Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?

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CLASSIFYING VIRTUAL PROPERTY IN COMMUNITY PROPERTY REGIMES:
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GOODWILL?
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TABLE OF CONTENTS

INTRODUCTION ................................................................................................................................ 2

PART I. CLASSIFYING COMMUNITY PROPERTY ............................................................................... 4
A. Types of Community Property............................................................................................ 6
   1. Earnings and Profits ......................................................................................................... 7
   2. Profits of Separate Property ............................................................................................. 9
   3. Increases in the Value of Property ................................................................................. 11
   4. Goodwill ......................................................................................................................... 14
B. Contractual Liabilities....................................................................................................... 16
C. Intellectual Property and Community Property ................................................................ 19

PART II. CHARACTERIZING VIRTUAL PROPERTY ........................................................................... 23
A. Virtual Property Defined by Descriptions ........................................................................ 23
B. Examples of Virtual Property ........................................................................................... 24
   1. URLs (and domain names)............................................................................................. 25
   2. Websites ......................................................................................................................... 26
   3. E-mail and E-mail Accounts .......................................................................................... 28
   4. Facebook Profiles ........................................................................................................... 29

PART III. CONSIDERING VIRTUAL COMMUNITY PROPERTY ........................................................... 31
A. URLs (and domain names) ............................................................................................... 31
B. Websites ............................................................................................................................ 33
C. E-mail and E-mail Accounts ............................................................................................. 35
D. Facebook Profiles .............................................................................................................. 37

CONCLUSION ................................................................................................................................. 39

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INTRODUCTION

The tale is as old as time: boy and girl meet; boy and girl fall in love; boy and girl marry; boy and girl live happily ever after.\(^1\) Though this romantic fantasy has permeated through society for ages, a few digital enhancements are required to move the story into the twenty-first century. Couples now meet on eHarmony\(^2\) and Match.com.\(^3\) Budding relationships are announced through status changes on Facebook.\(^4\) Weddings, from the invitations to the actual ceremony, are an online affair.\(^5\) The virtual world has infiltrated the old-fashioned love story; the Magic Kingdom has been razed and replaced by the Mac Kingdom.

But perhaps the digital age’s greatest impact on real-life relationships has been in the final stanza of the classic fairy tale: boy and girl live happily ever after. Today, joint stationery is out; joint e-mail accounts are in. Couples wishing to adopt create detailed websites promoting their parenting abilities.\(^6\) Parents communicate with college-aged children via Skype.\(^7\) Siblings’ avatars catch up in virtual coffee shops.\(^8\)

As more newlyweds ride off into the virtual sunset, light-years of legal questions arise,\(^9\) particularly in community property jurisdictions. Community property, as understood in the United States, operates under the general presumption that all property created or acquired during the marriage is considered community property, whereas property created or acquired outside of the marriage is classified as separate property. Thus, if a husband creates an e-mail account while married, there is a presumption that the e-mail account is community property, but had he created the e-mail account before the marriage, the e-mail account would be considered separate property. Whether property is classified as community or separate determines the rights and duties each spouse has towards that property during and after the marriage; spouses generally share in community property, while only the acquiring spouse has rights in separate property.

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\(^1\) E.g., JANE AUSTEN, EMMA (Barnes & Noble Classics 2004); CHARLOTTE BRONTE, JANE EYRE (Penguin Group 2006); WALT DISNEY’S CINDERELLA (A Golden Book 2005) (1998); SEX AND THE CITY (New Line Cinema 2008).


\(^8\) In the 3-D virtual world Second Life, there are a number of coffee shops where players can “[g]rab a cup of [their] favorite latte and unwind on the comfy couches” via their avatars. Second Life, Cafes & Cabarets, http://secondlife.com/destinations/music/cafes (last visited Aug. 20, 2010).

property. The wife, then, would share in the e-mail account created by her husband during the marriage, but would not share in the e-mail account created before the marriage.

Classifying the initial property, such as the e-mail account, created during a marriage or acquired outside of a marriage is relatively simple, but this task becomes more complicated when the initial property changes in form or substance. For example, property may increase or decrease in value, it may create profits, or it may transform into an entirely new type of property. In these instances, determining whether the increase in value, profits, or newly-transformed property should be classified as community or separate causes community property jurisdictions great consternation. Such difficulty is particularly apparent as new forms of property emerge, such as business interests, trusts, copyrights, and patents. These new types of property can be transformed in a greater variety of manners than more traditional forms of property, like land and livestock, which existed when community property rules were initially codified hundreds of years ago. Thirteenth century rules are not always easy to apply to twenty-first century forms of property.

For the same reasons classifying business interests, trusts, copyrights, and patents is problematic for community property jurisdictions, classifying virtual property will be equally (if not more) challenging. Virtual property comes in a host of forms including e-mail accounts, domain names, websites, and social-networking profiles, and these types of virtual property can change in form and substance every nanosecond. The novelty of virtual property is enough to cause a short circuit in community property jurisdictions and the surge in the volume of virtual property possessed by individuals during the past few years only magnifies these difficulties. Today, 79 percent of the United States population uses the Internet, and of this Internet-using population, 90 percent send and receive e-mail. In 2006, there were roughly 31 million blogs on the Internet, and by 2007, that number had grown to 70 million. In 2008, retail e-commerce sales in the United States were valued at roughly $142 billion. A single domain name has sold for as much as $16 million. In May 2010, the 500 millionth user signed up for Facebook.

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10 For example, developments in stock required community property regimes to fine tune their statutes. In Louisiana, cash dividends are considered fruits, such that they are automatically part of the community, regardless of whether they are created by community or separate property. See LA. CIV. CODE arts. 552, 2338, 2339 (LEXIS through May 2010 amendments); infra Part II.A.2. Stock dividends, however, are not considered fruits, and thus not automatically part of the community if they are created by separate property. See LA. CIV. CODE arts. 552, 2341 (LEXIS through May 2010 amendments). See also J. Wesley Cochran, It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas, 58 BAYLOR L. REV. 407 (2006) (discussing the interplay of copyrights and patents with Texas community property law); Nathan R. Long, Community Characterization of the Increased Value of Separately Owned Businesses, 32 IDAHO L. REV. 731 (1996) (discussing how different community property jurisdictions classify the increased value of separately owned businesses); W. Michael Wiist, Comment, Trust Income: Separate or Community Property, 51 BAYLOR L. REV. 1149 (1999) (discussing the classification of trust income in community property jurisdictions).


When Microsoft purchased a small percentage of Facebook in 2007, it valued Facebook, as a whole, at $15 billion.\(^{16}\)

The increase in the social and economic impact of virtual property means that more individuals are entering holy matrimony with e-mail accounts and blogs, and more spouses are developing websites and Facebook profiles for their businesses. Therefore, there is a growing need for community property jurisdictions to consider how to respond when the first couple litigates whether a Uniform Resource Locator (URL) is community or separate property, whether a website generates an increase in separate property, whether e-mail contacts are profits, and whether Facebook friends create goodwill. To help community property jurisdictions avoid being left in the wake of cyberspace, this Article begins the necessary examination of how community property regimes should classify virtual property. Part I outlines the basic structure of how property is classified in community property regimes, describing the particular types of property that are likely to arise in the virtual context. Part II defines the concept of virtual property and details examples of virtual property that may be present in modern couples’ lives. Based on the understanding of community property and virtual property presented, Part III then considers how the identified examples of virtual property might be classified in community property regimes. In doing so, the Article provides a host of examples that are likely to arise in everyday life and contemplates how courts should analyze and classify those particular forms of property. Finally, this Article concludes by considering the difficulties in store for community property jurisdictions and virtual property even after the property is properly classified.

PART I. CLASSIFYING COMMUNITY PROPERTY

Community property, as recognized in the United States, finds its roots in the Spanish system of bienes gananciales.\(^{17}\) Under this system, two property classifications exist:


\(^{16}\) KIRKPATRICK, supra note 15, at 244–45.

\(^{17}\) WILLIAM Q. DE FUNIAK and MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2 ed. 1971); W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:27 (1982); Nina Nichols Pugh, The Spanish Community of Gains in 1803: Sociedad de Gananciales, 30 LA. L. REV. 1, 1–2 (1969). This is not to say that Spain invented community property; a system of marital property existed long before Spanish community property developed. Community property is widely thought to have originated with the Visigoths who recognized “[a] community right in the marital gains” and eventually conquered Spain. RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 1 (Bancroft-Whitney 1895); DE FUNIAK and VAUGHN, §§ 8, 22; Michael J. Vaughn, The Policy of Community Property and Inter-Spousal Transactions, 19 BAYLOR L. REV. 20, 28–29 (1967).

Eight states recognize community property as the default regime for marital property: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. ARIZ. REV. STAT. § 25-211(LEXIS through May 2010 amendments); CAL. FAM. CODE § 760 (LEXIS through 2010 amendments); IDAHO CODE § 32-906 (LEXIS through 2010 amendments); LA. CIV. CODE art. 2338 (LEXIS through May 2010 amendments); NM. STAT § 40-3-8 (LEXIS through 2010 amendments); NEV. REV. STAT. § 123.220 (LEXIS through May 2010 amendments); TEX. FAM. CODE § 3.003 (LEXIS through April 2010 amendments); WASH. REV. CODE § 26.16.030 (LEXIS through April 2010 amendments). All of these states were either once part of a Spanish colony or influenced by Spanish laws.
community property and separate property. Community property states maintain the Spanish presumption that all property created or acquired during the community’s existence is community property, thereby following the general definition that community property includes all property “which is increased or multiplied during marriage.” Louisiana, the first state to adopt a community property regime, relied on this ganancial concept when it more specifically defined community property as:

the profits of all the effects of which the husband has the administration and enjoyment; . . . the produce of the reciprocal labor and industry of both husband and wife; and . . . the estates which they may acquire during the marriage either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase may be only in the name of one of the two and not of both . . . .

Though stylistically altered through the years, the substance of what constitutes community property has remained largely unchanged, and is followed today by other community property jurisdictions in the United States.

Ballinger, § 6. For an account of how community property traveled through each state, see McClanahan, §§ 3:20–31.

In addition to the eight community property states, Wisconsin has adopted the Uniform Marital Property Act (“UMPA”) which grants spouses a present, undivided, one-half interest in all marital property. See Wis. Stat. 766.31 (LEXIS through May 2010 amendments). Much like community property, marital property under Wisconsin law includes, among other things, “income earned or accrued by a spouse or attributable to property of a spouse during marriage,” and there is a presumption that all property is marital property. Id. Alaska has also developed similar laws based on the UMPA, but Alaska’s marital property regime is an opt-in system, as opposed to the default system in Wisconsin. See Alaska Stat. § 34.77.090 (LEXIS through April 2010 amendments).

For purposes of this Article, the term “community property regimes” refers to both the Spanish-based community property regimes and the UMPA-based regimes. Differences between the individual states’ systems are discussed as they impact the arguments presented herein.

New Mexico and Washington also have a third category of property: quasi-community property. See N.M. Stat. § 40-3-8(C) (LEXIS through 2010 amendments) (defining quasi-community property as property acquired while a spouse is domiciled in a state other than New Mexico); Wash. Rev. Code § 26.16.220 (LEXIS through April 2010 amendments) (defining quasi-community property as property acquired in a state other than Washington). In actuality, quasi-community property is not a separate type of property, but instead is a vehicle for answering choice-of-law questions with regards to property acquired in a different state. Wisconsin also creates a third category of property: mixed property. Wis. Stat. § 766.63 (LEXIS through May 2010). Mixed property is also not a separate type of property, but instead the recognition of the pro rata theory of classification of property.


Ballinger, supra note 17, § 5; George McKay, A Treatise on the Law of Community Property § 297 (2 ed. 1925) (1910).

La. Dig. p. 336, art. 64 (1808) (Eng. trans.).

Today, community property is defined in Louisiana Civil Code article 2338 as,

[Property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly;
Accompanying the definition of community property, states define separate property. For example, Louisiana’s Civil Code states that separate property comprises,

- property acquired by a spouse prior to the establishment of a community property regime;
- property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.

Other jurisdictions have similarly included in the definition of separate property things such as property acquired before marriage, property acquired with separate property, and property acquired by inheritance or donation to a spouse individually.

