992).
\textsuperscript{305}The best articulation of some support for this tendentious practice is found in \textit{Cooper v. Spencer}, 238 S.E.2d 805 (Va. 1977), focused on the subjective understanding of the couple as to the business nature of their marital economic activities. The Court focused in ordinate attention on the fact that the profits from the family business were shared in gross rather than formally portioned into individual shares. In a community property state, this should not be a problem because the community property law then divides the gross profits into individual spousal shares.
\textsuperscript{306}UPA § 18(a); RUPA §503.
\textsuperscript{307}See Rosenbloom v. Rosenbloom, 851 So.2d 190, 191 (Fl. App. 2003).
\textsuperscript{308}UPA § 6, UPA § 18(e).
rights of control. The parties may agree to contract away the right to control. In a community property jurisdiction, each spouse shares the equal right and control over community property. In some states, either party may unilaterally alienate the community property. “Where either spouse, separately, may manage and control community property, a spouse has the right to manage and control a business operated by the other spouse as a sole proprietorship if the business is a community asset.” Community property law is therefore consistent with a finding that this factor weighs in favor of a business partnership.

c. Capital Contributions

If the partners agree, personal services can be considered as a non-cash capital contribution to a partnership. In most marriages, as will be discussed later each individual brings to the relationship different skills with different market values. In many marriages, especially among younger individuals, the assets that each brings to the partnership is human capital. By jointly sharing their human capital, they may maximize their earning capacities throughout a lifetime and create capital for the partnership. Sharing of human capital in a marriage to further the interests of the economic external relations of the couple is consistent with a partnership.

B. Business for “Profit”

Despite, the pledge at most weddings that a marriage is “better or for worse, for richer, for poorer,” whether the relationship between the parties to marriage exists as a business for profit under the law is problematic. The sine qua non of partnership is that it is commercial entity whose goal is to generate profits. Despite the element of “profit” as the dispositive motivating factor behind a partnership, the term profit is undefined in either the Uniform Partnership Act or in the Revised Uniform Partnership Act. Profit is defined in Black’s Law Dictionary as “[t]he excess of revenues over expenditures in a business transaction.” The dictionary definition of a business transaction is even less helpful. A “business transaction [is a]n action that affects the actor’s financial or economic interests, including the making of a contract.” A literal reading of the text would bring many of the marital economic transactions other than internal consumption into the realm of “business for profit.” As one scholar noted “the family can be viewed as an economic subsystem that uses the paid and unpaid time of productive
members to provide both market and home-produced goods and services for all members.\footnote{320} It may be helpful to think of marriage in terms taught in a first year economics course and recall the products possibility frontier, opportunity costs, and comparative advantage by substituting the various skills and economic opportunities of each partner, the wealth of the domestic economy grows.\footnote{321} Marriage in purely economic terms allows specialization, increased economies of scale, and the substitution of lower market-wage domestic productivity thus permitting the higher market-wage earner an increased opportunity to participate in the marketplace.\footnote{322} To be blunt, historically this meant lower market-wage females specialized in domestic drudgery so that higher market-wage males had the “leisure” to place work first, work overtime, and dedicate themselves to wage-slavery. Thus, marriage achieves one of the goals of marriage or the family as an economic unit, the pursuit of every higher standard of living (increased income and wealth). This should be sufficient to establish a “for profit” motive in marriage.\footnote{323}

C. Federal Tax Law Consequences

The tax treatment of the assets under control of the marriage under the proposed business-entity- mode is one possible criticism. Probably the most salient characteristic of any business entity is how it is treated for federal tax purposes. And, although state tax law is a significant aspect of any sound financial planning, it would add a level of complexity to the analysis that is well outside the scope of this article. Under federal tax law, a partnership is treated as a pass-through entity, and the income earned by the partnership whether distributed or not is taxed to the individual partners.\footnote{324} Surprisingly, the tax code has numerous options for married couples. For example if both a husband and wife materially participate in a business and file a joint tax return they then may elected not to be treated as a partnership for tax purposes and would not have to file a partnership tax return.\footnote{325} So under some scenarios a court could treat the marriage as also constituting a business entity partnership without tax consequences to the divorcing individuals. Alternatively, if treating the partnership, as a traditional business entity partnership for tax purposes is more advantageous they may elect to follow that route.\footnote{326} These progressive tax rules do not yet apply to same-gender married couples or individuals living in a


\footnote{321}See generally Elena Bardasi and Mark Taylor, Marriage and Wages: A Test of the Specialization Hypothesis, 75 ECONOMICS 569 (2007).


\footnote{323}See JAMES D. GARRANTNEY, ET AL., MICROECONOMICS: PRIVATE AND PUBLIC CHOICE 493 (12th ed. 2009) (“profit accrues only when the value of the good produces is greater than the value of the resources used in its production”).

