TERMINATION OF COPYRIGHT TRANSFERS: THE AUTHOR SPOUSE’S LAST LAUGH

By

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“He laughs best who laughs last.”
—Sir John Vanbrugh (1664-1726)

ABSTRACT

The 1976 Copyright Act provides that an author may unilaterally terminate a transfer of copyright approximately 35 years after the initial transfer. In community property states, state law assumes that through the magic of the operation of state law, the author-spouse transfers the copyright that federal law initially vests in the author to the community property (marital) estate. Author-spouses are now entering the period when they may begin to terminate any putative copyright transfer to the community property estate or terminate other transfers that may be the basis for pre-or-post-nuptial agreements, property settlements, or dissolution decrees in divorce actions. This article will analyze whether an author-spouse may terminate the transfer of copyright in the context of a domestic relationship, and conclude that regardless of state law, private agreements, or court decrees that in the context of copyright termination, the domestic relationship, and state law, the author-spouse will always have the last laugh, and be able to nullify the carefully ordered state law based economic regimes and presumptions for domestic relations and the possible ensuing dissolution of the marital union.

This article will analyze the legal effect of a termination of a copyright transfer on marital community property. In a community property state, marital property may be held either separately or as part of the community. Separate property belongs solely to the individual spouse. Community property belongs to the marital community and upon dissolution of that community; the property must then be partitioned. Courts have found that in community property states that through operation of state law that the copyrights to works created during marriage were vested in the marital estate and subject to division upon dissolution of the marriage. As noted by one commentator, “[i]n recent years, all state courts

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[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.[3] These judicial holdings are highly contested in the law review literature, but generally they are accepted as law by leading copyright commentators. However, assuming that the two courts deciding the issue of ownership to the copyright of a work created during the marriage in a community property state are correct, there is still an unresolved issue the author-spouse’s post-dissolution right to terminate under copyright law the copyright transfer to the marital estate or to terminate copyright transfers in prenuptial, postnuptial, settlement agreements, or even those created by court decrees. Moreover, the status of termination rights in copyrighted works in equitable distribution states and the answers to the questions presented by peripatetic married couples that accumulate quasi-community property that must be considered in the course of a dissolution proceeding are also unclear.

This article will review the two cases involving post-dissolution ownership of a copyright to works created during the marriage, In re Marriage of Worth and Rodrigue v. Rodrigue, to set the stage for the analysis of whether under copyright law, an author-spouse may terminate the putative transfer to the community property estate. This article then analyzes whether the author may terminate the transfer and the vexatious problem of when the transfer initially takes place whether it takes place upon the creation of the copyright work or upon the court’s order portioning the community property. The article will then consider whether an author may terminate a transfer by operation of law to the marital community or terminate a transfer that takes place through an order of the court. The article then concludes that as a matter of copyright law the transfer takes place upon creation of the work; however, as a matter of equitable distribution of the marital estate, courts are likely to find that the copyright transfer takes place at the termination of the marriage. Courts may attempt to frustrate an author’s attempt to terminate a copyright transfer through their contempt powers. However, such orders should be pre-empted under federal law. Accordingly, whatever plans laid by mice, men, or the states, the author-spouse will always enjoy the last laugh, and the right to terminate the copyright transfer.

I. The Termination of Transfer Rights Problem

As of 2013, the questions surrounding the exercise of termination of transfer rights under copyright law are important because the 1976 Copyright Act provides that an author may terminate a transfer of the United States copyright right approximately 35 years after the initial transfer.[4] Authors have finally reached the window in which they may begin to exercise their termination of transfer rights. Although outside the domestic relations context, some current examples of the

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[3] 2-23 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.07

potential problems created by the termination of transfer rights involve the iconic comic book characters Superman, Spiderman, Ironman, The Incredible Hulk, Thor, and the Fantastic Four, iconic comic book characters that are potentially worth billions of dollars to the heirs of their creators and will remain valuable into the foreseeable future.\(^5\) The dilemma of the modem software industry is that it came to age under a then indeterminate brand new copyright regime, and now faces the reality of termination of copyright transfers on dates certain. A little over a decade ago, he software industry and their clients learned to their chagrin during the Y2K crisis that modern computer programs were built on up-to-40-year-old legacy backbones.\(^6\) Today, modern software may still contain 35-year-old copyrighted code that is subject to the termination of transfer of the copyright so that in order to continue to use the software, the current proprietor may have to unravel and remove copyrighted legacy software routines at significant expense or to come to a new agreement with the current owner of the termination right.

The problems facing the creative industries are further compounded by the rapid growth of these industries in the immediate post-1976 Copyright Act period in light of the unsettled state of copyright law immediately after the enactment of the 1976 Copyright Act. While many followers of the software industry, remember the 1990s as their golden years, many important software giants were founded in the 1970s—shortly after the 1976 Copyright Act was passed into law. The 1970s and 1980s saw the founding of major software companies for example, Foxconn (1974), Microsoft (1975), Apple (1976), 3COM (1979), Oracle (1979), Logitech (1981), Compaq (1982), Electronic Arts (1982), Adobe (1982), etc.\(^7\) Among the issues that were debatable and debated during this period were whether software was copyrightable and the appropriate standard for determining a work for hire. Copyright law was also unclear whether computer software was copyrightable subject matter.\(^8\) This definition of employee for the purposes of creating a work-for-hire is important because if a copyrighted work is a work for hire, then the copyright vests in the employer and there is no termination of transfer right. The definition of employee for a work for hire was not resolved under 1989, 11 years after the effective date of the 1976 Copyright Act.\(^9\) So for a period of 11 years, copyright law was unclear, and there were four competing definitions of employee used in different circuits. The Ninth Circuit the home of much of the software industry did not opine on the work-for-hire definition until 1989 and then

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\(^6\) See William Evan & Mark Manion, Minding the Machines: Preventing Technological Disasters 76 (Prentice Hall PTR 2002)(cost of fixing Y2K $400-$600 billion). Much of the Y2K fix consisted of patches to overcome problems relating to the date rather then the removal and creation of new software elements. \textit{Id.} at 73.