These definitions provide the general framework used to classify newly-created types of property, such as stock and intellectual property, and should serve as the basis when scrutinizing virtual property. However, as property has developed in the ways it can be increased and multiplied during a marriage, additional statutes and jurisprudence have developed to further identify how property in particular cases should be classified.

### A. Types of Community Property

See also LA. CIV. CODE art. 2339 (LEXIS through May 2010 amendments) (defining the fruits of separate property as community property unless reserved through an authentic act or act under private signature that is filed in the public registry).

See statutes cited supra note 17.

ARIZ. REV. STAT. § 25-213 (LEXIS through May 2010 amendments); CAL. FAM. CODE § 770 (LEXIS through 2010 amendments); IDAHO CODE § 32-903 (LEXIS through 2010 amendments); LA. CIV. CODE art. 2341 (LEXIS through May 2010 amendments); NEV. REV. STAT. § 123.130 (LEXIS through May 2010 amendments); N.M. STAT. § 40-3-8(A) (LEXIS through 2010 amendments); TEX. FAM. CODE § 3.001 (LEXIS through April 2010 amendments); WASH. REV. CODE § 26.16.010 (LEXIS through April 2010 amendments).

Spouses may alter the default community property rules and re-define what constitutes community or separate property by executing a matrimonial agreement in accordance with the state-required formalities. See, e.g., IDAHO CODE § 32-916 (LEXIS through 2010 amendments); WIS. STAT. § 766.17 (LEXIS through May 2010). This Article only considers the application of the default community property rules.

LA. CIV. CODE art. 2341 (LEXIS through May 2010 amendments).


There are four particular classifications of property that serve as a continual source of confusion: earnings, profits, increases in value, and goodwill. Virtual property can easily fall into any of these four categories and create property that falls into these categories. Because of the novelty and ever-changing nature of virtual property, it may be difficult to determine how virtual property and the property it creates should be classified.

1. Earnings and Profits

The most basic form of community property is earnings. Because community property includes all property acquired during marriage, spouses share in whatever each produces as a result of his or her “effort, skill, or industry.” A salary is the most common example of earnings. If a husband earns a salary during the marriage, the husband’s salary is considered his earnings because it was created by his labor. Therefore, it is classified as community property. Because the salary is community property, both the husband and the wife have an undivided interest in the salary.

Earnings become more difficult to discern when profits are included in the equation. While earnings represent what a spouse gains based on his effort, skill, or industry, profits represent what a spouse gains from things without exerting effort, skill, or industry and without diminishing the substance of the underlying thing. For example, the husband’s salary is considered an earning, but the rent payments the wife receives from renting an apartment to a third party are considered profits; the husband exerts effort to acquire his salary, whereas in the latter example, the wife does not exert effort to acquire the rent payments.

It is simple to delineate earnings from profits in this basic example, but as a husband exerts less effort to gain an earning, or a wife exercises more industry to receive a profit, courts struggle to determine when an alleged earning turns into a profit and vice versa. For example, in Laughlin v. Laughlin, a wife entered the marriage as owner and operator of a farm. During a small part of the marriage, both the husband and wife operated the farm jointly, but for the majority of the community’s duration, the farm was leased to third parties. Upon dissolution of the community, the New Mexico Supreme Court had to quantify how much of the funds

29 See de Funiak and Vaughn, supra note 17, § 66; McKay, supra note 20, § 296; Katherine S. Spaht & Richard D. Moreno, Matrimonial Regimes § 3.2, in Louisiana Civil Law Treatise 73 (3d ed. 2007).
30 Ballinger, supra note 17, § 5; McKay, supra note 20, § 297.
32 Spaht & Moreno, supra note 29, § 3.5. Community property regimes refer to profits by different names. In Louisiana, profits are referred to as fruits. La. Civi. Code art. 551 (LEXIS through May 2010 amendments). Other states refer to profits as rents and issues. E.g., Idaho Code § 32-906(1) (LEXIS through 2010 amendments); Nev. Rev. Stat. § 123.130 (LEXIS through May 2010 amendments); Wash. Rev. Code § 26.16.010 (LEXIS through April 2010 amendments). For continuity and simplicity, this Article refers to all of these concepts merely as profits.
34 The fact that profits are gained without diminishing the substance of the underlying thing is what distinguishes profits from property acquired by separate property. See, e.g., La. Civi. Code art. 551 (LEXIS through May 2010 amendments).
35 As discussed in Part I.A.2, the distinction between earnings and profits is important because while earnings gained during the community are always considered community property, profits gained during the community are not necessarily considered community property.
36 Laughlin v. Laughlin, 155 P.2d 1010 (N.M. 1944).
37 Id. at 1011.
generated by the farm were created by the “labor, skill, industry, and ability” of the parties and therefore considered earnings, and how much of the funds were generated merely as rent revenue and therefore considered profits.\footnote{Id. at 1013.} The \textit{Laughlin} court found that when distinguishing between earnings and profits, “[m]athematical exactness is not expected or required, but substantial justice can be accomplished by the exercise of reason and judgment . . . .”\footnote{Id. at 1019.} In reaching its conclusion, the court cited the approach promulgated by Professor John Norton Pomeroy that profits “should be confined to those proceeds which arise, without the husband’s \textit{active} use of the separate property, as a capital, in carrying on some business, trade, or profession, and therefore, without the husband’s \textit{direct} labor as the agency of means for their production.”\footnote{Id. at 1018 (citing 4 \textsc{West Coast Reporter} 193 (1894)).} Under this definition, the distinction between earnings and profits turns on whether a spouse exerts “direct labor” and makes an “active use” of property.

Other courts have suggested similar strategies for distinguishing between earnings and profits. The Louisiana Third Circuit Court of Appeal in \textit{Paxton v. Bramlette},\footnote{\textit{See} Paxton v. Bramlette, 228 So. 2d 161 (La. App. 3d Cir. 1969).} addressed a factual situation similar to that of the New Mexico court in \textit{Laughlin}. The wife in \textit{Paxton} entered a marriage with a substantial interest in a variety store chain and in certain commercial rental properties.\footnote{Id. at 162.} During the course of the marriage, the wife received checks from both the variety store chain and the commercial rental properties.\footnote{Id. at 163–64.} Upon the dissolution of the marriage, the \textit{Paxton} court was asked whether the checks the wife received constituted earnings or profits. The husband argued the checks were earnings because the wife went to an office to do work for both the variety store chain and the commercial rental properties from 10:00 a.m. until 5:00 p.m., and that no important business decision was made without her approval.\footnote{Id. at 164.} The wife, in response, argued that the checks were merely profits because she spent very little time at the office and had no specific duties over either business entity.\footnote{Id.} She averred that the checks received were merely in lieu of receiving dividends on her interests in the entities.\footnote{Id.}

Finding the husband’s story more credible, the \textit{Paxton} court held that the checks paid to the wife were earnings, and thus automatically community property.\footnote{Id.} In reaching this conclusion, the court suggested a method for determining whether income should be classified as earnings or profits: “if the revenue received was the result of substantial capital investment with relatively little labor,” the revenue should be classified as a profit; however, “if the revenue represents the return on substantial labor with relatively little capital investment,” then the revenue should be classified as an earning.\footnote{Id. at 163 (citing Clarence J. Morrow, \textit{Matrimonial Property Law in Louisiana}, 34 \textsc{Tul. L. Rev.} 3 (1959); Howard W. L’Enfant, Jr., Comment, \textit{Classification of Property}, 25 \textsc{La. L. Rev.} 95 (1964)).}

While the goals and approaches of the \textit{Paxton} court and \textit{Laughlin} court are similar, there remains no definitive statement on how to distinguish earnings and profits. It is clear from jurisprudential and scholarly discussions, however, that the question arises with great regularity.
and the line between earnings and profits is easily blurred. Virtual property is likely to cause such frequency and haziness to swell because, as demonstrated hereinafter, it is not always clear whether revenue created from virtual property is caused by a spouse’s labor or a spouse’s capital investment. For example, a blogger may exert great effort to generate earnings from his blog, whereas the owner of a website may make an investment in his website but put forth very little energy to gain revenues from it. In determining whether virtual property like websites creates earnings or profits, jurisdictions will have to analyze the same types of facts that were examined in cases such as Paxton and Laughlin.

2. Profits of Separate Property

That courts will need to distinguish earnings and profits when analyzing virtual property necessarily implies that such distinctions impact spouses’ rights to the property; if spouse’s rights to earnings and profits were the same, there would be no need for courts to delineate between the two. The distinction between earnings and profits is primarily necessary because while earnings received from effort exerted during the community are always considered community property, profits created during the community are not.

In all community property regimes, the profits of community property are classified as community property. With regards to the profits of separate property, however, there are two distinct rules: the Civil Law Rule and the Common Law Rule. As the name implies, the Civil Law Rule is derived directly from Spanish civil law and was first codified in the Fuero Real in 1255. Under Spanish law, “a wife [was] given a share of the fruits resulting from property which [was] not shared with the wife, just as she [was] entitled to a share of the fruits of all other goods whatsoever, acquired during the marriage . . . .” Today, in the states that follow the Civil Law Rule—Louisiana, Texas, Idaho, and Wisconsin—this means that community property

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49 See, e.g., Gillespie v. Gillespie, 506 P.2d 775, 777–78 (N.M. 1973); Jones v. Edwards, 245 P. 292, 293–94 (Nev. 1926); Lake v. Lake, 4 P. 711, 724–25 (Nev. 1884); Kysom v. Kysom, 596 So. 2d 1308, 1315–16 (La. App. 2d Cir. 1991); SPAHT & MORENO, supra note 40, § 3.8; Andrews, supra note 33, at 175.

50 ALASKA STAT. § 34.770.030(d) (LEXIS through April 2010 amendments); ARIZ. REV. STAT. § 25-211 (LEXIS through May 2010 amendments); CAL. FAM. CODE § 760 (LEXIS through 2010 amendments); IDAHO CODE § 32-906(1) (LEXIS through 2010 amendments); LA. CIV. CODE art. 2338 (LEXIS through May 2010 amendments); N.M. STAT. § 40-3-8(B), (E) (LEXIS through 2010 amendments); NEV. REV. STAT. 123.220 (LEXIS through May 2010 amendments); TEX. FAM. CODE § 3.002 (LEXIS through April 2010 amendments); WASH. REV. CODE § 26.16.030 (LEXIS through April 2010 amendments); WIS. STAT. § 766.31(1) (LEXIS through May 2010 amendments).

51 For an excellent history of how each state came to adopt the Civil Law Rule or the Common Law Rule, see Andrews, supra note 33, at 181–92.

52 DE FUNIAK and VAUGHN, supra note 17, § 71. Although the Civil Law Rule was not codified until 1255, it is largely thought to have been in effect much earlier. See id.

53 Id. § 71 n.43 (quoting Alfonso de Azevedo, Comentariorum Iuris Civilis in Hispaniae Regias. No. 5, to Nov. Rec. Law 5).
includes “the rents, issues and profits, of all property, separate or community . . . .” In these states, the profits generated by the separate property farm in *Laughlin v. Laughlin* would be considered community property, unless one or both spouses took steps to reserve the profits as separate.

Five states, however, deviate from Spanish civil law and follow the Common Law Rule. These states include Arizona, California, Nevada, New Mexico, and Washington. California first instituted the Common Law Rule in 1860. Prior to this time, the California legislature had adopted the Civil Law Rule by passing a statute which provided that “the rents and profits of the separate estate of either husband or wife . . . [are] deemed common property . . . .” In *George v. Ransom*, the California Supreme Court struck down the statute, holding that “the Legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to her husband or his creditors.” The court further commented,

This term “separate property” has a fixed meaning in the common law, and had in the minds of those who framed the Constitution, the large majority of whom were familiar with, and had lived under that system. By the common law, the idea attached to separate property in the wife, and which forms a portion of its definition, is, that it is an estate, held as well in its use as in its title, for the exclusive benefit and advantage of the wife.