\footnote{324}26 U.S.C. § 701


cohabitation relationship. Consequently, cohabitation-couples outside the legally privileged complementary marriage will have to rely on the default partnership tax rules. However, since the partnership is merely a pass through entity for tax purposes, the parties will be required to file a partnership tax return, but the qualitative and quantitative incidence of the tax burden will not change.

V. Joint authorship or Work for Hire

State domestic relations law may render characterizing works created during marriage as works by an individual author problematic—at least under state law. Courts have not properly considered whether other statutory forms of authorship under the Copyright Act may better meet the expectations of the creative couple under the Copyright Act. This section will analyze whether these works created during marriage might be either joint-works or works-for-hire under Copyright law. Under modern copyright law, the initial ownership of the protected work belongs to either a natural person author or the hiring party as author, if it is a work-for-hire. The work-made-for-hire section of the Copyright Act deems the employer party to be the author of new works of the mind that are created at the instigation or expense of the employer without formalities such as a written, signed, assignment agreement. This section will analyze the legal status of copyrighted works that are created within the traditional non-marital employment context and concluded that treating marriage, as a business entity partnership is consistent with existing copyright law.

A. Copyright 1909 Act

Much of the relevant copyright law under the 1909 Copyright Act was made through a well-developed body of soundly criticized case law. The 1909 Copyright Act is a significant starting point because in many areas the 1976 Copyright Act is merely a codification of the existing common law gloss on the 1909 Copyright Act. Unfortunately, the 1909 Copyright Act, and its predecessors are not helpful to understand the context of copyright and state family property law. Pre-1976 Copyright Act, copyright law principles of ownership and authorship readily yielded to or naturally conformed to state law principles of personal property and family law. Under the 1909 Copyright Act, copyright law’s work-for-hire doctrine as applied in the

327 See Windsor v. United States, 797 F.Supp.2d 320, 322-23 (S.D.N.Y. 2011). The Attorney General of the United States is no longer defending the constitutionality of § 3 of DOMA. Id. at *1; see supra n. X
328 See supra, section XX.
329 See Albert Ritzler, Et Al., 3 International Contract Manual § 79:195 (May 2011)(“The taxable income of a partnership generally is computed in the same manner as that of an individual, except that certain deductions (for example, charitable contributions, personal exemptions, foreign income taxes, and net operating losses) are not allowed.”).
employment context was relatively simple. The 1909 Act’s test did not distinguish between works created by employees or works created by independent contractors so long as the work as was created at the “instance and expense” of the employer. However, apart from the comedic or satirical view of marriage as one partner firmly in control (usually the distaff partner), copyrighted works created during a marriage were probably not works-for-hire of the marital institution since “the essential factor in applying the ‘work for hire’ doctrine is ‘whether the employer possessed the right to direct and to supervise the manner in which the work was being performed.’”

Under the 1909 Copyright Act the concept of a “joint-work of authorship” was developed through a series of cases. The most significant difference between the law of joint-authorship under 1909 Copyright Act and the current law is that while under the 1976 Copyright Act each author at the point of creation of their respective contribution must have a present intent to merge the work so that the sum of the individual contributions results into a unitary whole; there was no such requirement under the 1909 Act. Under the 1909 Copyright Act, the authors’ intent did not have to be concurrent with the creation of the claimed joint-work. So, it was possible to have works that were created with no present intention of the work ever becoming part of a joint-work and then later by the author (or even a subsequent copyright owner) assenting to an addition or change to the work converting the original work into a new work of joint-authorship.

This author naïvely presupposes that while many spouses inspired creative works, few spouses exercised such a level of creative or other control over the author-spouse as to make the resulting work, a work-for-hire or that the non-author-spouse contributed sufficient original expression to make the resulting work a joint-work under the 1909 Copyright Act. Consequently, there is little relevant case law under the 1909 Copyright Act to inform a current understanding of copyright and the community property estate. Fortunately however, the 1909 Copyright Act contained few formalities for the transfer of a copyright. So states were free to transfer copyright the under operation of state law. The initial fixation of the work under the 1909 Copyright Act, if protected at all, was protected under state common law copyright and this protection continued until general publication of the work. Transfers or assignments of “copyrights” in unregistered works were governed solely by state law. In fact, while the assignment of a registered copyright had to be in writing, the assignment of a state common law

335 Scherr v. Universal Match Corp., 417 F.2d 500 (2d Cir. 1969).
343 Although, this is commonly referred to as state common law copyright, some states had state copyright statutes. See, e.g., N.H. REV. STAT. § 352:1
copyright could be made orally\textsuperscript{345} or through conduct,\textsuperscript{346} and at least one case held that “possession of the manuscript by the plaintiff is evidence of his ownership. . ..”\textsuperscript{347} One may conclude that under a state common law copyright regime, as a creature of state law, a state could transfer the common law copyright by any means through operation of state law; and the federal registrant as successor to the state common law copyright author would own no more than as registrant-as-successor was entitled to under the rights initially conveyed by state law.\textsuperscript{348} Because all copyrighted works began life and continued as creatures of the state common law until general publication conveyance of state copyrights through operation of state law was consistent with federal copyright law.