\(^7\) http://www.computerhope.com/history/198090.htm

\(^8\) See Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1241-42 (3rd Cir. 1986).

\(^9\) See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 736 n. 2, 738-39 (1989)(describing four different tests used by the regional circuit courts to determine whether a work is a work-made-for-hire under the 1976 Copyright Act).
erroneously held that only formal salaried employees are employees under the work for hire provisions of the 1976 Copyright Act.\textsuperscript{10}

Even after the contours of the 1976 Copyright Act were established by the courts by the early 1990s, the lackadaisical attitudes of software and entertainment companies, and towards copyright niceties arguably persisted well into this most recent 35-year period.\textsuperscript{11} This attitude is typified in \textit{Effects Associates, Inc. v. Cohen} where the Court noted:

Cohen suggests that section 204's writing requirement does not apply to this situation, advancing an argument that might be summarized, tongue in cheek, as: Moviemakers do lunch, not contracts. Cohen concedes that “[i]n the best of all possible legal worlds” parties would obey the writing requirement, but contends that moviemakers are too absorbed in developing “joint creative endeavors” to “focus upon the legal niceties of copyright licenses.”\textsuperscript{12}

Consequently, the current creative content industries, especially those companies with significant legacy software, may be surviving on the inertia of the author, non-exclusive licenses granted through conduct, and possible infringement claims that may be barred by the statute of limitations or equitable doctrines such as laches, or acquiesce. Termination of copyright transfer rights may motivate these copyright creators to recapture lost value and for those already so motivated, they will be freed from equitable defenses that may have developed over the passing decades.

II. Copyright as a Community Property Right

\textit{In re Marriage of Worth} and \textit{Rodrigue v. Rodrigue}, are the two leading cases under the 1976 Copyright Act, involving a dispute between spouses over the ownership of a copyright in a community property jurisdiction. These cases are not especially instructive as to the legal mechanics, procedures, or processes by which the copyright transfer takes place nor do they address the point in time of the initial transfer—other than to find that by operation of state law a transfer did take place at some point in the relationship. Both cases reach similar results, but each case arrives at its result through a different theory of state law. They are useful only in that both cases found that a process of state law transferred some right associated with the author’s copyright from the author to the community property, and that they serve as a convenient starting point to determine when the initial transfer of copyright takes place in a community property state.

A. \textit{In re Marriage of Worth}

\textsuperscript{10} See Dumas v. Gommerman, 865 F.2d 1093, 1102 (9th Cir. 1989), rejected by Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989).

\textsuperscript{11} See, e.g., Effects Associates, Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990).

\textsuperscript{12} Effects Associates, Inc. v. Cohen, 908 F.2d 555, 556-57 (9th Cir. 1990).
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 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 a copyright infringement action against the producers of the “Trivial Pursuit” board game. The divorced-spouse sought an order for one-half of the proceeds, if any, from the copyright infringement action.

The Worth court had 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’s provision “vesting initial” ownership of the copyright in the individual author(s). California’s community property law assumes a partnership model and that each spouse makes an equal contribution to the marriage and shares equally in the wealth accumulated during marriage. Copyright law on the other hand reflects 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.

The Worth court then considered the “vests initially” provision of § 201(a) with § 201(d)(1) which provides that copyrights may pass by operation of law and 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 in the form of community property.

Having concluded that federal law permitted the transfer of a copyright by operation of state law from the author to the community property estate, the Worth court then considered whether a copyright was the type of property that could be assigned through state community property law. 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. The

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13 See California has a sui generis law statutory law of community property. See BASSETT, supra note xx, at § 1:4.
15 In re Marriage of Worth, 195 Cal. App. 3d at 771.
19 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”).
20 See Rodrigue 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.
21 In re Marriage of Worth, 195 Cal. App. 3d at 775.
22 In re Marriage of Worth, 195 Cal. App. 3d at 775.
Worth court distinguished a professional license to practice law, medicine, or a skilled-trade acquired during marriage from a copyright to a work created during the marriage by holding that “A copyright has a present value based upon the ascertainable value of the underlying 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.”

Although, as a matter of common sense, ordinary experience, and the facts in the Worth case, itself demonstrate this conclusion is clearly wrong.

B. Rodrigue v. Rodrigue

In Rodrigue v. Rodrigue, for the first time, the federal courts interpreted copyright ownership and applied Louisiana community property law. The district court was unable to harmonize the conflict between state community property law and federal law and held that federal law preempted Louisiana’s state community property law purporting to transfer the copyright from the author spouse. However, the United States Court of Appeals for the Sixth Circuit was able to achieve some measure of harmonization between state and federal law and found that there was no federal preemption to state community property law.