Following *George v. Ransom*, the legislature defined separate property as including the profits of separate property, and today, the California Family Code states that the “[s]eparate property of a married person includes all of the following: (1) All property owned by the person

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54 I D A H O C O D E § 32-906(1) (LEXIS through 2010 amendments). See also T E X. C O N S.T. OF 1876, art. XVI, § 15 (LEXIS through April 2010 amendments); L A. C I V. C O D E art. 2339 (LEXIS through May 2010 amendments); W I S. S T AT. § 766.31(4) (LEXIS through May 2010 amendments). For couples that opt-in to the Alaskan community property regime, the default rule is also the Civil Law Rule. See A L A S K A S T A T. § 34.77.030(d) (LEXIS through April 2010 amendments).

Texas has created a notable exception to the Civil Law Rule for oil and gas royalties. In *Norris v. Vaughan*, the Texas Supreme Court examined the profits created by the husband’s separate property gas well. 260 S.W.2d 676, 678 (Tex. 1953). The court held that because the extraction of gas is actually an extraction of the husband’s separate property, the “[p]roduction and sale of natural gas . . . is equivalent to a piecemeal sale of the separate corpus, and funds acquired through a sale of separate corpus, if traced, will remain separate property.” *Id.* at 679.

55 In community property states following the Civil Law Rule, spouses may reserve the profits of their separate property by executing particular documents. See, e.g., I D A H O C O D E § 32-906(1) (LEXIS through 2010 amendments); L A. C I V. C O D E art. 2339 (LEXIS through May 2010 amendments). States have also created an exception for the profits of inter-spousal donations. The donation of community property by one spouse to the other spouse automatically converts both the donated community property and any profits of that property into separate property. *E.g.*, T E X. C O N S.T. OF 1876, art. XVI, § 15 (LEXIS through April 2010 amendments); L A. C I V. C O D E art. 2343 (LEXIS through May 2010 amendments).


57 See *George v. Ransom*, 15 Cal. 322 (Cal. 1860).

58 *Id.* at 323.

59 *Id.* at 323.

60 *Id.* at 324.
before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3) The rents, issues, and profits of the property described in this section.61 The other four Common Law Rule states have adopted similar statutory definitions for profits of separate property.62 Thus, under the Common Law Rule, any profits received by the wife in Paxton from her interest in the variety store chain would be classified as separate property because the profits were generated by the wife’s separate property.

The use of the Common Law Rule by some states and the Civil Law Rule by other states adds yet another wrinkle in the context of classifying virtual property. Once jurisdictions determine that virtual property has created profits, then it must be determined whether the initial virtual property is community property or separate property, for depending upon the jurisdiction, that classification will determine whether the profits created are community or separate.

3. Increases in the Value of Property

In addition to producing profits during the course of a marriage, property—and particularly virtual property—can also increase in value. Increases in value cause particular difficulties when there is an increase in the value of separate property due to community labor, i.e. labor exerted by one spouse during the marriage.63 For example, if a wife enters a marriage with a house, the house is the wife’s separate property. If the husband, a carpenter, spends his weekends building an addition onto the wife’s separate-property house, the carpenter husband has expended community labor to increase the value of the wife’s separate property. At termination of the community, the issue arises of how the carpenter husband should be compensated for this increase in value.

As with profits, there are two predominant approaches as to how states examine such increases in the value of separate property: either the increase in value creates a property right or it creates a reimbursement right. The majority of community property states—Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—create a reimbursement right.64 Under the reimbursement theory, the community is entitled to be reimbursed based on the increased value of the separate property that is attributable to community labor.65 The theory in the reimbursement states is that while community labor may increase the value of separate property, it does not change the underlying classification of the property.66 Therefore, in a

61 CAL. FAM. CODE § 770(a).
62 See ARIZ. STAT. § 25-213(A) (LEXIS through may 2010 amendments); NEV. REV. STAT. § 123.130 (LEXIS through May 2010 amendments); N.M. STAT. § 40-3-8(A), (E) (LEXIS through 2010 amendments); WASH. REV. CODE § 26.16.010 (LEXIS through April 2010 amendments).
63 See McCLENNAH, supra note 17, §§ 6:15–:16.

Louisiana, the only state to codify this rule, maintains the same end result, but instead of creating a reimbursement right in the community, Louisiana creates a reimbursement right in the individual spouse who does not own the separate property. LA. CIV. CODE arts. 2366, 2368 (LEXIS through May 2010 amendments). The reimbursement right entitles the non-owning spouse to his one-half interest in the increase of the separate property attributable to uncompensated labor. See SPAHT & MORENO, supra note 29, § 7.18.
reimbursement state, at the termination of the marriage, the community between the carpenter-husband and wife is entitled be reimbursed for the increased value of the wife’s separate-property house attributable to the addition, but neither the husband nor the community has an actual ownership interest in the house or addition; full ownership continues to rest with the wife.67 Thus, if prior to the addition the house was valued at $200,000, and after the addition the house was valued at $225,000, the community has a reimbursement right of $25,000.68

In contrast to the reimbursement right created by the above states, two states—California and Wisconsin—create a property right in separate property that is increased in value due to the uncompensated labor of the community.69 Under the UMPA and Wisconsin law,

Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity to either spouses property other than marital property creates marital property attributable to that application if both of the following apply:

(a) Reasonable compensation is not received for the application.
(b) Substantial appreciation of the property results from the application.70

Therefore, so long as the carpenter husband is not compensated for his labor when building the addition to his wife’s separate-property home, and that addition created substantial appreciation in the wife’s home, the carpenter husband has a property interest in the wife’s separate-property home.

California case law implies that an even broader property right exists. In Long v. Long,71 a husband built a house on his separate property using community funds and uncompensated community labor.72 Upon termination of the community, the husband argued that the house should be considered his separate property as it was built on land that was his separate property.73 While under general property law the husband would have been considered the sole owner of the house, the Long court rejected the husband’s argument, stating that “[e]ven if the lots were the separate property of the [husband] . . . , the house did not lose its character as community property insofar as the [wife] is concerned.”74 The court reasoned that the house was

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67 Similarly, if instead of the husband exercising his labor to add the addition on to the house, the wife had added the addition on to the house with her own uncompensated labor, the husband would still be entitled to his share of the increased value of the separate property house because the wife’s labor theoretically could have been used to increase the value of community property instead of her separate property. Therefore, the husband is equally entitled to his interest of the increase.
68 This is presuming the entirety of the $25,000 increase in the value of the wife’s house is attributable to the building of the addition. If there are other non-community caused reasons for the increase in value in a court must deduct that amount from the reimbursement right of the community.
72 Id. at 50.
73 Id.
74 Id.
considered community property because it was built by community labor and with community funds.75

California courts further refined the principle pronounced in Long to adopt a pure pro tanto theory of ownership in separate property that increases in value due to community property. In the early 1980s, California courts developed the Moore/Marsden rule, which provides that if community property is used to reduce the principal balance of a mortgage on one spouse’s separate property, the community acquires a pro tanto interest in the separate property.76 The Moore/Marsden rule has been extended to also apply to increases in value of separate property. For example, in Bono v. Clark, a husband entered the marriage with real property and a trailer.77 During the course of the marriage, the husband and wife made substantial improvements to the trailer.78 To determine whether the community had an ownership interest in the trailer, the Bono court remanded the case back to the trial court, stating that if the trial court found that community property was used to increase the value of the separate-property trailer, then “the community will be entitled to a pro tanto interest in the property.”79 However, if the use of community property did not enhance the separate property’s value, then the wife was only entitled to a reimbursement right of one-half of the community funds spent on improving the husband’s separate property.80 Thus, under California law, it appears that a community ownership interest is created in separate property when community property is used to increase the value of separate property; however, the community is only entitled to a right of reimbursement when community property is spent on separate property without increasing its value.81

Regardless of whether the increase in value of the house creates a property right or a right of reimbursement, that the house has increased in value due to community labor is very apparent in the carpenter-husband hypothetical: the carpenter-husband worked on the house and built the addition; his direct, tangible effort led to the addition which increased the value of the house. Increases in value, however, can also occur in intangible property through seemingly less direct efforts. For example, courts recognize that stock may increase in value from community labor when a spouse is an officer or director of the business entity.82 In such cases, courts recognize that stock may “increase in value due to a combination of the inherent nature of the separate property and community labor” and, upon dissolution of the community, apportion what percentage of increase is attributable to the nature of the property and what part is attributable to community labor.83

The idea of community labor increasing the value of separate property is particularly important in the virtual property context. If a wife spends her time increasing the number of Facebook friends a husband has on the separate-property profile for his small business, that may be considered an increase in value to separate property, thus giving the wife either a reimbursement right or a property right in the husband’s Facebook profile. Moreover, virtual

75 Id.
76 See In re Marriage of Moore, 618 P.2d 208, 210 (Cal. 1980); In re Marriage of Marsden, 181 Cal. Rptr. 910, 915 (Cal. Ct. App. 1982).
78 Id. at 34.
79 Id. at 42.
80 Id.
81 See Knauss, supra note 70, at 878–80 (discussing the implications of Bono v. Clark in California law).
83 Id. at 721. See generally SPAHT & MORENO, supra note 29, § 2.5.
property, like stock, may increase in value in part from community labor and in part from its inherent nature. The value of a separate-property website may increase because one spouse exerts effort maintaining the website, but it also may increase in value simply because of the nature of the website. Accordingly, when analyzing virtual property, community property jurisdictions must be cognizant that the value of virtual property may increase and, if the value does increase, the cause of that increase.

4. Goodwill

While increases in value of property may occur in tangible ways, such as the carpenter-husband laboring on the wife’s house or the wife spending time increasing the number of Facebook friends on her husband’s profile, the cause of an increase can also be less tangible. Sometimes an increase in the value of property is attributable to a personal skill or personality trait of one of the spouses. This cause, referred to as goodwill, is harder to quantify but still present, particularly in occupations like law partnerships in which personal skill or reputation drives business.84 This je ne sais quoi of professional practices has been defined by California courts as,

the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on accounts of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. It is the probability that the old customers will resort to the old places. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in.85

Stated more succinctly, goodwill amounts to the extra value of a professional practice, beyond that of the tangible and contractual assets of the practice, which indicates the future earnings of the practice due to the particular, personal skills of those involved in the practice.86

Goodwill is only valuable if attached to the practice (and people) that created it. Thus, though goodwill is commonly considered property,87 it is not considered property distinct from the thing to which it attaches.88 This segregation of goodwill as an intangible asset within a professional practice creates great difficulties in valuing professional practices in community

84 See In re Marriage of Foster, 117 Cal. Rptr. 49, 52 n.2 (Cal. Ct. App. 1974) (discussing that goodwill had been found by courts in a dental laboratory business, advertising partnership, medical practice, and law practice).
86 See SPAHT & MORENO, supra note 29, § 2.8.
88 Nail v. Nail, 486 S.W.2d 761, 763 (Tex. 1972); Depner v. Depner, 478 So. 2d 532, 533 (La. App. 1st Cir. 1985).
property regimes, and those troubles will likely reappear in the context of virtual property given that virtual property, such as websites or Facebook profiles, are regularly used to encourage repeat business.

States have taken slightly different approaches in attempting to remedy the issue of goodwill. Some states find that the goodwill of a community-owned professional practice is community property to the extent it was created during the community. These states—Arizona, California, Nevada, New Mexico, and Washington—include goodwill when they calculate the value of a partnership at the termination of the community.\(^89\) There is no set standard for how these states determine the value of goodwill,\(^90\) but once courts assign a value to the goodwill at the termination of the community, that value is then included in the community assets to be divided.\(^91\) For example, if a doctor had $100,000 in tangible and contractual assets in her practice and an additional $50,000 of goodwill in her practice, the community property regimes that classify goodwill as a community asset would find that the doctor’s practice had a community value of $150,000.

Louisiana, Texas, and Wisconsin, on the other hand, take a more nuanced approach to valuing goodwill. In these states, commercial goodwill—the goodwill of the business recognized separate and apart from the goodwill of the individuals operating the business—is included in the valuation of the practice, but personal goodwill—the goodwill attributable solely to the individual running the business—is not included in the community property calculation.\(^92\) The Louisiana statute codifying this approach states,

In a proceeding to partition the community, the court may include, in the valuation of any community-owned corporate, commercial, or professional business, the goodwill of the business. However, that portion of the goodwill attributable to any personal quality of the spouse awarded the business shall not be included in the valuation of a business.\(^93\)

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\(^90\) See, e.g., Wisner, 631 P.2d at 120; In re Marriage of Ackerman, 52 Cal. Rptr. 3d 744, 750–51 (Cal. Ct. App. 2006) (citations omitted); Davis, supra note 87, at 193–200 (discussing the different methods of valuing goodwill in California).

