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# How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace

Sally Brown Richardson

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# How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace

*Sally Brown Richardson\**

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## INTRODUCTION

Things have changed. Before tying the knot, a man in the 1950s might have owned a car, some furniture, a few pots and pans, a closet half-filled with clothes, and the money in his checking account. A woman entering holy matrimony in the 1970s might have had a car, some furniture, a few pots and pans, a closet

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filled with clothes, the money in her checking account, the money in her savings account, and a few shares of stock. By the 21<sup>st</sup> century, a couple walking down the aisle might each already possess a car, some furniture, a few pots and pans, a closet filled with clothes, the money in his checking account, the money in her savings account, shares of stock, a certificate of deposit account, two email accounts, one Facebook profile, and a blog. *Things*, quite literally, have changed.

While time has altered the items that people own, a few constants remain: people still marry, people still divorce, and people still die. And, as they have for thousands of years, marriage, divorce, and death still affect the things people possess, particularly in community property jurisdictions where there is a presumption that all property created or acquired during marriage is part of the community. This presumption takes effect from the moment vows are exchanged, thereby impacting not only how property is divided at the termination of the marriage, but also how property is managed throughout the community.<sup>1</sup>

In considering the future viability of the community property regime, we must contemplate how jurisdictions will respond to the changing *things* in our lives. Particularly, we must consider one burgeoning form of property: virtual property. “[V]irtual property is code that mimics the properties of real-space objects.”<sup>2</sup> Things like blogs, Twitter accounts, and Facebook profiles create rights in virtual property that exist only online, yet maintain the interconnected, physical, and persistent qualities associated with tangible property.<sup>3</sup> Given the proliferation of virtual property and the economic gains to be reaped from such property,<sup>4</sup> it is only a matter of time before divorcing couples litigate how virtual property should be classified and managed during marriage or divided and valued at the termination of a marriage. Historically, community property jurisdictions have struggled when first

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1. See Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. 161 (2011) (discussing how community property regimes impact property during the marriage, as compared to separate property regimes that only impact property at the termination of the marriage).

2. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1063 (2005).

3. See Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are my Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?*, 85 TUL. L. REV. 717, 747–57 (2011) (describing virtual property and examples of virtual property); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual World*, 92 CALIF. L. REV. 1, 37–43 (2004) (describing virtual property).

4. See Richardson, *supra* note 3, at 720–21 (discussing the social and economic impact of virtual property).

reacting to new forms of property,<sup>5</sup> and there is no reason to think that governing virtual property will pose any easier challenge initially.

This Article continues an effort to bring to light some questions that will arise when community property regimes begin facing issues concerning virtual property<sup>6</sup> by examining the classification of virtual property as community property or separate property, the management of community virtual property, and the effect the termination of a community will have on virtual property. In doing so, this Article reaches two conclusions. First, to avoid being lost in cyberspace, courts and legislatures in community property jurisdictions must fully understand how virtual property operates and, more specifically, how the particular virtual property in question operates. This conclusion appears remarkably self-intuitive; prior to drafting legislation and decisions, lawmakers and judges should always fully understand any impacted property. While this is undoubtedly true, the first conclusion serves as an important reminder, for, as demonstrated herein, while different types of virtual property may appear similar on a computer screen, the underlying code of such properties may be very different and warrant different outcomes in the law. Before any precedent is set regarding how virtual property should be classified, managed, or valued, the property itself must be fully understood.

Building on the understandings gained after applying the first conclusion, the second conclusion this Article reaches is that, generally speaking, new laws governing virtual property need not be created. Though most community property rules were initially codified hundreds of years ago,<sup>7</sup> our well-aged community property constructs adequately govern virtual property in most cases. There are some areas of the law that may require slight enhancements—particularly our rules regarding the management of community property—but community property laws should not

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5. See, e.g., KATHERINE S. SPAHT & RICHARD D. MORENO, MATRIMONIAL REGIMES § 3.12, in 16 LOUISIANA CIVIL LAW TREATISE 125–26 (3d ed. 2007) (commenting on the complications of classifying trusts under Louisiana community property law); 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); Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 LAW & CONTEMP. PROBS. 171, 175–76 (1993) (noting the difficulties in classifying business interests).