On appeal, the United States Court of Appeals for the Sixth Circuit, the Rodrigue Court interpreted the text of § 201(a) to only convey the exclusive right to the § 106 copyright without vesting the corresponding economic rights in the author. Under this strained interpretation, only the § 106 exclusive rights of reproduction, adaptation, publication, public performance, and public display were initially vested in the author. 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. Although citing Worth on the issue of

23 In re Marriage of Worth, 195 Cal. App. 3d at 775.
24 For example in Worth, at dispute was a share of the damages as a result of an copyright infringement action. This damage award would be clearly a result of the post-dissolution efforts of the author-spouse. Id. See also Roddenberry v. Roddenberry, 51 Cal. Rptr. 2d 907 (Cal. App. 1996)(the dispute was over the profits resulting from 21 years of post-dissolution efforts by the author-spouse to revive the Star Trek and ultimately to creating the Start Trek franchise.).
25 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).
26 Rodrigue, 55 F. Supp.2d at 547
27 Rodrigue, 218 F.3d at 436-47.
28 Rodrigue, 218 F.3d 436. These property law principles may be sui generis to Louisiana as a civil code jurisdiction and severely limit Rodrigue as persuasive authority in the Fifth Circuit much less nationally. See Nivens, 40 Fam. L.Q. at 517-18.
29 Rodrigue v. Rodrigue, 218 F.3d at 435-36.
30 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
the copyright right vesting in the author, the *Rodrique* court then departed from *Worth* court’s its legal analysis and found that the author-spouse was the sole author and the other spouse was not a co-author under copyright law.31

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.32 The *Rodrique* Court then *sua sponte* on grounds not raised in the briefs and used principles of Louisiana property 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.”33 The author-spouse owned the legal rights associated with the *usus* and *abusus* of the copyright while the economic rights associated with the *fructus* of the copyright was owned jointly by either the spouses or through the marital estate.34 This division of personal intangible property rights does not clearly map a copyright law, common law, or even a civil law understanding of property law.

III. Author’s Transfer of Copyright

The most problematic question regarding an author’s termination of transfer in the domestic relations context is whether a transfer of a copyright by operation of law to the community is a transfer that an author may terminate under 17 U.S.C. § 203(a). Under§ 203(a), an author may only terminate a grant that the author has executed. This question requires some consideration of whether a transfer to the community property estate is one by operation of law, and if it takes place by operation of law, is it subject to termination by the author. A downstream-related issue is that even if the rights are vested in the community property estate through operation of law and not subject to transfer, can the rights subsequently then granted by the community property estate be terminated by exercise of the termination of the author’s transfer rights. Finally, this article will address the copyright termination status of rights that were conveyed through prenuptial, postnuptial, property settlement agreements or court orders.

A. By Prenuptial, Postnuptial, or Settlement Agreements

Perhaps, the easiest question presented in this section is the author-spouse’s ability to terminate a transfer that is executed as part of a prenuptial, postnuptial, or settlement agreement. A prenuptial, postnuptial, or settlement agreement is merely a contract of conveyance like any other assignment of copyright ownership or a grant of a lesser right such as a non-exclusive license. There does not appear to be anything in the Copyright Act or its legislative history

31 Rodrigue v. Rodrigue, 218 F.3d at 436 & n. 16; but see 218 F.3d at 438 n. 26.
32 Rodrigue, 218 F.3d at 441.
34 Rodrigue v. Rodrigue, 218 F.3d at 437.
to indicate that the termination right should be treated differently depending on the motivation or the consideration underlying the transfer.\textsuperscript{35} The prenuptial, postnuptial, or settlement agreement may be more problematic as it may have merged into the divorce degree or other judicial order.\textsuperscript{36} Divorce law recognizes the difference between contracts regarding divorce settlements as a private contract and a divorce settlement agreement that has become integrated into an order of the court.\textsuperscript{37} The analysis in the next section regarding court decrees should apply with equal force if the prenuptial, postnuptial, or settlement agreement has become part of a court order. However, if the prenuptial, postnuptial, or settlement agreement has not become part of a court order, it remains merely a contract executed by the author and subject to having the transferred copyright terminated by the author.

As a practical matter, if the jurisdiction followed the model established by the court in \textit{Worth} then either spouse capable of transferring the copyright, and however strange that it may seem to anyone versed in copyright law that one must suppose that copyright law’s provisions regarding the termination of joint works of authorship would apply—unless the federal courts intervened and limited the statutory term author to mean only the creator of the original work. The conundrum of putting the \textit{Worth} decision into practice and the complexities of exercising these termination rights are well outside the scope of this article. “In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit [by the widow(er), children, or grandchildren who] are entitled to exercise a total of more than one-half of that author’s interest.”\textsuperscript{38} In order to exercise termination of transfer rights, it would take both spouses or if one spouse is deceased, it would take \textit{per stirpes} a block of 51% to exercise the decease spouse’s rights. So, it would be simpler for the author spouse to terminate a transfer to the marital estate and then terminate all transfers that flow from ownership rights of the non-author-spouse. If this is not an option then ignore the statutory language that defines “joint-work” under the Copyright Act and treat this anomalous situation by analogy as a joint-work and apply the termination of a transfer in a joint-work.

However, the decision in \textit{Rodrigue} would more closely fit the classic pattern in termination cases. As was discussed earlier, in \textit{Rodrigue} the court gave ownership and control of the §106 rights to the author-spouse. Since all interests in copyrights subject to termination will derive from a grant of rights executed by the

\textsuperscript{35} But see 17 U.S.C. §205(d)(resolving conflicting transfers)

\textsuperscript{36} See, e.g, Molak v. Molak, 639 A.2d 57, 58 (R.I. 1994)(“A property-settlement agreement that is not merged into a final divorce decree retains the characteristics of an independent contract.”).