\(^91\) E.g., In re Marriage of Rosen, 130 Cal. Rptr. 2d at 6; In Marriage of Duncan, 108 Cal. Rptr. 2d 833, 845 n.12 (Cal. Ct. App. 2001).


\(^93\) LA. REV. STAT. § 9:2801.2 (LEXIS through May 2010 amendments). The Louisiana statute has been criticized by community property scholars.

[The statute] continues to miss the mark in that it fails to focus the question of goodwill around the issue of whether the intangible value is a reflection of future earnings, or a value reflective of the ability of the community business to continue without the former spouse. The former is nothing more than traditional separate property future earning of a former spouse, while the latter is a presently determinable value of the community business, an asset susceptible of division. Nevertheless, . . . the legislature has placed in the hands of courts the proper tools to do equity in these often difficult cases.
Thus, if a doctor had $100,000 in tangible and contractual assets in her practice and an addition $50,000 of personal goodwill in her practice, the community property regimes that do not consider goodwill to be a community asset would only find that the doctor’s practice has only a community value of $100,000. However, if of the $50,000 of goodwill, $25,000 was attributable to the medical practice and $25,000 was attributable to the doctor herself, then the $25,000 of goodwill of the medical practice would be considered a community asset. Thus, in the more nuanced goodwill states, if a spouse can articulate her individual personal characteristics that create goodwill, the value of the goodwill can be subtracted from the value of the community-owned practice.94

B. Contractual Liabilities

The above examples are all forms of property that can be created or acquired during the community regime. In addition to gaining property, couples also acquire debts during marriage. While acquiring some virtual property, such as a Facebook profile, is free, acquisition of other forms of virtual property, such as domain names and certain e-mail accounts, requires a spouse to incur debts. Thus, how community property jurisdictions govern contractual liabilities will impact whether the community is liable for virtual property acquired by spouses.

There are two systems community property states follow for governing contractual liabilities: the community debt system and the managerial system.95 Under the community debt system, the extent to which community property may be held liable for a debt depends on the classification of the debt. If the debt is classified as a community debt the entirety of the community may be held liable.96 Debts considered to be separate debts, however, may only be satisfied by the separate property of the debtor-spouse or the debtor-spouse’s interest in community property.97

In the four states that follow the community debt system—Arizona, New Mexico, Washington, and Wisconsin—“every debt created . . . during the existence of the marriage is prima facie a community debt,” thus making the community presumptively liable for all debts incurred during the marriage.98 After creating a presumption of liability, community debt states create exceptions for when a debt incurred during the marriage is not a community debt. In

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SPAHT & MORENO, supra note 29, § 2.9. These comments reflect perhaps the most important aspect of goodwill: it is a tool courts may use to provide equity among spouses. See Bryan Mauldin, Comment, Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community, 56 TUL. L. REV. 313, 342 (1981) (noting that “[t]he sheer number of methods available for valuing goodwill, combined with the widely varying estimates that result, open the door to awards based upon subjective concepts of equity rather than bona fide efforts to value and divide community property”).

94 See SPAHT & MORENO, supra note 29, § 2.8.
96 de Armond, supra note 95, at 275.
97 N.M. STAT. 40-3-10 (LEXIS through 2010 amendments); WASH. REV. CODE 26.16.200 (LEXIS through May 2010 amendments); WIS. STAT. § 766.55 (LEXIS through May 2010 amendments).
Arizona and Wisconsin, the obligation must be incurred for the benefit of the community in order to be classified as a community obligation. In New Mexico, statutes provide that one spouse alone cannot obligate community property in an indemnity contract; instead, both spouses must be signatories to the contract.

Under the managerial system followed by the other five community property states—California, Idaho, Louisiana, Nevada, and Texas—whether property may be used to satisfy a debt depends on whether the debtor-spouse has managerial control over the property. Under community property regimes, property may be classified as community, but it may be subject to the management and control of either both spouses or only one spouse. Generally, managerial states allow creditors to seize any property that a husband can manage, be it by himself or with his wife, in order to satisfy any debt the husband incurs during the marriage. Whether community property can be seized for debts incurred prior to the marriage depends upon the jurisdiction. In Idaho and Louisiana, pre-marital debts may be satisfied with community property. In Nevada, the non-debtor’s share of community property may not be seized to satisfy a debt incurred prior to the marriage. California law generally follows Idaho and Louisiana in allowing community property to be used to satisfy pre-marital debts, but makes an exception for the earnings of the non-debtor spouse; so long as the non-debtor spouse’s earnings are held in a separate deposit account in which the debtor spouse has no right of withdrawal and the earnings have not been commingled with any community property, the non-debtor spouse’s earnings may not be seized to satisfy the debtor spouse’s pre-marital debts.

Regardless of the liability scheme developed by the individual state, the liability of community property created during marriage generally extends to former community property. While there are a few exceptions, most states follow the creditor-friendly rule that “[w]hen the community incurs an obligation and is subsequently dissolved, the former community [property] remains liable . . . .” Thus, if a husband creates a debt that community property may be held

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100 N.M. STAT. § 40-3-4 (LEXIS through 2010 amendments). See also N.M. STAT. § 40-3-9 (LEXIS through 2010 amendments).
101 CAL. FAM. CODE § 910 (LEXIS through 2009 amendments); IDAHO CODE § 32-912; LA. CIV. CODE art. 2345 (LEXIS through May 2010 amendments); NEV. REV. STAT. § 123.230 (LEXIS through July 2010); TEX. FAM. CODE § 3.202 (LEXIS through 2009 amendments). See REPPY & SAMUEL, supra note 51, at ?? (around 426–27).
102 See, e.g., CAL. FAM. CODE § 1100(d) (LEXIS through 2010 amendments); LA. CIV. CODE arts. 2350, 2351 (LEXIS through May 2010 amendments); N.M. STAT. § 40-3-14(B) (LEXIS through 2010 amendments); TEX. FAM. CODE § 3.102(a) (LEXIS through April 2010 amendments); WASH. STAT. § 26.16.030(6) (LEXIS through April 2010 amendments).
103 de Armond, supra note 95, at 274.
104 See Carroll, supra note 95, at 4–9.
106 NEV. REV. STAT. § 123.050 (LEXIS through 2009 amendments).
107 CAL. FAM. CODE § 911 (LEXIS through 2010 amendments).
liable for by purchasing a domain name or obtaining an e-mail address, the wife’s former community property may still be held liable for that debt after the termination of the community.

In some scenarios, contracts may create both liabilities and benefits, and in such circumstances, the liabilities and benefits must be carefully separated for while contractual liabilities continue even after the dissolution of a marriage, contractual benefits do not. Benefits created by a contractual relationship that arise during the community are not considered as part of the community obligation, but instead they follow the general, aforementioned classification scheme for community property. For example, in Garfien v. Garfien, a wife entered a six-year “play-or-pay” contract with Paramount Pictures, meaning that Paramount was obligated to pay the wife regardless of whether it used her acting services, and the wife was obligated to be available for any acting services required by Paramount.110 The husband and wife divorced during the middle of the play-or-pay contract and the wife was never called upon to act during the course of the contract, be it during or after the marriage.111 The husband argued, inter alia, that the proceeds received by the wife from the contract in the years following the termination of the community should be considered community property because the contract was entered into during the community.112 The court disagreed, finding that the earnings of the wife in the years following the termination of the community constituted earnings by the wife and because they were earned after the divorce, they were the wife’s separate property.113

Though the wife’s earnings in Garfien were classified based on when they were actually earned, the debts created to enforce the play-or-pay contract were classified based on when they were incurred.114 Two years into the contract, while the husband and wife were still married, the wife had to sue Paramount to make the studio honor the play-or-pay contract.115 In doing so, the wife incurred $126,000 in legal fees, which were paid for with community funds.116 After the court concluded that the husband was not entitled to any of the revenues received by the wife after the termination of the marriage, the husband argued that the legal fees should also be prorated based on the amount paid out under the play-or-pay contract during the marriage, i.e. if the wife received 12.5% of the contract during the first year of the contract, then only 12.5% of the legal fees should be attributable to year one of the contract.117 Under the husband’s theory, some of the legal fees would be incurred after the termination of the community, thus meaning the community should not be held liable for those debts.118 The court rejected the husband’s argument, stating that “[a] debt is community or separate at the time it is incurred; it does not change its character merely because the beneficial effect of the consideration received may survive the marital cohabitation.”119

The Louisiana Supreme Court in Lanza v. Lanza reached a similar holding with regards to income generated under a contract.120 In Lanza, the husband was an insurance agent. The wife argued that she was entitled to an interest in the renewal commissions the husband

111 Id. at 716–17.
112 Id. at 716.
113 Id. at 717.
114 Id.
115 Id. at 715.
116 Id.
117 Id.
118 Id.
119 Id. at 717.
120 Lanza v. Lanza, 898 So. 2d 280 (La. 2005).
generated after the termination of the community for the insurance policies that were originally written during the community.\textsuperscript{121} The \textit{Lanza} court agreed with the wife: the renewal commissions were earnings of the husband and to the extent the husband exerted any effort, skill, or industry during the community to gain the commissions, the wife had a community interest in that portion of the renewal commissions.\textsuperscript{122} That the renewal commissions were paid after the termination of the community was irrelevant; the relevant question was when the husband exerted the effort to earn the commissions. The wife was entitled to a one-half interest in the commissions to the extent the commissions were earned based on effort exerted by the husband during the marriage.\textsuperscript{123}

Thus, contracts entered into during the marriage (and in some states, even contracts entered into before the marriage) create liability in community property and that liability extends to former community property after the termination of the community. Benefits of contracts entered into during the marriage, however, are separate and distinct from any liabilities the contract may impose. Benefits received are classified under the traditional community property schematic and, thus, are only attributable to the community to the extent they can be classified as community property as earnings, profits, increases in value, etc.

Just as spouses have entered into community obligations, created goodwill, increased the value of separate property, generated profits in separate property, and produced earnings with tangible property, spouses are now forming the same types of property interests and obligations with regards to virtual property. Therefore, when classifying virtual property, courts should rely on the classification framework they have used for other types of property in the past.

C. \textit{Intellectual Property and Community Property}

One particular type of property that courts have begun to classify (albeit with some difficulty\textsuperscript{124}) that may provide guidance for classifying virtual property, is intellectual property.\textsuperscript{125} An early case concerning the division of intellectual property in a community property jurisdiction is the case of \textit{Michel v. Michel} in which the Louisiana First Circuit Court of Appeal examined the ownership interests of spouses in in-progress literary works.\textsuperscript{126} In \textit{Michel}, at the time the husband and wife divorced, the wife was in the process of writing multiple novels.\textsuperscript{127} The wife completed and published the novels after the termination of the community.\textsuperscript{128} The court found that the husband had a community interest in the works as a result of the effort of the wife that took place during the marriage.\textsuperscript{129} The court then made a

\textsuperscript{121} \textit{Id.} at 287.
\textsuperscript{122} \textit{Id.} at 290.
\textsuperscript{123} The burden of proof that the commissions were earned based on effort exerted during the community was placed on the wife because the commissions were paid out after the termination of the community. \textit{Id.} at 290–91.
\textsuperscript{125} See SPAHT & MORENO, \textit{supra} note 29, § 3.39.
\textsuperscript{126} 484 So. 2d 829 (La. App. 1st Cir. 1986).
\textsuperscript{127} \textit{Id.} at 833.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 834.
reasonable assessment as to the amount of work that occurred prior to the termination of the community, and granted the husband his community interest based on that assessment.¹³⁰

The *Michel* court gives guidance as to how the *earnings* from intellectual property should be divided—namely that all earnings attributable to effort expended on intellectual property during the community are community property. However, courts have also begun to develop further analyses to determine how community property law affects other rights in intellectual property, i.e. determining not only who owns the earnings, but also who owns the actual intellectual property right. Community property law as it relates to copyrights is of particular importance in the context of virtual property given that “[c]opyright is the law of text . . . , and also of computer software, digital technology and the Internet.”¹³¹