6. See Richardson, *supra* note 3 (discussing how virtual property should be classified in community property regimes).

7. See WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 8 (2d ed. 1971).

be rewritten wholesale to accommodate this new and growing form of property.<sup>8</sup>

To reach these conclusions, this Article examines a different form of virtual property for each of the three general aspects of community property law.<sup>9</sup> The Article begins by using blogs to consider the questions that will arise when classifying virtual property. Then, the Article studies issues concerning the management of community virtual property through the use of community Twitter accounts. Finally, the Article raises questions regarding virtual property at the termination of the community by exploring Facebook profiles. For each of these categories, the Article (a) briefly summarizes the pertinent community property law on the particular subject, (b) describes the virtual property to be examined, and (c) raises issues jurisdictions will face when confronting this form of virtual property and gives guidance on how jurisdictions should approach the issues raised herein.

## I. CLASSIFICATION

Classification is the first step to governing any property in a community regime.<sup>10</sup> Classification complications arise not only

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8. What this Article expressly does not purport to do is to answer all questions of how specific forms of virtual property should be classified, managed, or divided and valued at termination of the community. This Article merely seeks to raise issues that community property jurisdictions eventually must face and give guidance about how jurisdictions should consider these issues.

9. Many of the issues discussed herein apply to all forms of virtual property. For example, most forms of virtual property require that the user log in to the property with a password. However, to avoid repetition, this Article only discusses issues concerning passwords when considering the management of Twitter accounts. *See infra* Part II.C.

10. *See* DE FUNIAK & VAUGHN, *supra* note 7, § 1 (stating that all property held and owned by a married couple is presumed to be community until it is proved to be separate). There are eight community property jurisdictions in the United States: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. ARIZ. REV. STAT. ANN. § 25-211 (West, Westlaw through 2011 amendments); CAL. FAM. CODE § 760 (West 2004); IDAHO CODE ANN. § 32-906(1) (West, Westlaw through July 2011 amendments); LA. CIV. CODE ANN. art. 2338 (2009); N.M. STAT. ANN. § 40-3-8(B) (West, Westlaw through 2011 amendments); NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 2010 amendments); TEX. FAM. CODE ANN. § 3.003 (West 2006); WASH. REV. CODE ANN. § 26.16.030 (West, Westlaw through 2011 amendments). Wisconsin adopted the Uniform Marital Property Act, which, like community property law, grants spouses a present, undivided interest in all marital property. *See* WIS. STAT. ANN. § 766.31 (West, Westlaw through July 2011 amendments). For the purposes of this Article, the term “community property jurisdictions” refers to all nine of these states.

with the initial virtual property itself, but also with the property rights created from the initial virtual property. For example, when a blog is first created, there are not only issues in determining whether the rights to the blog are community or separate, but also whether future property rights created by the blog thereafter—such as new blog posts or revenues generated by the blog—should be classified as community or separate.

#### *A. Classification of Property as Community or Separate*

Property may be classified as community property or separate property. Generally, all property created or acquired during the community's existence is presumed to be community property,<sup>11</sup> whereas property created or acquired outside of the marriage is considered separate property.<sup>12</sup> Within this general framework lies a host of categories used to determine whether property is created or acquired during the marriage and, therefore, community property.<sup>13</sup>

The three categories that are the most useful for classifying virtual property are earnings, profits, and increases in value.<sup>14</sup> Earnings are defined as those revenues a spouse produces as a result of her “effort, skill, or industry.”<sup>15</sup> Profits are what a spouse

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11. See CAL. FAM. CODE § 802 (West 2004); LA. CIV. CODE ANN. art. 2340 (2009); NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 2010 amendments); N.M. STAT. ANN. § 40-3-12 (West, Westlaw through 2011 amendments); TEX. FAM. CODE ANN. § 3.003(a) (West 2006); WIS. STAT. ANN. § 766.31(2) (West, Westlaw through July 2011 amendments); *Cockrill v. Cockrill*, 601 P.2d 1334, 1336 (Ariz. 1979); *Simplot v. Simplot*, 526 P.2d 844, 851 (Id. 1974); *Millisich v. Hillhouse*, 228 P. 307, 308 (Nev. 1924); *E.I. du Pont de Nemours & Co. v. Garrison*, 124 P.2d 939, 940 (Wash. 1942).