\textsuperscript{38} 17 U.S.C. §203(a)(1).
author-spouse, the author spouse may terminate them. However, the court suggested that the author-spouse had a state law duty to manage the copyright estate in a prudent manner. Further, the question of the status of the economic rights and whether they may be terminated separately from the §106 grant of exclusive rights to the copyright owner is left unresolved. The purpose of the termination of transfer rights is to permit the author and the author’s statutory heirs only if the author pre-deceases the author to recapture any residual copyright value in the work. If the right granted by the court in Rodrique is analogous to a pension or an investment then the spouse’s claim should survive even after the author purports to termination the transfer. However, if the spouse’s claim is merely that of any other assignee, then the spouse’s economic rights are also subject to termination along with the §106 exclusive rights. Assuming that the Rodrique court’s analysis is correct, the non-author-spouse’s continued claim would be a question of state law unless the Copyright Act’s termination of copyright transfer provisions and clear Congressional intent would preempt a state law claim to economic rights post termination.

B. By Operation of Law

Under the Copyright Act, authors may terminate copyright transfers that they executed.\(^{39}\) Copyrights may be transferred either by conveyance or by operation of law.\(^{40}\) The Copyright Act does not clearly address terminating transfers that took place by operation of law.\(^{41}\) The language of § 203(a) states “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author...otherwise than by will, is subject to termination under the following conditions....”\(^{42}\) It is not clear whether a transfer by operation of law is subsumed under the phrase “executed by the author” for the purposes of a copyright termination of transfer. Courts when interpreting the Copyright Act start with the plain and ordinary meaning of the statutory text.\(^{43}\) If the statutory text is ambiguous then courts will resort to extrinsic tools of statutory interpretation such as legislative history in order to divine Congress’s intent.\(^{44}\)

In general, there are two points at which a copyright may be transferred. First, the initial transfer by the author-creator and second, the transfer of an ownership

\(^{39}\) 17 U.S.C. §203(a). Section 203(a) provides that “[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions....”

\(^{40}\) 17 U.S.C. §201(d). Section 201(d) provides that “[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”

\(^{41}\) Curiously, neither do the leading treatise authors. See generally Nimmer on Copyright, Patry on Copyright; Goldstein on Copyright.


\(^{43}\) CCNV v. Reid, 490 U.S. at 739.

\(^{44}\) Id.
interest by an owner deriving his or her rights from the author. The author’s right to transfer it appears to be almost inviolable. Section 201(e) of the Copyright provides that

> When 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.

Consequently, all copyright rights must be derived directly from the author and must be transferred voluntarily with the sole exception of those transferred as part of an involuntary bankruptcy proceeding. Section 201(d)(1) and §204(a) provide for a transfer of copyright “by operation of law.” However, operation of law has been so far limited to “limited to judicial actions such as bankruptcy actions, mortgage foreclosures, IRS liens, and divorce decrees.” This interpretation is clearly consistent with the limited number of situations such as bankruptcy (expressly allowed under §201(e)), lien and mortgage foreclosures, bequests, consent judgments, and “perhaps community property law or marital divisions” have the necessary overt acts in order for a court to find a perhaps sometimes implicit but an actual voluntary consent to the transfer of a copyright by operation of law. The involuntary initial transfer of the copyright would be permissible through involuntary bankruptcy proceedings. In this case, there would be a clear date when the copyright entered the bankruptcy estate and was then sold or transferred to meet the claim’s of the author-spouse’s debtors. Considering the purposes behind the termination of transfer right, there appears to be no reason why a transfer through a bankruptcy proceeding cannot be terminated under the usual provisions of §203(a). Also a prior voluntary transfer of a copyright that is now part of a bankruptcy estate and is otherwise eligible for termination of the initial transfer could also be terminated under the provisions of §203(a) because the bankruptcy code does not trump the Copyright Act.

Courts often look to patent law by analogy in copyright cases. However, patent law is readily distinguishable from copyright law because state rather than federal law determines patent ownership. More importantly, the Patent Act does not contain an analogous provision as “by operation of law” nor has Congress seen fit to change this in the Leahy-Smith America Invents Act (AIA), the most

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45 2 Patry on Copyright § 5:138 n.2
46 2 Patry on Copyright § 5:116
49 See Sky Tech. LLC v. SAP AG, 576 F.3d 1374, 1779-80 (Fed. Cir. 2009).
The closest analogous provision in patent law is 35 U.S.C. §154(a)(1) which provides that “Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention….”

The case law in the Federal Circuit regarding assignments of patents by operation of law have largely focused on various forms of post-mortem succession to the patent rights. To the limited degree at law is useful in interpreting the Copyright Act, it is that at least for the purposes of patent law, the patent law express assignment provisions under 35 U.S.C. §261 are not exclusive and that patent law recognizes” by operation of law” as an alternative method of conveying a patent and one that is not covered by the express patent law requirement of a writing.

Recognizing the problematic ambiguous statutory language, the article will assume because other than in the case of bankruptcy, any initial transfer of copyright by an author must be voluntary that it was one that it is an eligible transfer executed by the author (under §203(a)) the author-spouse may terminate a transfer may by operation of law, and continue with its analysis of termination of transfer rights in the domestic relations context. However, if the author may not terminate a transfer by operation of law, this would limit the author’s potential rights solely to subsequent transfers by the marital community or to prenuptial, postnuptial, or settlement agreement or even more narrowly since those subsequent transfers were by the marital estate, in theory the author may not be able to terminate those transfers either. The logic is that if an author cannot terminate upstream transfers then the author also could not be able to terminate downstream transfers of an interest in a copyright.