Copyright law, as governed by the Copyright Act of 1976,¹³² protects, among other things, literary, musical, pictoral, and graphic works, and sound recordings.¹³³ A copyright to the work “vests initially in the author.”¹³⁴ When there are multiple authors to a work, the copyright vests in all of the authors, thus making them co-owners of the copyright.¹³⁵ Copyrights also extend to collective works and derivative works,¹³⁶ though there is a separate copyright in each contribution to the collective work, as well as a copyright in the collective work as a whole.¹³⁷

By owning a copyright, the author has the exclusive right to reproduce the work, prepare derivative works based upon the copyrighted work, distribute copies of the work to the public, perform the work in public, and display the work publicly.¹³⁸ This exclusive right exists from the moment the work is created and continues until seventy years after the author’s death.¹³⁹ Though the copyright is self-executing, in order to bring a copyright infringement suit, registration of the copyright is required.¹⁴⁰

Because copyrights are protected by federal law and community property is created by state law, the argument has been raised that community property law should be preempted from affecting copyrights in any manner.¹⁴¹ State and federal courts, however, have rejected this position. The first court to find a community interest in a copyright was a California appellate court in the case of *Marriage of Worth*.¹⁴² In *Worth*, the husband wrote and published several books during the course of the marriage.¹⁴³ After the husband and wife divorced, the husband filed an action against the producers of the board game “Trivial Pursuit,” claiming copyright

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¹³⁰ *Id.*
¹³⁵ *Id.*
¹³⁶ *See* 17 U.S.C. §§ 101, 103. Sec. 103 discusses the application of copyrights to compilations. Compilations, as defined in § 101, include collective works.
¹³⁷ 17 U.S.C. § 201(c).
¹⁴⁰ *See* 17 U.S.C. §§ 401, 408, 411(a).
¹⁴³ *Id.* at 135.
infringement because certain questions were allegedly plagiarized from his books. 144 The wife then sought an order that she would be entitled to one-half of any proceeds the husband received because the husband’s copyright was community property. 145

After reviewing federal copyright law and state community property law, the court found that the wife had a community property interest in the husband’s copyright. 146 The court concluded that the wife had an interest in the literary work created by the husband’s effort, time, and skill during the marriage. 147 Building on the conclusion that the artistic work was community property, the court found that “it must follow that the copyright itself obtains the same status.” 148 Though the court acknowledged that under the Copyright Act, a copyright is “an intangible interest separate and distinct from the tangible creative work” that “vests initially” in the authority spouse, 149 the court held that a “copyright is automatically transferred to both spouses by operation of the California law of community property.” 150 Thus, the wife had a community interest in the actual copyright.

The Worth court’s grant of a community interest in the copyright itself was rejected by the U.S. Fifth Circuit Court of Appeals in Rodrigue v. Rodrigue. 151 The husband in Rodrigue painted a number of paintings of the now well-known image “Blue Dog” during his marriage. 152 After the termination of the marriage, the wife claimed that she had an undivided one-half interest in all of her husband’s intellectual property rights generated during the marriage and all of the post-community artworks that were derivative of that intellectual property. 153

The Rodrigue court began by analyzing the nature of copyrights and the nuances of copyright law. 154 After exploring the facets of copyright law, the court stated,

[T]he copyright “vests initially” in the “author,” and the “author” is the “originator,” the “maker,” the person to whom a work “owes its origin.” We do not question that [the husband] is the sole “author” of the copyrights here at issue. Neither do we mean to suggest that [the wife’s] co-ownership interests arise from co-authorship. We do conclude, though, that the language of § 201(a), providing that a bundle of but five specific rights, those listed in § 106, “vests initially” in the author, does not ineluctably conflict with any provision of Louisiana matrimonial property law that would recognize that [the wife] does have an economic interest in [the husband’s] copyrights. 155

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144 Id.
145 Id.
146 Id. at 138.
147 Id. at 137.
148 Id.
149 Id. (citing §§ 201(a); 202).
150 Id.
152 Rodrigue, 218 F.3d at 433.
153 Id. at 434.
154 Id. at 435–36.
155 Id. at 436.
The court then examined the bundle of rights of full ownership created under Louisiana’s civil law property system, noting that a person could have rights to the fruits (or profits) of property without having complete control of the property.\textsuperscript{156} Thereafter, the court analyzed state community property law and recognized that the general principles of civil law property were even further defined in the context of married persons.\textsuperscript{157} The Rodrige court noted that under the different management systems for community property, one spouse may have complete authority and control over property, thus being able to make all decisions with regards to the property, yet both spouses may share equally in the revenues generated by the property.\textsuperscript{158}

With these concepts in mind, the court in Rodrige found there was a distinction as to whether the community had an interest in the revenues created by the copyright and whether the copyright was subject to community control. “[A]n author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright but . . . the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses in indivision thereafter.”\textsuperscript{159} Because the community had an interest in the economic benefits generated by the copyrighted material, the court also found that the wife had an interest in the economic benefits of the works that were derivative of the intellectual property general during the marriage.\textsuperscript{160}

The few cases concerning intellectual property rights and community property may serve as guidance for courts faced with classifying virtual property from both a substantive perspective and an analytical perspective. Substantively, some of the property created in the virtual world is protected by copyright law. In these instances, the jurisprudence and scholarship that has developed regarding community property and copyrights will be directly applicable. For the forms of virtual property that are not protected by copyright law, however, the manner in which courts have analyzed intellectual property—particularly the Rodrige court—is a sturdy analytical framework to follow. The Rodrige court took great pains to understand the nature and nuance of copyrights, the inner-workings of classification of property under Louisiana community property law, and then attempted to apply the community property framework to copyrights.\textsuperscript{161} Such attention to both the facts surrounding the virtual property at issue and the laws impacting the property will be required, for virtual property comes in many forms that are not easy to classify as earnings, profits, increases in value, or goodwill without a comprehensive understanding of the structure of the virtual property itself.

\textsuperscript{156} Id. at 436–37.
\textsuperscript{157} Id. at 438.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 435.
\textsuperscript{160} Id. at 443. The court remanded the case to the district court to determine which works were derivative. The rationale of Rodrige was used by a Texas appeals court in Miner v. Miner to hold that an ex-wife was entitled to a community interest of future versions of a computer software program created during the marriage. Miner v. Miner, 2002 Tex. App. LEXIS 5841, at *6–7 (Tex. Ct. App. 2002). \textit{But see} Cochran, supra note 10, at 450 (questioning whether the Miner court was right to rely on Rodrige given the differences in Texas and Louisiana property law).
\textsuperscript{161} Courts have also worked to apply traditional community property classifications to other areas of intellectual property, such as patents. For example, In Alsenz v. Alsenz, a husband entered a marriage with a number of patents. Alsenz v. Alsenz, 101 S.W.3d 648, 651 (Tex. Ct. App. 2003). The patents generated income during the marriage. Id. at 653. Upon dissolution of the marriage, the husband asserted that the income created by the patents was his separate property. Id. The Texas Court of Appeals disagreed with the husband, finding that the income generate by the separate property patents constituted profits of the separate property, and therefore, under the Civil Law Rule as followed in Texas, were community property. Id. at 654.
PART II. CHARACTERIZING VIRTUAL PROPERTY

Before community property jurisdictions can address how virtual property should be classified, the general concept of virtual property must itself be appreciated. Moreover, the details of the specific type of virtual property in question must be understood.

A. Virtual Property Defined by Descriptions

Though the concept of virtual property is centuries old, the study of virtual property did not gain notable ground until the turn of the twenty-first century when computer games involving virtual worlds dramatically increased in number of players. As virtual worlds began growing in popularity, one of the leading scholars in the area of virtual property, Professor Castronova, developed the foundational description of virtual worlds by describing such worlds as interconnected, physical, and persistent. Virtual worlds, Professor Castronova found, are interconnected because they “exist[] on one computer but can be accessed remotely (i.e. by an internet connection) and simultaneously by a large number of people . . . .” They are physical because “people access [virtual worlds] through an interface that simulates a first-person physical environment on their computer screen; the environment is generally ruled by the natural laws of Earth and is characterized by scarcity of resources.” And virtual worlds are persistent because they “continue[] to run whether anyone is using [them] or not . . . .” Because of the features that virtual worlds have to offer, Professor Castronova asserted that, “[v]irtual worlds are virtual because they are online, but they are worlds because there is some physicality to them.”

Building on Professor Castronova’s work with virtual worlds, Professor Joshua A.T. Fairfield defined virtual property through similar descriptions: “virtual property is code that mimics the properties of real-space objects. It is rivalrous, connected, and persistent.” Virtual property is rivalrous, Professor Fairfield argued, because owners can exclude other people from it. It is persistent because it exists continuously in that “it does not fade after each use.” And virtual property is interconnected because it may be experienced by multiple individuals.

These features of virtual property, Professor Fairfield stated, make virtual property similar to
tangible property: “If I hold a pen, I have it and you don’t. Rivalrousness. If I put the pen down and leave the room, it is still there. That is persistence. And finally, you can all interact with the pen—with my permission you can experience it. That is interconnectivity.”

The underlying idea for the descriptions of virtual property provided by Professor Castronova, Professor Fairfield, and all of the scholars who have begun to examine virtual property is that virtual property resembles more traditional forms of property in every way, except that it is inherently intangible. Most scholars, though not all, view the intangibility of virtual property as an inconsequential difference. Many emerging forms of property, such as intellectual property, are intangible by their very nature, yet individuals are still assigned property rights in such forms of property. Intangibility may make comprehension of virtual property harder for the human mind, but such difficulty in understanding does not strip virtual property of its underlying classification as property.

B. Examples of Virtual Property

Like real property and personal property, virtual property comes in many forms. The descriptive definitions above provide a broad (and necessary) understanding of the concept of virtual property, but to properly classify virtual property within a community property regime, specific descriptions of individual types of virtual property are required.

Four forms of virtual property that may be present in married couples’ lives include URLs, websites, e-mail accounts, and Facebook profiles. All of these types of virtual property possess the aforementioned characteristics, but also have their own unique features.

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173 Id.
175 There are some who argue that virtual property is not like tangible property because it cannot exist outside of the virtual world. See, e.g., Richard A. Bartle, Pitfalls of Virtual Property (The Themis Group, 2004), available at http://www.themis-group.com/uploads/Pitfalls of Virtual Property.pdf (last visited Aug. 21, 2010). However, even these individuals use the same descriptions when defining virtual worlds, stating that virtual worlds are “persistent environments through and with which multiple individuals may interact simultaneously.” Bartle, at 2. See also Allen Chein, Comment, A Practical Look at Virtual Property, 80 ST. JOHN’S L. REV. 1059, 1088 (2006) (stating that even though virtual property might be thought of like tangible property, it is unlikely that a court would recognize a property interest in virtual property).
176 Lastowka & Hunter, supra note 9, at 40–42.
177 Id. at 41.
178 This Article does not engage in the debate of whether property rights should be recognized in virtual property. Though there are some individuals, as previously noted, that disagree with the assignment of property rights in virtual property, this author agrees with the majority of legal commentators “that the law out to recognize virtual property as property and vest someone with those rights.” Vacca, supra note 174, at 34. Similarly, this Article does make any attempt to enter the fray regarding how property rights in virtual property should be conceptualized.
179 MMORPGs are notably absent from the list of virtual properties discussed in this Article. MMORPGs are no doubt of great economic value: from 2004 to 2008, the MMORPG World of Warcraft had ten million subscriptions purchased and in 2007 it generated $1.2 billion for its developers. See Bruce Sterling Woodcock, MMOG Active Subscriptions 200,000+., http://www.mmogchart.com/Chart1.html (last visited Aug. 21, 2010); Erlank, supra note 192, at 2. MMORPGs are not discussed herein, however, due to the abundance of growing scholarship that discusses their complexities. E.g., Sarah Howard Jenkins, Application of the U.C.C. to Nonpayment Virtual Assets or Digital Art, 11 DUQ. BUS. L.J. 245 (2009) (applying Articles 2 and 2A of the U.C.C. to MMORPGs); Chein,
1. URLs (and domain names)

A URL is the location and access method for particular resources on-line; it is “a way of specifying the location of publicly available information on the Internet.” URLs are comprised of both a protocol and a domain name. The protocol is the manner in which data is transmitted between computers. Hypertext Transfer Protocol (http://) is the most recognizable protocol. The domain name follows the protocol and serves as the actual, readable location for a website. When a protocol is combined with a domain name, the resulting URL acts as Internet address for a website. For example, the URL for Tulane University Law School is http://www.law.tulane.edu, with the protocol being http:// and the domain name being www.law.tulane.edu.