12. See ARIZ. REV. STAT. ANN. § 25-213 (West, Westlaw through 2011 amendments); CAL. FAM. CODE § 770 (West 2009); IDAHO CODE ANN. § 32-903 (West, Westlaw through July 2011 amendments); LA. CIV. CODE ANN. art. 2341 (2009); NEV. REV. STAT. ANN. § 123.130 (West, Westlaw through 2010 amendments); N.M. STAT. ANN. § 40-3-8(A) (West, Westlaw through 2011 amendments); TEX. FAM. CODE ANN. § 3.001 (West 2006); WASH. REV. CODE ANN. § 26.16.010 (West, Westlaw through 2011 amendments); WIS. STAT. ANN. § 766.31(8) (West, Westlaw through July 2011 amendments).

13. For example, Louisiana Civil Code article 2338 includes in the classification of community property all property acquired with community things or with community and separate things, property donated to spouses jointly, most natural and civil fruits, and damages awarded for loss or injury to community things.

14. For a full discussion of the definitions of earnings, profits, and increases in value, see Richardson, *supra* note 3, at 725–34.

15. LA. CIV. CODE ANN. art. 2338 (2009). *Accord* IDAHO CODE ANN. § 32-906(1) (West, Westlaw through July 2011 amendments); WIS. STAT. ANN. §

gains from property without exerting effort, skill, or industry<sup>16</sup> and without diminishing the substance of the underlying thing.<sup>17</sup> Unlike earnings and profits, increases in value are not pay outs generated by the initial property, but instead represent growth of the initial property itself.<sup>18</sup>

Distinguishing between earnings, profits, and increases in value requires a fact-intensive investigation of the property at issue.<sup>19</sup> Such inquiry is necessary because which of these three categories a particular piece of property falls into determines whether the property is ultimately classified as community or separate. Earnings created by community property, i.e. earnings based on effort, skill, or industry exerted during the community, are always classified as community property, and earnings created by separate property are always classified as separate property.<sup>20</sup>

Earnings, though, must be distinguished from profits, for the profits of separate property are classified as community property in some states.<sup>21</sup> In these states that follow what is known as the Civil Law Rule—meaning that the profits of separate property are classified as community property<sup>22</sup>—it is crucial to determine

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766.31(4) (West, Westlaw through July 2011 amendments); GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY § 296 (2d ed. 1925).

16. Andrews, *supra* note 5, at 174–75.

17. 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. CIV. CODE ANN. art. 551 (2009).

18. *See Suter v. Suter*, 546 P.2d 1169, 1173 (Idaho 1976); *Plachta v. Plachta*, 348 N.W.2d 193, 195 (Wis. Ct. App. 1984); SPAHT & MORENO, *supra* note 5, § 2.5.

19. *See, e.g.*, *Laughlin v. Laughlin*, 155 P.2d 1010 (N.M. 1944) (distinguishing between earnings and profits); *Paxton v. Bramlette*, 228 So. 2d 161 (La. App. 3d Cir. 1969) (same).

20. RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 5 (1895); MCKAY, *supra* note 15, § 297.

21. Profits of community property are always considered community property. SPAHT & MORENO, *supra* note 5, § 3.6.

22. Four states—Idaho, Louisiana, Texas, and Wisconsin—follow the Civil Law Rule. TEX. CONST., art. XVI, § 15; IDAHO CODE ANN. § 32-906(1) (West, Westlaw through July 2011 amendments); LA. CIV. CODE ANN. art. 2339 (2009); WIS. STAT. ANN. § 766.31(4) (West, Westlaw through July 2011 amendments). The remaining five community property jurisdictions follow what is known as the American Rule which classifies the profits of separate property as separate property. ARIZ. STAT. ANN. § 25-213(A) (West, Westlaw through 2011 amendments); CAL. FAM. CODE § 770(a)(3) (West 2004); NEV. REV. STAT. ANN. § 123.130 (West, Westlaw through 2010 amendments); N.M. STAT. ANN. § 40-3-8(A), (E) (West, Westlaw through 2011 amendments); WASH. REV. CODE ANN. § 26.16.010 (West, Westlaw through 2011 amendments). *See*

whether property generated by separate property is earnings or profits because that decision will resolve the ultimate question of whether the property is classified as community or separate.

Additionally, it must be considered whether new property should be considered an increase in value. Increases in value of separate property due to community resources create either a right of reimbursement or a property right depending upon the jurisdiction. In states that grant a right of reimbursement, the community is generally entitled to be reimbursed based on the increased value of the separate property that is attributable to uncompensated community labor or resources.<sup>23</sup> However, the underlying classification of the property and the increase does not change.<sup>24</sup> In other words, when separate property increases in value because of community resources, the separate property and the increase remain separate property; the community, though, is granted a right of reimbursement because the community helped cause the increase in value of the separate property.<sup>25</sup> In jurisdictions that grant a property right instead of a right of reimbursement, the increase in the value of separate property due to the uncompensated labor or resources of the community is itself classified as community property.<sup>26</sup>

In addition to the above classifications, community property jurisdictions also have developed rules regarding how to classify property rights acquired over a period of time.<sup>27</sup> Property rights created by contract are frequently gained over a period of years. In some instances, such as with life insurance, community property jurisdictions apply an inception of title theory to the property right, meaning that the life insurance policy acquired is classified as separate or community based on when the contract is entered into,

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WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 177–78 (Carolina Academic Press 7th ed. 2009) (utilizing the terms American Rule and Civil Law Rule).

23. *E.g.*, LA. CIV. CODE ANN. art. 2366 (2011); LA. CIV. CODE ANN. art. 2368 (2009); *Martsch v. Martsch*, 645 P.2d 882, 887 (Id. 1982); *Potthoff v. Potthoff*, 627 P.2d 708, 715–16 (Ariz. Ct. App. 1981) (citation omitted); *Loyacono v. Loyacono*, 618 So. 2d 896 (La. Ct. App. 5th 1993); *In re Estate of Kobylski*, 503 N.W.2d 369, 375–76 (Wis. Ct. App. 1993); *McCoy v. Ware*, 608 P.2d 1268, 1269 (Wash. Ct. App. 1980); SPAHT & MORENO, *supra* note 5, § 7.18.

24. *See, e.g.*, *Wilkerson v. Wilkerson*, 992 S.W.2d 719, 722 (Tex. Ct. App. 1999); *Potthoff v. Potthoff*, 627 P.2d 708, at 715–16 (Ariz. Ct. App. 1981).

25. SPAHT & MORENO, *supra* note 5, § 7.15.

26. WIS. STAT. ANN. § 766.63(2) (West, Westlaw through July 2011 amendments); *Long v. Long*, 199 P.2d 47 (Cal. Dist. Ct. App. 1948).

27. *See generally* REPPY & SAMUEL, *supra* note 22, at 85–86 (comparing the theories of inception of title, time of vesting, and pro rata).

regardless of when payments on the life insurance policy are made.<sup>28</sup> Accordingly, under the inception of title theory, property rights are either community or separate based on the moment in time they were acquired. In other instances, such as with pensions, community property jurisdictions apply a pro rata theory to the property right, meaning that the percentage of the pension attributable to employment during the community is classified as community property, and the percentage of the pension attributable to employment outside of the community is classified as separate property.<sup>29</sup> Thus, under the pro rata theory, property can be part community and part separate.