C. Judicial Decrees

Prenuptial, Postnuptial, and Marital Property Settlement Agreements are merely ordinary contracts unless merged into a decree of divorce. “They are treated by courts in the same manner as ordinary contracts, governed by contract law, and subject to the principles of contract law.” The nature of these agreements changes when they are merged into a divorce decree, from one of ordinary contract to an order of the court having the force of law. Regardless of what a state court may decree as part of the property settlement in a marital dissolution proceeding, Congress has vested in the author-spouse, his or her

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50 See generally P.L. No. 112-29 (H.R. 1249).
52 See generally Akazawa, 520 F.3d at 1356; H.M. Stickle v. Heublein, Inc., 716 F.2d 1550 (Fed. Cir. 1983); but see Sky Techns., 576 F.d. at 1381 (state foreclosure and by operation of law assignment of a patent).
54 See TRACY BATEMAN FARRELL, 41 AM. JUR. 2D HUSBAND AND WIFE § 89 & § 101 (2012)(citing cases); Unif. Premarital Agreement Act § 9;
55 See Family court jurisdiction to hear contract claims §8-§9, 46 A.L.R.5th 735
widow(er), and his or her children, the ultimate right to terminate a copyright 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.\footnote{17 U.S.C. § 203(a).} 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.”\footnote{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.} If the author-spouse through the voluntary act of marriage in a community property state is presumed to have granted through the operation of state law an interest in the copyright, then the author-spouse may 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.\footnote{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); \textit{but see} Rano v. Sipa Press, Inc., 987 F.2d 580, 585 (9th Cir. 1993), \textit{disagreed with}, Korman v. HBC Florida, Inc, 183 F.3d 1291, 1295 (11th Cir. 1999).} Further, if the copyright term is extended, Congress has so far provided additional opportunities to terminate the transfer in the extended copyright term.

A related section of the Copyright Act § 203(b)(5) at first blush may 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.”\footnote{Senate Report 94-473, 1975 WL 370212, 125.} So, § 203(b)(5) would not provide an independent state law exception in marital dissolution proceedings or community property states to the author’s termination rights.

D. International Complexities

Termination copyright rights under § 203(a) are not limited to United States authors or United States works.\footnote{See 17 U.S.C. § 101 (defining U.S. work).} Copyright law is territorial so foreign authors and the authors of non-U.S. works may terminate copyright transfers of rights to exploit works in the United States. Whatever rights that an author or copyright owner may enjoy under copyright law are solely based on the domestic
law of the jurisdiction in which the author or copyright owner is asserting copyrights. The complexities that are discussed above apply in equal or greater force when the work in not a United States work under the Berne Convention or the author is not a United State author. One may speculate that if the marriage is one that takes place under laws and analogous conditions that would result in a voluntary transfer of copyright under the laws of the foreign country, such as a civil law community property jurisdiction that a U.S. court may find a voluntary transfer of the U.S. copyright by operation of the foreign law. So that even if the law of the jurisdiction in which the author lived (or other jurisdiction where there was a copyright transfer) did not provide for a termination of transfer right, the author could terminate copyright transfers in the United States. Presumably such a transfer of rights in the United States may be terminated under the same terms and conditions discussed in the following section. And of course, the converse is equally true. Section 203(a) does not permit the termination of a transfer of foreign (non-US) rights.

IV. Termination of Transfer Rights

The termination of transfer must place in a window of time approximately thirty-five years after the initial transfer. There are at least three possible points at which a copyright may be initially transferred in in the marital context, automatic transfer by law, as part of a court order, or as part of a prenuptial, postnuptial agreement, or as part of a voluntary property settlement at the time of dissolution. A transfer of ownership of a copyright to the marital community in a community is considered by some courts and scholars to be a transfer by operation of law. Accordingly, one must examine state law to determine when the transfer takes place.

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

61 See Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162, 1167 (9th Cir. 1996); Berne Convention Art. 5(3). See generally 7 Patry on Copyright § 25:18.
62 If this was not true then § 201(e) is totally redundant.
63 See 7 Patry on Copyright § 25:74 (discussing copyright reversion rights).
64 See generally Berne Convention, Art. 5(1) (“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”); Berne Convention, Art. 5(3) (“Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.”); TRIPS Agreement Art. 3 (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . . .”).
“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. When the clock starts is critical because it determines the length of
the period during which the non-author spouse has rights in the copyright. If the
transfer takes place upon the creation of the work, the transfer rights to a work
done in the first year of a thirty-five marriage may be terminable with at least two
years notice. While if the rights are transferred upon dissolution, the non-author
spouse would enjoy at least thirty-five years of post-dissolution benefits resulting
from a work that was created sometime during the marriage.

1. The Termination of Transfer Rights Clock Starts: At Creation

Probably, the better interpretation of when the transfer occurs under
community property law is that in a community property state the transfer to the
community takes place upon the fixation of the copyrighted work during
marriage.\(^\text{66}\) Copyright right law clearly provides that the copyright subsists upon
fixation, and community property law provides that

Community property is defined nearly uniformly in all community
property states. A typical definition is: ‘property acquired after
marriage by either the husband, the wife, or both.’ All property
acquired during the marriage is presumed to be community
property. The presumption is not generally overcome by the fact
that record title to the property is in the name of one spouse alone.
Mere expectancies and other interest which do not constitute
“property” cannot constitute community property.\(^\text{67}\)

So, because the property right in the copyright vests immediately upon
fixation, the legal rights, if any, are immediately transferred to the marital estate.
This understanding of community property is consistent with the court’s holding in
Worth. The Worth court noted “Moreover, the Act expressly provides for the
transfer of a copyright by contract, will “or by operation of law.” (§ 201(d)(1).) Consequently, notwithstanding that the copyright “vests initially” in the authoring
spouse (§ 201(a), emphasis added), the copyright is \textit{automatically transferred to
both spouses by operation of the California law of community
property}.”\(^\text{68}\) Accordingly, the transfer by operation of California’s community law
property law took place automatically upon the fixation of the work.

This simultaneous transfer of property rule appears to be black letter law in


\(^{67}\) BNA Tax Management Portfolios, States, Gifts, and Trusts Series, Estate
Planning/Business Planning, 802-2nd: Community Property: General Considerations D1
available at 20XX WL 4746486.