In common parlance, users “purchase URLs” and “register domain names,” though both phrases are misleading as to what legal rights are created. To obtain a legal interest in a domain name (and, in turn, a URL), a number of entities are involved. In order to avoid multiple individuals from having the same domain name, the Internet Corporation for Assigned Names and Numbers (ICANN) was created in 1998 with the purpose of coordinating domain names. ICANN serves as merely an organizer of domain names; it does not own any domain names or control the content associated with any domain names.

ICANN also accredits domain name registrars, who purport to “sell” URLs to individuals. In reality, however, registrars merely grant the user a license to use the URL. For example, a popular registrar is GoDaddy.com. In GoDaddy.com’s Universal Terms of Service Agreement, users have the exclusive right to publish a website at the URL and retain ownership of all items published, but GoDaddy.com reserves the right to remove content from a user’s website or void the user’s license to use the URL entirely if the user violates the terms of the Service Agreement, though the terms of the Service Agreement are fairly non-restrictive,
prohibiting only the most egregious behavior. Users of URLs from GoDaddy.com pay for set
time periods—two years, five years, ten years, etc.—after which the user must renew his license
with GoDaddy.com in order to retain the URL. The contract between GoDaddy.com and the
user is automatically assigned to the user’s heirs, successors, and assigns. Thus, in purchasing
a URL or registering a domain name through GoDaddy.com, the user obtains an assignable
license to use the URL with fairly non-restrictive terms.

2. Websites

In the real world, having an abstract home address such as 123 Main Street is good and
necessary, but it serves little purpose if there is no tract of land or building attached to it.
Similarly, having a URL is necessary to have a home location on the Internet, but to make a URL
worthwhile, generally there must be something more attached to it, and that something more is a
website.

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189 Id. § 7. The terms of the Service Agreement require the user to refrain from using the URL to engage in illegal
activities, child pornography, hate speech, intellectual property infringement, etc. Id. § 4.
190 See Go Daddy Domain Name Registration Agreement § 1 (last revised Jul. 8, 2010), available at
191 GoDaddy.com, Service Agreement, supra note 188, § 16.
192 Courts, such as the U.S. Ninth Circuit Court of Appeals, have recognized the property rights created in URLs. In
Kremen v. Cohen, a strategic investor acquired the domain name sex.com from the registering company Network
Solutions, and registered the domain name to his business, Online Classifieds. 337 F.3d 1024 (9th Cir. 2003). A
swindling investor, also recognizing the future benefits the domain name could have, sent a letter to Network
Solutions claiming that Online Classifieds had dismissed the strategic investor, abandoned its interest in the domain
name, and authorized the transfer of the domain name to the swindling investor. Id. at 1026–27. Network Solutions
“accepted the letter at face value and transferred the domain name.” Id. at 1027. The strategic investor attempted to
regain the domain name, and ultimately was successful in his efforts, receiving a large damage award for his loss of
profits. Id. at 1027. When the swindling investor literally left the country to avoid payment, the strategic investor
filed suit against Network Solutions for conversion in order to try to recoup some of his economic losses. Id. at
1027.

In examining whether the strategic investor had a conversion claim, the Ninth Circuit found that the
strategic investor had a property interest in the domain name. Id. at 1030. The Kremen court stated:

Like a share of corporate stock or a plot of land, a domain name is a well-defined interest.
Someone who registers a domain name decides where on the Internet those who invoke that
particular name—whether by typing it into their web browsers, by following a hyperlink, or by
other means—are sent. Ownership is exclusive in that the registrant alone makes that decision.
Moreover, like other forms of property, domain names are valued, bought and sold, often for
millions of dollars.

Id. at 1030. Other courts have also followed this rationale. “California’s policy in treating domain names as
property is thus accurately characterized as protecting the rightful holders of domain names, encouraging investment
in and development of that property.” CRS Recovery, Inc v. Laxton, 600 F.3d 1138, 1144 (9th Cir. 2010). See also
“domain name should be subject to an action for conversion”).

193 In some situations, however, mere possession of the URL is quite valuable. Because all URLs are required to be
unique, if a user possesses a URL that another user desires, the URL-possessing user has a monopoly over the
desired URL and can assign the URL license to the desiring party for a marked up price. For example, the domain
name Insure.com was sold for a record $16 million in 2009. Insure.com Sells Its Name, CHIC. TRIB., Oct. 10, 2009,
at C12. Similarly, purchasing URLs to block another individual’s ability to purchase the URL is a growing trend,
particularly in politics. See Patrick Gavin, Carlson Launches Olbermann Site, POLITICO (Jul. 15, 2010), available at
A website is a series of interconnected webpages that display information about the person or entity it represents. Websites traditionally have a homepage that serves as the foundational page for the site and directs users to other webpages within the website, or even to non-associated, third-party websites. For example, the Tulane University Law School’s homepage can be found at http://www.law.tulane.edu. To learn about academics at the law school, the user clicks on the academics icon and accesses a different webpage. These two webpages, plus all of the other webpages maintained by the law school, create the university’s website.

Websites come in many ever-expanding forms. Some websites, such as the law school’s website, act primarily as an information website, advertising different aspects about the school, but generally not allowing outside users to contribute content to the website. Other websites, such as blogs, also provide information to users, but that information is more regularly updated and users are typically able to post material in the form of comments. Online shopping websites, such as http://www.amazon.com, allow the user to purchase goods. Social networking websites, such as Facebook, let users create a profile and use that profile to share information with other users who have created profiles. These are but a few examples of the many types of websites on the Internet.

To create a website, there are a number of software programs available. By downloading a program such as Adobe Dreamweaver or utilizing an on-line program such as Google’s Blogger, the user can create her own website and upload that website to her acquired URL. In doing so, the registering URL company and website software provider do not maintain any ownership in the content posted on website, but the website software provider does maintain the intellectual property rights of the software utilized to create the website. The user, however, grants both the URL company and the software provider a “worldwide . . . , royalty-free, nonexclusive, transferable, perpetual, irrevocable, and fully sublicensable license to use, distribute, reproduce, modify, adapt, publish, translate, publicly perform and publicly display,” while URLs and websites are used together, they are not the same thing, despite the mischaracterization by some courts. See, e.g., Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) (mischaracterizing a website as the address for a webpage).

While URLs and websites are used together, they are not the same thing, despite the mischaracterization by some courts. See, e.g., Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) (mischaracterizing a website as the address for a webpage).
Thus, the user receives the right to use the software to develop the website and ownership of the content posted on the website, while the software provider retains ownership of the actual software being used to develop the site.

In creating a website, the user must determine the form of the site, i.e. blog, retail, social networking site, and the form chosen dictates the purpose of the website, at least in part. A retail website has the distinct purpose of selling goods to consumers; a blog acts as an online diary. However, there may also be alternative purposes—or at least benefits—to a website. While a blog is merely an online journal, a law firm may add a blog to its website with to demonstrate knowledge in a particular field of law or attract new clients. Or, an individual may create a blog primarily as a writing outlet, but also use it as a means of earning money. By creating a blog through the Google tool Blogspot, a blogger can add “AdSense” to her blog. Through AdSense, Google selects advertisements and places the advertisements on the blog that are relevant to the content of the blog. The blogger exerts no energy in choosing the advertisements or uploading them; she merely must sign up for the AdSense service. The blogger then receives revenue based on the number of times users see the advertisements and click on the advertisements. Thus, earnings are directly generated by blog readers clicking on advertisements, but indirectly earned by the efforts of the blogger, as the content of the blog is what drives people to the blog where they view and click on the advertisement.

3. E-mail and E-mail Accounts

Another type of website commonly used is a website that provides e-mail services. E-mail (or electronic mail) is a “non-interactive communication of text, data images, or voice messages between a sender and designated recipients by systems utilizing telecommunications links.” A plethora of companies provide e-mail accounts for users, one such company being Google, which supplies Gmail accounts. In obtaining a Gmail account, the user receives a “personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to [the user] by Google.” Though the user only obtains a license to use the

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203 Id. § 8(a). Accord GoDaddy.com, Service Agreement, supra note 188, § 6.
204 DICTIONARY, supra note 180, at 58–59.
206 See, e.g., JULIE & JULIA (Columbia Pictures 2009).
211 Examples of e-mail account providers include Hotmail, Yahoo, AOL, Fastmail, and Inbox.com.
212 Google, Terms of Service § 10.1, http://www.google.com/accounts/TOS?hl=en (last visited Aug. 21, 2010) [hereinafter “Google, Terms”]. A user may assign or grant a sub-license his license to use his Gmail account with Google’s written permission. Id. at § 10.3.

Who has a proprietary interest in e-mail accounts has been the source of much litigation. See, e.g., Hedenburg v. Aramark Am. Food Servs., 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. 2007) (discussing whether an employer has a right to access an employee’s home computer in discovery); Nat’l Econ. Research Assocs, Inc. v.
Gmail account, he maintains full ownership “in any of the content, including any text, data, information, images, photographs, music, sound, video, or other material,” that the user uploads, transmits, or stores in the Gmail account.213

The content a user may provide within an e-mail account takes many forms, the primary form being e-mail. In sending or receiving messages in a Gmail inbox, the user has an ownership interest in the content of the e-mail. Users may also store contact information for other individuals in an e-mail account, and the content of that contact information would also be owned by the user.

4. Facebook Profiles

Just as e-mail is a means of communicating on-line, so are social-network websites, like Facebook.214 Social networking websites “are web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”215

To create a Facebook profile,216 the user signs up for a Facebook account, just as she would sign up for an e-mail account.217 The Facebook user may then upload a profile picture of herself, provide information about herself such as her birthday, hometown, marital status, employers, college, contact information, etc. The Facebook user may become “friends” with other Facebook users, thereby allowing Facebook friends to interact with one another through the social network. E-mail-like messages can be sent through Facebook’s on-line messaging service. The user may post photos or videos of herself or others, and then post comments on those photos and videos. Similarly, she can leave comments on the “walls” of her own Facebook profile or others’ Facebook profiles. Events can be scheduled and invitations distributed through Facebook. A user can keep up with her Facebook friends without actually interacting with the friend, but instead by simply viewing the friend’s profiles to see what new photos, videos, and comments have been posted on the friend’s profile. Facebook even contains a news feed application that notifies the user of the latest updates made to her Facebook friends’ profiles.218

As with websites, there are different purposes for Facebook accounts. There are general personal Facebook profiles in which users connect with friends, provide information about themselves, post photos of themselves, etc. There are also group pages which “are meant to

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214 See Facebook, http://www.facebook.com (last visited Aug. 22, 2010). Other examples of social-networking websites include MySpace, Bebo, Friendster, hi5, and Orkut.
216 A Facebook profile is a personal page that “allows [the user] to share [her] interests, activities, and anything else [she] want[s] to include with people [she] connect[s] to on Facebook.” Facebook, Setting Up a Profile, http://www.facebook.com/home.php?#!/help/?guide=set_up_profile (last visited Aug. 22, 2010).
217 Id.
foster group discussion around a particular topic area.” Some group pages are used to simply announce group meetings and highlight press clippings about the organization, while other group pages such as “Betty White to Host SNL (please?)” serve a limited purpose.

Businesses can also create a Facebook profile. Facebook business profiles help the “entity communicate and engage with their audiences, and capture new audiences virally . . . .” This type of viral marketing allows a business to reach millions of potential customers without expending large sums of capital. For example, a law firm might include on its Facebook profile what legal services it provides, where it has offices, and the principal partners of the firm. A local ice cream parlor may attract patrons by advertising new flavors being served.

Because updates to a business profile are announced on Facebook’s news feed, friends of the business are kept constantly abreast of any announcements the business makes. Moreover, a Facebook user can signify that she “likes” a business’ profile, which is then announced through the Facebook news feed to the user’s friends, thus creating virtual word-of-mouth advertising for the business.