B. Copyright 1976 Act

The 1976 Copyright Act established a new rubric to distinguish works created as works-made-for-hire (work-for-hire) from other works of authorship.\textsuperscript{349} The copyright to a work prepared by an employee for the employer within the employee’s scope of employment is a work for hire.\textsuperscript{350} Alternatively, a specially commissioned work that falls within one of the nine statutorily defined eligible types of work, and an express written agreement signed by both parties (or their agents) results in the creation of a statutory work-for-hire.\textsuperscript{351} A copyrighted work that meets the statutory definition of work-for-hire results in the legal fiction that the employer or commissioning party is the author of the work; therefore, the title to the copyright initially vests in the employer or commissioning party.\textsuperscript{352}

This leads to the perhaps distasteful question of whether one can legally view the author-spouse as the employee of the marriage/business partnership. Earlier in this article, marriage was divided into two distinct institutions: the romantic partnership (internal production and consumption) and the business partnership (external production and consumption). The romantic partnership is responsible for the intimate and social aspect of the marriage, and the business partnership is responsible for the external commercial relations of the couple. An author-spouse could be considered an employee of the commercial partnership. Under the earlier hypothetical, Lexi, Annie, and Toby agreed that Lexi will provide Toby with financial support and that Annie will provide other support in exchange Toby will write a book, and when the book is published they will split the profits from the book and any derivative works. The question is now to whom the copyright belongs. There are two possibilities: either it belongs to Toby as the individual

\textsuperscript{345} 2 PATRY ON COPYRIGHT § 5:106
\textsuperscript{346} See Jerry Vogel Music Co. v. Warner Bros., Inc., 535 F. Supp. 172, 175 (D.C.N.Y. 1982)(“It is well-settled, however, that the transfer of the “common law copyright” in unpublished works did not have to be in writing but could be oral or inferred from conduct.”).
\textsuperscript{348} Cf. Self–Realization Fellowship Church v. Ananda Church of Self–Realization, 206 F.3d 1322, 1327-28 (9th Cir. 2000).
\textsuperscript{351} 17 U.S.C. § 101 (“a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”).
\textsuperscript{352} 17 U.S.C. § 201(b). See supra sec. XX (discussing work for hire authorship).
The determination of authorship under the Copyright Act will pivot on whether Toby was an employee working within the scope of his employment or independent contractor. The United States Supreme Court in Community for Creative Non-Violence v. Reid interpreted the work-for-hire provisions of the Copyright Act. The Court established under the 1976 Copyright Act that the Restatement (Second) Agency § 220 test is the appropriate multi-factor test to determine the employment status of an author. In determining whether a hired party is an employee as opposed to an independent contractor, courts evaluate the following factors including:

1. the source of the instrumentalities and tools;
2. the location of the work;
3. the duration of the relationship between the parties;
4. whether the hiring party has the right to assign additional projects to the hired party;
5. the extent of the hired party's discretion over when and how long to work;
6. the method of payment;
7. the hired party's role in hiring and paying assistants;
8. whether the work is part of the regular business of the hiring party;
9. the provision of employee benefits; and
10. the tax treatment of the hired party.

Courts usually will only apply or weigh the factors they deem relevant under the facts of the case. In Aymes v. Bonelli, the Second Circuit found that there are some factors that will be significant in virtually every situation. These include: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. These factors will almost always be relevant and should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship. Concededly, this test is designed for skilled tradespeople and its application in the context of copyright law and highly creative individuals (dominant employees or superior servants) may be

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358 Of course, some courts weigh some factors more heavily than others. Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992).
a bit strained. But courts have recognized that highly creative individuals may also be employees of the institutions that they themselves create and manage.