\(^{68}\) In Re Marriage of Worth, 195 Cal App. 3d 768, 774 (Cal. App. 1987).
other community property jurisdictions.\(^6^9\)

The basic concept of community property is easily expressed: all property acquired by the spouses during the marriage belongs not to either spouse individually but to a third entity, the marital community. Because legal title to community property lies with the community and not with either spouse individually, community's ownership interest is not a mere future expectancy which vests upon divorce; it is an immediate and real legal title interest. Thus, classification of an asset as community property has important consequences during the marriage for both the parties and their creditors. When the community is dissolved by either divorce or death, property owned by the community is divided between the parties.\(^7^0\)

In fact, this is one of the salient differences between a community property jurisdiction and an equitable distribution system also known as a common system or title system.\(^7^1\) In the community property state all marital property is held jointly in the marital estate. In an equitable distribution state, title may remain in the name of each spouse, and at the time of marital dissolution, the court would then allocate property rights under some equitable scheme. So, in an equitable distribution state, if there were going to be a transfer of a copyright by operation of law, it would be done by the court as part of allocating the property rights of the marital partners at the time of dissolution.

Under the court's holding in \textit{Worth}, that the transfer takes place by operation of state law immediately upon creation and fixation, this could lead to a ludicrous result in community property states where a long suffering spouse of many years finds that the transfer of the copyrighted work to the marital estate will be terminated upon or shortly after the divorce so that the brand new trophy spouse, may enjoy the fruits of the copyright for many years to come. Yet, it is a more principled rule than assuming the copyright exists in the ether of state property law to be characterized and transferred only when a court so orders, and that order then constitutes the transfer by operation of law for the purposes of determining the start of the statutory period that commences measure of the termination of transfer rights.

Unless, the \textit{Worth} court is correct that this is actually a joint-work under the Copyright Act. The \textit{Worth} court assumed without any analysis that both California law and the Copyright Act by operation of state law, under the provisions addressing transfer of a copyright, could make a spouse a joint-author. The \textit{Worth} court's holding presents one more copyright conundrum. The \textit{Worth} court created a legal fiction under state law that the divorced spouse was a co-author or the author of a joint work. Under the Copyright Act, there are specific provisions for

\(^6^9\) See \textit{Salenius v. Salenius}, 654 A.2d 426, 429 (Me 1995); \textit{Hursey v., Hursey}, 326 S.E.2d 178, 181 (Ct. App. 1985); \textit{Drake v. Drake}, 725 A.2d 717, 721 n.5 (Pa. 1999); \textit{Cf. UNIFORM MARITAL PROPERTY ACT} § 4 ("All property of spouses is presumed to be marital property.")

\(^7^0\) Brett R. Turner, \textit{1 EQUIT. DISTRIBUT. OF PROPERTY}, 3d § 2:5

\(^7^1\) Drake, 725 A.2d at 721 n.4
the author’s of joint-works to exercise their termination of transfer rights, and more importantly, one joint-author cannot terminate the copyright ownership rights of another joint-author.\textsuperscript{72} However, the Copyright Act contains a statutory definition of joint work that is inconsistent with California law as interpreted by the court in \textit{Worth}. The Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”\textsuperscript{73}

Absent an express written agreement, courts look to the conduct of the putative joint authors to find intent, and the burden of proof is on the party claiming to be a co-author.\textsuperscript{74} Absent a presumption that living in a community property state is evidence of intent to make a spouse a co-author, many, if not all, non-author spouses will be unable to carry this burden by demonstrating an objective manifestation that the two individuals (couple) intended to create a joint-work. The courts often focus on the question of the dominant author’s intent to create a joint-work, in this case, the author-spouse.\textsuperscript{75} The case law is consistent that each putative author must make an independently copyrightable contribution to the joint work.\textsuperscript{76} Often, the assistance provided but a non-author spouse to the author spouse is of the type that the court’s have rejected in the context of joint-works, for example assistance in editing or research assistance--even if these contributes may have been independently copyrightable.\textsuperscript{77} So, most spouses, absent some evidence of a creative collaboration, are unlikely to meet the statutory definition of the author of a joint-work. Further, while 17 U.S.C. § 201(d)(1) permits the transfer of any of an author’s copyright rights, 17 U.S.C. § 201(d)(1) limits this to the author’s exclusive rights under 17 U.S.C. § 106 and does not appear to include granting a state or state court through the operation of state the right to reject the statutory definition of a joint-work and to create new forms of authorship. Consequently, even if California does view each spouse in a community property state as a joint-author, the federal termination of transfer right will belong to the spouse who is considered the author under the Copyright Act.

Under the court’s holding in \textit{Rodrique}, the author’s exercise of termination of transfer rights in problematic. In \textit{Rodrique}, the court held that the 1976 Copyright Act vested title in the § 106 copyrights: reproduction, derivative works, dissemination to the public, public display, performance, and digital performance rights while Louisiana’s domestic relations law transferred the economic rights from the exploitation of the author’s § 106 rights to the marital community. Therefore, one must determine whether a termination of the transfer of the author’s

\textsuperscript{72} Cf. 17 U.S.C. § 203(a)(1).
\textsuperscript{73} 17 U.S.C. § 101.
\textsuperscript{74} See Thomson v. Larson, 147 F.3d 195, 200-02 (2d Cir. 1998)
\textsuperscript{75} See Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991)
\textsuperscript{76} See, e.g., Janky v. Lake County Convention And Visitors Bureau, 576 F.3d 356, 362 (7th Cir. 2009), \textit{cert. denied}, 130 S.Ct. 1740 (2010); Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000); but see Gaiman v. McFarlane, 360 F.3d 644, 660-61 (7th Cir. 2004); Childress v. Taylor, 945 F.2d 500, 506 (2d Cir. 1991)(noting a split among the leading commentators and copyright treatises)
\textsuperscript{77} Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991)
economic rights is within the termination of transfer rights granted to the author under the Copyright Act. Congress’s purpose of granting the author termination of transfer rights is to permit the author to terminate unremunerative transfers of the copyright and to be permitted a second opportunity to exploit the work.\textsuperscript{78} If the economic rights from licensing or conveying the copyright are somehow severed from the author’s § 106 exclusive rights to exploit the copyrighted work then §203 serves a much-reduced function in the hierarchy of author incentives provided for by Congress under the Copyright Act.