Be it a business or a group or an individual, in creating a Facebook profile, the Facebook user has license to use her Facebook profile, but owns all of the content and information she posts to Facebook. Thus, the Facebook user retains ownership of all of the comments she makes on walls and the photos she publishes. The user may not transfer her Facebook account to anyone without Facebook’s consent. By creating a Facebook profile, the user grants Facebook “a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any [intellectual property] content [the user] post[s] on or in connection with Facebook.”

Facebook profiles, e-mail, websites, and URLs are examples of just a few forms of virtual property that many modern married couples possess as individuals when they enter the marriage and create during the course of the marriage. In all of these types of virtual property, the user is granted some form of property interest, be it an ownership interest or a license to use a service. Because the husband and wife gain a property interest, community property rules come into effect.
PART III. CONSIDERING VIRTUAL COMMUNITY PROPERTY

Though community property rules should govern how spouses share in virtual community property, as of yet, there is no reported case in which spouse’s have litigated the classification of such property. Such legal issues, however, are forthcoming as interests in virtual property are becoming more common and more profitable. If a Mom and Pop shop create a Facebook profile to drum up more business, upon the divorce of Mom and Pop, who has rights to the Facebook profile is as valid of a question as who has rights to the book of business or the trademark of the logos. When a lawyer-husband enters a marriage with a URL and website for his solo practice, at the end of the marriage his wife may have a reimbursement right for time she spent maintaining and increasing the value of his separate property website. In order to respond to these types of property acquisitions and modifications that have become common place among spouses in the past five years, the first question community property regimes must answer is how the property should be classified, for whether the lawyer-husband’s URL and website are separate property or community property alters the wife’s rights in the property.

A. URLs (and domain names)

Assume that prior to marrying wife (W), husband (H) enters into a contract with GoDaddy.com to acquire the URL http://www.blackacres.com. The contract is for ten years and costs $14.99 per year. Because the contract was entered into prior to the marriage, in states following the community debt system, the debt would be considered a separate debt and community property would not be held liable for that debt. In states following the managerial system for contractual liabilities, however, whether community property could be used to satisfy the premarital debt depends on the jurisdiction.

In addition to creating a separate, premarital debt, H also acquires separate property, namely the domain name. H has a property interest in the domain name—namely the exclusive and assignable right to use the name—and because that property interest was created prior to the marriage, it is considered H's separate property.

Five years into the contract for http://www.blackacres.com, while H and W are married, a British rock band called The Black Acres emerges. In wanting to gain an Internet presence, The Black Acres wish to purchase the URL license to http://www.blackacres.com from H. H agrees to assign the license to the band for $100,000. To date, H has only paid for five years of the contract ($74.95), so the assignment of the license generates $99,925.05.

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230 The following search was entered into the LexisNexis “Federal & State Court Cases, Combined” search engine on August 23, 2010: “e-mail” or “email” or “URL” or “domain name” or “blog” or “Facebook” or “myspace” or “website” and “community property.” The search yielded 207 results, none of which concerned the classification of virtual community property.

231 In the following hypothetical situations, some of the issues re-arise under different scenarios. In an attempt to avoid repetition, each issue is not re-examined for each situation under which it may arise, unless the alteration of the situation alters the outcome or substantially changes the method a court should utilize in determining whether the property is community or separate.

232 As of July 28, 2010, GoDaddy.com was selling URLs for anywhere from $0.89 to $39.99 per year.

233 See supra Part I.B.

234 Id.

In classifying the $99,925.05, a court cannot consider it earnings because neither H nor W exercised any effort, skill, or industry to earn the revenue.\textsuperscript{236} Similarly, it cannot be considered an increase in the value of H’s separate property due to an expenditure of community labor because no community labor was exercised that caused the increase in value.\textsuperscript{237} The payment can also not be considered a profit of H’s separate property because H does not retain the URL; in consideration for the band’s payment, H must assign the URL to the band. Instead, the $99,925.05 must be considered property acquired with separate property.\textsuperscript{238} The URL was H’s separate property and he used that property to acquire the revenue. Because the $99,925.05 is classified as property acquired by separate property, the money is considered separate property and the community has no interest in it.

Suppose instead of The Black Acres purchasing the license from H, the band’s rivals, The White Tracts, agree to pay H $100,000 to \textit{not} assign the license to The Black Acres for the next five years. H has still earned $99,925.05 from the URL, but now the revenue is properly classified as a profit. Under the arrangement with The White Tracts, H maintains his possession of the URL and he is generating a profit from maintaining that possession. Therefore, he is earning money from a thing without diminishing the value of the thing. Whether the community has an interest in the $99,925.05 depends on whether the jurisdiction follows the Civil Law Rule or the Common Law Rule.\textsuperscript{239}

Under the right scenario, the money generated from the sale of the URL might also be considered an increase in value of H’s separate property due to community labor. Presume that H is a member of The Black Acres. When H acquires the URL, the band is simply a garage band. During the course of H’s marriage to W, the band takes off and is picked up by a record label. The record label wants to purchase the license from H so it can have total control over the band’s publicity. H assigns the license for $100,000. Under these facts, a court might consider the revenue generated from the sale an increase in the value of H’s separate property due to community labor. The value of http://www.blackacres.com increased because of H’s efforts as a member of the band; had the band remained a garage band, the record label never would have paid $100,000 for the rights under the license.\textsuperscript{240} If the revenue is considered an increase in H’s separate property, then in the majority of states, W will have a reimbursement right to that increase.\textsuperscript{241}

If instead of acquiring the URL before the marriage, H signed up for the URL during the marriage, then all of the above analysis would change. Under community debt systems, the obligation with GoDaddy.com would become a community obligation that would hold community property liable; in managerial systems, any property H had the right to manage and control would be liable for the debt.\textsuperscript{242} The property interest in the domain name would be a

\textsuperscript{236} See supra Part I.A.1.
\textsuperscript{237} See supra Part I.A.3.
\textsuperscript{238} See sources cited supra note 27.
\textsuperscript{239} See supra Part I.A.1.
\textsuperscript{240} Inarguably, any increase in value to the URL is only attributable to H’s labor indirectly; unlike a carpenter-husband building an addition onto his wife’s separate property house, H did not expend any labor directly on the URL. The labor H exerted is similar, however, to the labor a company officer or director exerts to increase the value of stock. In the case of increases in the value of stock due to an officer’s or director’s efforts, courts have held that such increases are community property that gains the non-officer or non-director spouse a reimbursement or property right in the stock. See sources cited supra note 82.
\textsuperscript{241} See supra Part I.A.3.
\textsuperscript{242} See supra Part I.B.
community interest. If the URL license was assigned to The Black Acres, the revenue generated would be property created by community property, and thus the revenue would be classified as community property itself. If instead The White Tracts paid H to not assign the license to The Black Acres, the revenue would be the profits of community property, thereby making the revenue also community. And if H was a member of the band, the money earned by the assignment of the license to the record label would be an increase in value of community property attributable to community labor, which would be classified as community property.

B. Websites

Eventually H leaves the fanciful life of garage bands, and enters the legal profession, working as a law professor. H uses Google’s Blogger program to acquire and develop http://blackacres.blogspot.com, a legal blog devoted to property law. The right (or license) to use the URL http://blackacres.blogspot.com is H’s separate property because he acquired the license before wedding W. H writes 100 posts for the blog prior to his marriage, and then stops posting following the nuptials. In this instance, the content of the 100 posts is H’s separate property because it is property created before marriage.243

H also has a copyright to the content of the blog because it is his literary work.244 If a publishing company contacts H during the marriage wanting to publish the blog postings as a book on property law,245 the money received by H would be his earnings, or economic gains, from his copyright. Applying the analysis from Michel v. Michel, however, the only benefits that W could receive from the copyright would be those attributable to effort exerted by H during the community.246 Because H wrote all of the blog posts before the community commenced, H exerted no effort during the community to produce the writings and, thus, W would not have a community interest in any of the economic benefits stemming from the copyright.

During the course of the community, H begins to blog again, and adds 50 new posts to the blog. In this instance, a court will have to determine whether the 50 new posts are an addition to separate property—i.e. the content of H’s blog—or if each individual blog post constitutes a distinct piece of property such that the added posts are not additions to the blog, but new forms of property altogether. If the former approach is adopted, then the 50 new posts constitute additions to H’s separate property; if the latter approach is taken, then 50 new posts are newly-created community property because they were generated during the community.247

Whether each blog post constitutes new, distinct property should depend upon the nature of the blog. If the blog is like a personal diary,248 then the blog may be comparable to a book in which the content of the blog is a unit. If, on the other hand, a blog is more like a newspaper where each post stands alone, unrelated to previous posts, then the new posts may be considered distinct from the old posts, thus making the post-marriage posts community property.

246 See 484 So. 2d 829, 833–34 (La. App. 1st Cir. 1986).
247 It is important to note that the question presented at this juncture concerning websites is not whether the right to use the blog and the URL is a community or separate right. Based on the time the URL was acquired, it is clear that right is a separate right that rests with H. The question is how the actual content of the blog should be classified.
248 DICTIONARY, supra note 180, at 58–59.
How a court considers the added blog posts—either as an addition to separate property or as newly formed community property—appears irrelevant in this context because blog posts, by themselves, are not a particularly valuable asset. The valuable asset is really what H does with the 50 new posts. If H takes the 50 new posts created during the community and turns them into a sequel to his first property law book, then the revenue generated by the sequel would be H’s earnings because it would be attributable to work he performed during the community, regardless of how the blog posts themselves are classified. Thus, there would be a community interest in the earnings. Whether there would be a community interest in the actual copyright vested in H from the creation of the 50 new posts would depend first, on whether the new posts were considered community or separate property, and second, on whether the court followed the approach in Rodrigue v. Rodrigue or the approach in Worth.

While the classification of the actual posts appears irrelevant, it may be important for determining the classification of other revenues generated by the blog. Suppose that before H entered the marriage, he put AdSense on his blog. As his separate property, property-law blog grows in economic success, the money generated from the advertisements on H’s blog increase. How this money should be classified is uncertain to date. Likely, this revenue should be considered as either earnings or profits. Following the general rule created in Paxton v. Bramlette or Laughlin v. Laughlin, if H devoted great labor to the ads, then the revenue they generate should be considered earnings; if, however, little to no labor was expended on the ads, the revenue generated should be considered profits.

When using AdSense, the blogger merely clicks a few icons and supplies limited information; the real “effort” is exercised by the readers of the blog who view and click on the advertisements and by the individuals who select which advertisements will run on the blog. If a court views H’s effort as simply the effort required to sign up for AdSense, then there is almost no energy expended by H to obtain the advertisements. Thus, the revenue from the advertisements should be considered profits. If the court considers all of the posts on the blog as separate property, then whether there is a community interest in the revenue depends on whether the jurisdiction follows the Civil Law Rule or the Common Law Rule. If, however, the court considers the new 50 blog posts to be community property, then the revenues generated by those posts would be considered community property.

Such examination, however, does not take into account all of the work required to secure revenues generated through AdSense. In order for advertisements on a blog to be profitable, the blogger must have engaging content that drives readers to the blog such that they can click on the advertisement. Thus, H’s effort to generate money through AdSense must include not only the labor involved in directly putting AdSense on H’s blog, but it must also include H’s efforts in writing blog posts to attract readers.