In the earlier hypothetical involving, Toby, Lexi, and Annie. The partnership existed to permit Toby to write a book. The first factor “the source of the instrumentalities and tools” will likely favor finding Toby to be an employee. The second factor, “location of the work” is likely to favor finding Toby an employee, especially if the author spouse works at home. The third factor “the duration of the relationship between the parties” is likely to favor the author-spouse being the employee of the partnership. The fourth factor “whether the hiring party has the right to assign additional projects to the hired party” is likely to be weigh neutrally in the context of the partnership. The fifth factor “the extent of the hired party's discretion over when and how long to work” is likely to be weighed neutrally. The sixth factor “the method of payment” would be regular support from the non-author spouse and weigh in favor of an employee. The seventh factor “the hired party's role in hiring and paying assistants” to some degree these will be joint decisions and weigh in favor of finding the author-spouse is an employee. The eighth factor “whether the work is part of the regular business of the hiring party” weighs in favor of the author spouse being an employee since one of the reasons that the partnership exists is to permit the spouse to create new works. The final two factors “the provision of employee benefits” and “the tax treatment of the hired party.” Will depend on each couple. It is important to note that courts have been very generous to the putative employer when analyzing whether to consider a new work as being a work for hire as long as the work took place during the period of the employment and in some tangential manner furthered the interests of the employer even if the work was created at home, outside office hours, at the employee’s personal expense, and using the employee’s own equipment.

Under the hypothetical, the partnership paid Toby to write a book without exercising further control. “Many talented people, whether creative artists or leaders of major corporations, are expected by their employers to produce the sort of work for which they were hired, without any need for the employer to suggest any particular project. “Instance” is not a term of exclusion as applied to specific works created within the scope of regular employment. It may have more significance in determining whether an employee’s work somewhat beyond such scope has been created at the employer's behest or to serve the employer's interests.” Therefore, the partnership may exercise only the most attenuated control over Toby (the author) and he will still be an employer under copyright law.

If Toby is an employee and the book was within the scope of his employment then the legal author is the partnership. The legal status of a copyrighted work as either a work-for-hire or as a work of a natural person has significant legal ramifications. First, a work-for-hire is not

360 See Restatement (Second) Agency § 220. The Restatement recognizes this problem by noting that “The word indicates the closeness of the relation between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it.” §220(a).
361 See Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, 380 F.3d 624, 639–40 (2d Cir. 2004).
364 Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, 380 F.3d 624, 640-41 (2d Cir. 2004).
365 See Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, 380 F.3d 624, 642 (2d Cir. 2004)(citing Rest. (Second) Agency § 220(1) & cmt. a).
protected under the Visual Artists Rights Act.\textsuperscript{366} Second, the duration of copyright is different. The statutory term of protection for work-for-hire is between 95-to-120 years.\textsuperscript{367} In contrast, the term for a work of authorship by a natural person as the legal author is life of the author plus seventy years.\textsuperscript{368} Finally, the author of a work-for-hire may not exercise termination of transfer rights.\textsuperscript{369} Under the 1976 Copyright Act, the termination of transfer right is a statutory right for the author or the author’s statutory heirs to terminate copyright transfers that were granted to third parties and to recapture the alienated copyrights.\textsuperscript{370} Under some circumstances, this is a potentially significant economic right that Congress has vested in authors and their statutory heirs.\textsuperscript{371} However, while some works will remain valuable forever, the vast majority of copyrighted works would have only a nominal economic value thirty-five years in the future.\textsuperscript{372} Considering that the marital couple could change the default from a marriage qua business partnership to the romantic author form of the marital relationship, and the relative economic insignificance of the work-for-hire doctrine for many creative works, it is not clear that the marital partnership would be economically harmed by this proposal.

VI. Conclusion

Once an institution is defined as “marriage” or “family” is becomes the gold standard against which all other laws and legal institutions must be proven.\textsuperscript{373} Other institutions are measured against it, found wanting, and then the judge like Procrustes stretches or lops off the limbs on other bodies of law to force them to conform to an idealized romantic norm of marriage. While love and marriage may result in a spiritual partnership, this entity as a juridical construct does not easily fit into partnership as defined under the Uniform Partnership Act or Revised Uniform Partnership Act. Although, this article has shown with a bit of difficulty, one may consider marriage as just another business entity by separating the emotive-spiritual relationship from the prosaic day-to-day entity that enters into contracts or otherwise engaged in commercial activities, and in the context that may result in a better understanding of existing copyright law. The existing case law demonstrates an obvious reluctance to consider marriage, a sui generis cornerstone of society, as just another mere business entity.

This article further suggests that an understanding of human relationships in the context of partnership law may permit judges to more fairly resolve property disputes of over assets acquired during the relationship in accordance with generally accepted norms without currently

\textsuperscript{368} 17 U.S.C. § 302.
\textsuperscript{369} See 17 U.S.C. § 203.
\textsuperscript{373} See United States v. Lopez, 514 U.S. 549, 563-565 (1995) (family law appears to be the only limits on Congress’s power under the Commerce Clause).
politically unpalatable requirement of extending the existing parameters of heterosexual or even same-sex couple-marriage to include polymorphusly perverse plural marriages. Partnership provides for the creation of dissolution of such relationships without using the politically and semantically loaded term of “marriage.” Although, this solution will cost participants in these relationships the economic and social privileges that accompany any union labeled a “marriage.”