2. Termination of Transfer Clock: Pre-Dissolution Terminations

The following example demonstrates the silliness of state domestic relations law in this area, especially in a community property state. If the parties are still married and under federal law, the author-spouse effected a termination of the copyright transfer then under state law, the copyright is then automatically re-vested in the community property estate by operation of state law. This would totally frustrate Congress’s stated purpose behind the termination of transfer right the right that of “safeguarding authors against unremunerative transfers . . . because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.”\textsuperscript{79} An interpretation of state domestic relations law that reverts the terminated copyright transfer from the marital estate back to the marital estate raises serious questions of federal preemption since Congress vested in the author the absolute right to terminate that transfer of the copyright, and state law effectively at least during the marriage in a community property state precludes the author from terminating an operation of law transfer to the marital community by automatically retransferring the terminated right to the marital community. Such a law would render federal law nugatory.

There could be another reading of the Copyright Act that accomplishes Congress’s intent to protect authors. Section 201(e) permits the voluntary transfer of the copyright to the marital community in a community property state; however, the penumbras of termination right under § 203 do not permit the state by operation of state law to revert the terminated copyright to the marital estate. However, while this would give effect to Congress’s purpose behind § 203, the protection of authors from bad copyright deals, there is nothing in the legislative history or in the text of the Copyright Act that requires these two provisions be read together to accomplish some overarching Congressional purpose. Section 201 provides the process by which copyright ownership may be conveyed and § 203 provides for a statutory process to terminate that transfer right. Once the copyright transfer has been effectively terminated, it returns to the author’s bundle of sticks to be transferred once again in a manner consistent with § 201.


3. Termination of Transfer Clock: Post-Dissolution

One way to look at the transfer in a community property jurisdiction is that the initial transfer is the only initial transfer and all other divisions of the copyright are traceable back to that one initial transfer at creation of the work to the marital estate. If this is the correct, then creation of the work commences the termination clock. Alternatively, one could understand the initial transfer at the moment of creation to the marital community; however, the subsequent transfer at the moment of dissolution, is a separate and independent act that starts a new termination of transfer clock. This position, while may commend it as one that promotes the equity in the property division at divorce, does not appear to be consistent with the modern understanding of community property and marital dissolution. Dissolution is merely the allocation of property rights that are vested in the marital community and not the creation of new non-marital property.

The courts have not considered the effect of transfers in equitable distribution jurisdictions. In jurisdictions, where spouses own the copyrights as separate property, there is the potential that either voluntarily or involuntarily the individually owned copyright may be implicitly or explicitly part of the property settlement. If the author-spouse voluntarily agrees to the use of the copyright as an asset in the dissolution, then the transfer should take place at the effective date of the agreement. The more interesting and under theorized question is the de facto or implicit use of an author’s copyright to offset some other property claim in the divorce. However, other than to flag these issues as worthy of further study, they are outside the scope of this article.

V. State Law Based Interests in Termination of Transfer Rights

Having tied up the bundle of sticks relating to the marital community’s interest under state law in the copyrighted works created during the marriage, there remains the question, of whether state law could purport to grant any interest in the termination right itself. This leads to the question of the legal status of the termination right under state law. In community property states, there are two major categories under which the copyright termination right could fall. It could be characterized as either an “expectancy” or as a “contingent interest”.

There do not appear to be any copyright cases directly on point. The 1909 Copyright Act’s roughly analogous provision that provided the author with a renewal period in which a new copyright estate was created that was not burdened by prior grants of copyright unless the author survived into the renewal period is a useful place to start. Under the 1909 Copyright Act, the courts described the renewal right as a

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mere expectancy. However, while the federal courts consistently described 1909 Act’s renewal right as an “expectancy,” it is clear from the operational language they used the renewal that the actual renewal rights were contingent under state law so were vested in the marital community.

The most analogous body of law to a termination of transfer right is probably found in the line of cases considering rights to pension benefits in community property states because pension benefits like termination of copyrights have an inherent period before the right is vested and pensions benefits like termination of transfer rights, in the case of some beneficiaries, Congress has established by statute eligible classes of claimants. In the case of In re Marriage of Brown, the California Supreme Court considered whether a spouse was entitled to a share of a pension in which there were no vested pension rights. The Brown court had to distinguish between an expectancy in which the marital community had no rights and a contingent interest in community property. “The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent or of a beneficiary designated by a living insured who has a right to change the beneficiary. As these examples demonstrate, the defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence.” The court would later opine that there is a contractual right to be named the beneficiary of a policy then the beneficiary no longer has a mere expectancy but rather a property right. This would suggest that under California law that not only was the right to the copyright transferred by operation of law, but also the right to the termination of that transfer (or perhaps at least the economic value of the termination right) was also transferred.