At the same time, a court cannot ignore that individuals other than H exert energy to create revenue on the blog. As previously noted, the readers of the blog and the individuals who select the advertisements are crucial to the economic success of the blog. Thus, in order for a

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249 See supra Part I.A.1.
250 If the blog posts are considered separate property, then the copyright would not be a community asset under either Worth or Rodrigue. However, if the blog posts are considered community property, then under the Worth approach, the copyright would also be considered community property.
251 See supra Part I.A.1.
252 See supra Part I.A.2.
253 See sources cited supra note 50.
court to properly classify what revenues of the blog are earnings and what revenues are profits, a
court would have to weigh the direct labor of the blogger in writing the blog posts and putting
AdSense on the blog against the labor of the advertisers in placing the advertisements on the blog
and the labor of the blog readers clicking on those advertisements. The former represent actual
work H had to perform; the latter are more akin to capital investments. When H put AdSense on
the blog, he made an investment (albeit in time) in the blog that reaps benefits, in part, due the
efforts of others and no effort of H. If a court weighs all of H’s efforts against the benefits of his
“investment,” then following a Bramulette-type analysis, so long as the revenue generated by the
blog were more attributable to the labor of H than to his investment, the revenue should be
considered earnings. To the extent those revenues, or earnings, are attributable to the 50 new
blog posts, the earnings would be considered community property.254

Assume that after teaching for a number of years, H decides he wants to leave the world
of academia and enter the world of practice. While married to W, H converts his property-law
blog into a solo practitioner’s website that includes numerous features, including a real-time
response feature where clients can send in a question and receive an immediate response and a
status-tracking feature where clients can log on to the site to determine exactly what work has
been performed on their case. After a few years of practice, H and W divorce. At the time of
divorce, H’s law practice is booming. His tangible assets, such as his desk, file cabinets,
telephones, and computers, were all acquired during the marriage and are valued at $50,000. His
contractual assets, such as the earnings he is owed from legal work already performed, are
valued at $100,000. In addition to these assets, H has generated such positive publicity around
his law practice and has developed a high probability that business will continue in the future as
it has in the past.

In this scenario, a court must make a determination of whether the website is creating
goodwill or earnings, some of which may be attributable to efforts of H during the marriage. If
H developed the features on the website that allowed clients to be kept constantly abreast of the
status of their legal issues, developed that feature during the community, and it did not require
substantial effort be exerted to maintain it, then part the revenues generated from the website
would be attributable to H’s efforts during the community, namely his efforts in creating the
website. To the extent W can show that revenue is generated because of H’s efforts during the
marriage, then that portion of his future earnings should be considered community property.

However, part of the revenue that the website creates may not be based on H’s efforts,
but instead on his goodwill. The feature that provides an instantaneous legal response from H to
clients’ questions requires constant effort on the part of H and utilizes his professional judgment
and decision-making as a legal professional, so it cannot be considered earnings generated during
the community. Such a feature may, however, drive clients back to H, in which case H has
created a certain amount of goodwill for his practice. Whether this goodwill is factored into the
equation when determining the value of H’s law practice for terms of dissolving the community
depends on what jurisdiction the spouses reside in.255

C. E-mail and E-mail Accounts

254 Though not adopted by any community property jurisdiction, another possible analysis is to adopt a pro tanto
theory of earnings and profits, classifying only that revenue that is attributable to H’s labor as earnings and only that
revenue that is attributable to H’s investment as profits.
255 Supra Part I.A.4.
To aid his legal career, H creates an e-mail account before he marries W. Because the e-mail account was created before the marriage, the e-mail account is separate property. If H entered into a contractual relationship with an Internet service provider that supplied e-mail accounts for a fee, such as AOL, then the contract H entered into with AOL would be a separate obligation because it was entered into before the marriage. In community property regimes that follow a community debt system, community property would not be liable for the AOL contract H entered.\textsuperscript{256} The extent of liability in community property in managerial states would depend upon the actual state.\textsuperscript{257}

Similarly, any e-mails sent from or received by H prior to the marriage would be considered separate property. However, e-mails sent during the marriage would be considered community property because they are created during the community.\textsuperscript{258} If while H was married and a law professor, he e-mailed research and a well-developed answer to a complicated legal issue to an attorney, the e-mail would be considered community property because it was generated by H’s efforts during the community. While the e-mail itself may appear to have little value, the revenues created by the e-mail may be quite large. If H was paid by the attorney for the research and thoughts, W would have a claim to her community interest in the proceeds because it would be H’s earnings. H would also have a copyright to the e-mail because it is his literary work, and the community would have an interest in any economic benefits generated by the copyright.\textsuperscript{259} If, however, H sent the e-mail before the marriage, the e-mail would be separate property and the community would have no right to any earnings generated by the e-mail because those earnings would be attributable to H’s effort prior to the commencement of the community.

How e-mails sent to H’s separate property e-mail account should be classified is less clear. The presumption is that all property generated by effort, skill, or industry of one of the spouse’s during the marriage is community property, but e-mails sent to a spouse are not necessarily generated from the spouse’s effort; they may be created by the effort of some third party. Suppose instead of being the law professor researcher, H is the attorney who receives an e-mail of well-documented research and the answer to a complicated legal issue. H and W then immediately divorce. The question for the court is whether the e-mail received by H is community property, such that W is also entitled to the content of the e-mail.

If H and the third-party sender exchange in an e-mail dialogue in which multiple questions and thoughts were sent back and forth, W might argue that the final e-mail containing what could be a valuable legal analysis was generated at least in part by H’s effort; had H not engaged in the back-and-forth dialogue, the end result would not have occurred. Therefore, H’s effort may be said to be directly attributable to the e-mail he received, so the received e-mail should be considered the earnings of H and considered community property. However, suppose H merely sent a one sentence question to the third-party sender and exerted no additional effort to obtain the received e-mail. In this scenario, the received e-mail that is not created by the effort of H might better be analogized to a donation. Donations given to a spouse individually are

\textsuperscript{256} \textit{Supra} Part I.B.
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} Unlike blogs, e-mails are not generally regarded as a collective unit. Thus, each individual e-mail might create a distinct property interest. However, depending upon the context of the e-mail, it might be possible that certain e-mails should be considered part of a collection, just like certain blog posts should be considered a collection. If that is the case, then the question would be when the first e-mail was sent; if the first-email was sent prior to the community regime, then the subsequent e-mails would be considered additions to separate property.
\textsuperscript{259} See Part I.C.
considered separate property, so an e-mail sent to a spouse individually might also be considered separate property. While there is a presumption that all property acquired during the community regime is community property, that presumption may be overcome. The fact that an e-mail was sent to a separate property e-mail account might be evidence H could use to argue that the intent of the third party sender was to send the e-mail only to H, and thus it should be classified as separate property.

Another possible analysis is that the e-mail is the profit of the e-mail account. Profits are things created by property without a spouse exerting any effort, skill, or industry and without diminishing the substance of the underlying thing. In this scenario, the underlying thing is the e-mail account which was used to receive the e-mail. The e-mail account itself is not diminished by receipt of the e-mail. If H exerted no effort to produce the received e-mail, then it might be considered the profit of the e-mail account. In that case, whether W has an interest in the profit depends on whether the e-mail account is separate or community property and, if it is separate property, whether the jurisdiction follows the Common Law Rule or the Civil Law Rule.

Sending and receiving legal analysis is hardly the only example of when profitable information is distributed via e-mail such that the e-mails themselves, be they sent or received, are of valuable. Suppose while married W and H open up an ice cream parlor and, without any provocation, W receives an e-mail with a recipe for a new flavor of ice cream. W and H divorce immediately thereafter and H wants to open up his own ice cream parlor where he would like to sell the new flavor of ice cream. H may have a claim to the e-mail with the ice cream recipe was in it because the e-mail was received during the marriage, though the extent of H’s claim depends upon whether received e-mails are considered profits, donations, or earnings, and the specific facts surrounding the receipt of the e-mail.

D. Facebook Profiles

Before H marries W, H recognizes the social value of Facebook and creates a Facebook profile. The content placed on H’s Facebook profile before the marriage is H’s separate property. As with the blog example, however, the question becomes how to classify additional information placed on the Facebook profile: does a Facebook profile creates one unit of property or numerous distinct units of property?

Courts might find that a Facebook profile is considered as one entity; all of the content posted to a Facebook profile comprises the user’s unique profile. Under this theory, if H posts 100 photos to his separate-property Facebook profile during the marriage, those 100 photos should likely be considered an increase in value in H’s separate property. For states that apply a reimbursement theory, courts would have to contemplate how much added value those 100 photos bring to H’s Facebook profile. W would then be entitled to a community interest in that increased value in H’s separate property.
On the other hand, courts might find that the content posted to a Facebook profile is all unique, individual pieces of property. Photos are easily separable from wall comments, which are easily separable from Facebook messages. If courts determine that all content posted to Facebook creates a distinct form of property, then content posted on a Facebook account during the community should become community property because it is created during the community.

The issues concerning the content posted to Facebook or the messages sent through Facebook are reminiscent of the questions raised by websites and e-mail accounts. A wrinkle unique to Facebook, though, is friends: are H’s Facebook friends earnings, profits, increases in value, or goodwill? As with many of the aforementioned scenarios, the answer is it depends on the facts surrounding the friends.

Suppose when H entered the marriage he had 500 Facebook friends. During the course of the marriage, H acquires 500 more Facebook friends. Unlike photos or comments, Facebook friends are not content H posts; Facebook friends are connections H makes. By friending people, H will gain certain rights because he will be able to view more Facebook profiles. Similarly, by adding additional friends H generally allows more people to see his profile. Thus, increasing the number of Facebook friends, H increases the value of his Facebook profile because he increases the rights of his profile. The value of H’s Facebook page was increased using community labor; H had to spend time and energy finding and requesting friends. Because H’s labor during the community increased the value of his separate property, W would be entitled to either a reimbursement or an ownership interest in that separate property depending upon the jurisdiction.267 The obvious difficulty would lie in determining how much a Facebook friend is worth.

In addition to increasing the value of H’s separate-property Facebook profile, the newly-added friends might also create goodwill. If while H is a practicing lawyer he adds the 500 new friends, he will increase his on-line visibility because more Facebook users will be able to see his Facebook profile. Moreover, every time H gains a new Facebook friend, that information will pop up in the news feed for both H and his new Facebook friend, thus meaning that all of the new Facebook friend’s friends will see information about H’s Facebook profile, thereby creating viral word-of-mouth publicity for H’s law practice. This increased on-line presence may result in gaining (and retaining) more clients. In this sense, H’s increased number of Facebook friends might be considered goodwill because they generate an image of H that encourages clients to hire him. Depending upon the jurisdiction, W might be entitled to a community interest in the goodwill H generates through his Facebook profile.

Goodwill is not the only way that Facebook friends could generate revenue that must be classified. Suppose instead of creating a personal Facebook profile, H creates a group page entitled “If one million people join, my dad will pay me $10,000.”268 Throughout the marriage, H increases his 500 friends to the required 1 million, and his dad pays H the promised $10,000. In that case, the $10,000 would be considered earnings because it was generated by the work of H during the community. Thus, the community has an interest in the $10,000 to the extent the work was attributable to the community. If H added 999,500 friends during the course of the community, the community has an interest in 99.95% of the $10,000 received by H because that is the percentage of the increase attributable to H’s efforts during the community.

267 See supra Part I.3.
268 There are groups like this. For example, there is a group page “If 1,000,000 people join my family will donate $1,000,000 to Haiti!”
The aforementioned hypothetical situations are far from the only scenarios that might arise with regards to virtual property in community property regimes, and the methods of classifying the virtual property described here are not necessarily the only ways that courts might classify the property. But the above scenarios begin to shed light on some of the issues that community property jurisdictions will face when dealing with virtual property. Though questions regarding the classification of virtual property are still only hypothetical as spouses have yet to litigate what community property interest they have in property, as virtual property grows in economic and social importance, these hypothetical will inevitably turn into a reality.

What the hypothetical scenarios clearly demonstrate is that when classifying virtual property, courts must carefully consider the inner-workings of the virtual property at issue. Blogs and retail websites are both websites, and may be built from the same software, but they are different types of websites with different purposes. The differences between them may lead to different classification results. Facebook profiles cannot automatically be analogized to e-mail accounts, despite the fact that both allow users to send and receive messages. Courts must understand how each type of virtual property operates before determining whether it is community or separate.

CONCLUSION

Though classification is the first question community property jurisdictions must answer when analyzing virtual property, classification is not the only impending legal question. Once virtual property is properly classified as community or separate, questions regarding who has managerial rights over the property will arise. If W creates an e-mail account during the marriage and that e-mail account is community property, does she need H’s concurrence before changing the password? If H creates a community-property Facebook profile, can he make a decision by himself to delete that Facebook profile? Furthermore, courts will eventually face the inquiry of how to value virtual property such that spouses may receive an equal amount of assets upon the dissolution of a community. How do you place a value on Facebook friends? Should the monetary value of URLs be tied to the value of the URL license agreement or the going-rate for similar URL addresses? But before courts can engage in any of these inquiries, they must first determine how virtual property should be classified. In doing so, courts must move into the digital age and understand the virtual world that has taken over reality.