However, any state law based property claim to exercise of the termination of transfer right as a contingent interest should be clearly and expressly preempted. The two cases finding that state community property law was not preempted were able to do so with dexterous readings of the copyright act. However, even these two cases acknowledge that if there were a conflict that federal law would control. In the case of termination of transfer rights, Congress has not been silent. Congress has clearly and unambiguously granted the termination rights to the author and the author’s statutory heirs, specifically the author’s widow(er) and children. The specific scope of this express grant of rights does not appear to leave open a principled opportunity for the courts to provide additional protections to a divorced spouse through the operation of state domestic relations law or the state’s characterizing the termination of transfer right as a contingent interest under state law.

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84 In re Marriage of Brown, 533 P.2d 561 563 (Cal. 1976).
85 In re Marriage of Brown, 533 P.2d at 565 (internal citations and footnote omitted).
law that is a property right of the marital community.\textsuperscript{86}

VI. State Court Contempt Power and Federal Preemption

Although a state court may not have the power to stop the termination of a copyright transfer or even reverse a termination of transfer, a state court may attempt to order the author or the author’s statutory heirs not to exercise the author’s termination right or to transfer for the benefits of the termination to a divorced spouse. State courts have the legal power to enforce their orders through civil or criminal contempt proceedings.\textsuperscript{87} Through contempt proceedings, state courts have attempted to force the recipients of federal benefits to comply with state court orders.\textsuperscript{88} State court domestic relations orders are enforceable through their contempt power less the order is preempted by federal law. Courts have the inherent or statutory power in federal and state courts to enforce court orders and to regulate the proceedings before the court, but these orders are limited by the Supremacy Clause of the Constitution, the state court’s ability to divide marital assets may be limited under federal preemption principles. “Contempt power has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary course of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitor.”\textsuperscript{89} Therefore, courts have used their contempt powers to enforce judicial orders of all types, and a court’s use of its contempt powers in a civil domestic relations matter is not uncommon. However, the scope of a court’s contempt power is not unlimited. A court may only use its contempt power to enforce a legally cognizable right. So, if the underlying law is invalid under the Constitution or by constitutionally based principles of preemption, then disobeying an order by the author or the person(s) possessing the termination of transfer rights is not contempt of court. So, this section will analyze whether a state court could interfere with an author’s exercise of his or her unfettered right to terminate a copyright transfer if the exercise of such a termination is contrary to a court order in a domestic relations case or whether federal law preempts such an order.

Section 203(a) is not part of the Copyright Act’s express preemption scheme.\textsuperscript{90} However, even without an express federal law preempts state laws,

\begin{itemize}
\item \textsuperscript{86} See Hisquierdo v. Hisquierdo, 439 U.S. 572, 583 (1979)
\item \textsuperscript{87} See generally Dan B. Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 186-268 (1971).
\item \textsuperscript{90} See 17 U.S.C. § 301 (“[A]ll 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, . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in such work under the common law or statutes of any State.”). There is a strong argument that
\end{itemize}
courts may find that a state law is 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. In conflict or field preemption cases, federal law preempts state law if either it is impossible to comply with both state and federal law or if the state law frustrates “the accomplishment and execution of the full purposes and objects of Congress.” If the conflict is in an area that is usually subject to state regulation then federal courts will not preempt the challenged state law unless “[it] was the clear and manifest purpose of Congress [to preempt state regulation].” Moreover, the Court uses a canon of statutory construction that courts should ordinarily prefer a plausible interpretation of state or federal law that avoids preemption state law.

Section 203(a) potentially falls within the ambit of a state family-property law conflict; therefore, the conflict must “do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.” However, this is by no means an insurmountable standard. In almost all of recent community property cases, the Court held that federal law preempted the challenged state laws. This practical lesson from recent Supreme Court cases suggests the Court actually gives little practical deference to state court decisions and state laws regarding family law and the allocation of federal rights or benefits.

The starting place for any preemption analysis of a federal statute is the language of the statute and the intent of Congress. The relevant operational language of § 203(a) provides that

(a) Conditions for Termination. — In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the

state limitations on an author’s ability to recapture §103 or §106 rights may be comparable granting equivalent rights, and thus expressly preempted.

95 Hisquierdo, 439 U.S. a 582 (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. But see Rose v. Rose, 481 U.S. 619 (1987).
author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. [The rights in clause (2) are vested in the widow(er), surviving children, grandchildren, and in the event that these statutory heirs are not still living, the executor, personal representative, or trustee may exercise the author's termination rights.]

* * *

(5) Termination 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.

Courts also look to the intent and purpose of the legislation. The legislative history behind §203(a) is clear, it is to permit authors to recapture unrenumerative transfers and to provide for the economic security of the spouse, children, and grandchildren of the author. One may assume that Congress wished the privilege the author first so as to promote the creation of new works and the natural objects of the author’s bounty, the spouse and progeny. However, it is not clear that Congress ever considered competing spouses. Children from any relationship are clearly protected at least in so far as they survive the author, but only the lawful spouse, at the author’s death, is entitled to be a statutory heir under the copyright act.

Conclusion

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 spouse, 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 proceeding. 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

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transfer of the copyright. 104 Second, regardless of the intent of the author-spouse 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 necessarily in the divorced spouse. 105 Under copyright law, it is the widow(er) or children who may exercise these rights. State laws seem to preclude a divorced spouse from the privileges of widow(er)hood. 106 The divorced spouse may not exercise the termination of transfer rights nor prevent the statutory heirs from exercising their termination of transfer rights. 107 Consequently, even if by operation of law, a copyright becomes part of the community property estate, it will remain there only at the sufferance of the author-spouse or the author’s statutory heirs, and a state court’s ability to manage the copyright assets, as part of the divorce proceeding is extremely limited.


107 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.”).