States are inconsistent in which approach they apply to property rights acquired over a period of time.<sup>30</sup> At least one Washington court, however, has proposed a test to determine when the inception of title theory should be followed instead of the pro rata theory.

[A]n asset acquire[d] through a transaction requiring the payment of installments over a period of time has the ownership characteristic of the initial obligation. . . . By ascertaining the character of ownership on the basis of the character of the initial obligation, this rule would put the risk of subsequent fluctuation in value on the original obligor(s) who, presumably, contemplated that risk. In contrast, an asset preserved by or having its source in periodic payments which cannot be compelled (directly or indirectly) by the payee is owned in separate and community proportions according to the character of the funds used to make the "voluntary" payments.<sup>31</sup>

Determining how assets acquired over time should be classified and distinguishing between earnings, profits, and increases in value can be difficult when examining traditional forms of property. These inquiries pose particular challenges when it comes to virtual property. Courts must take great care when classifying virtual property in order to ensure that the factual nuances of the virtual property in question are properly understood. The need for such care

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28. See, e.g., *McCurdy v. McCurdy*, 372 S.W.2d 381, 383-84 (Tex. Civ. App. 1963); SPAHT & MORENO, *supra* note 5, § 3.32 (discussing the inception of title rule as it applies to life insurance policies).

29. See, e.g., *Sims v. Sims*, 358 So. 2d 919 (La. 1978); see also *Giacomazzi v. Rowe*, 240 P.2d 1030 (Cal. Dist. Ct. App. 1952) (applying a pro rata theory to installment purchase contracts).

30. See REPPY & SAMUEL, *supra* note 22, at 86.

31. *Porter v. MacLeod*, 553 P.2d 117, 121 (Wash. Ct. App. 1976).

is demonstrated by examining the issues that arise when classifying a blog and the related property rights created by the blog.

### *B. Example of Virtual Property: Blogs*

Blogs are websites, which are series of interconnected web pages that display information about the person, entity, or thing they represent.<sup>32</sup> Blogs take many forms; “[s]ome blogs are like an individual’s diary while others have focused topics, such as recipes or political news.”<sup>33</sup> Regardless of the topic discussed, blogs thrive because they constantly change and provide readers with new, interesting information.<sup>34</sup> The author of the blog—the blogger—adds new content to his blog by posting writing on the blog as frequently as he desires.<sup>35</sup>

Typically, a blogger creates his blog by using a software program such as Adobe Dreamweaver or Google’s Blogger. In doing so, the blogger enters into an agreement with the software provider. The blogger agrees that the provider of the blog software maintains the intellectual property rights of the software utilized to create the blog, while the blogger retains ownership of the intellectual property the blogger puts on the blog, such as the posts he writes.<sup>36</sup> Additionally, the blogger grants the blog software provider a “worldwide, non-exclusive, royalty-free license to reproduce, publish and distribute” the information on the blog.<sup>37</sup>

Blogs serve little purpose until they are published on the Internet for others to read. In order to publish the blog, the blogger

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32. *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 690 (6th Cir. 2009); *Conwell v. Gray Loon Outdoor Mktg. Group*, 906 N.E.2d 805, 809–10 (Ind. 2009); *DICTIONARY OF COMPUTER AND INTERNET TERMS* 58–59, 525 (Barron’s 10th ed. 2009) [hereinafter “DICTIONARY”].

33. *DICTIONARY*, *supra* note 32, at 58–59.

34. *See, e.g., Our First Post*, THE COMMITTEE ON FINANCIAL SERVICES (May 5, 2011), <http://financialservices.house.gov/Blog/?postid=230184> (noting that the House Committee hopes the “blog will make people want to read it” because it will “inform its readers about the ongoing debates surrounding financial services issues”).

35. *DICTIONARY*, *supra* note 32, at 374 (defining a post as a message placed on a web page).

36. *See, e.g., Terms of Service* § 6, *BLOGGER*, <http://www.blogger.com/terms.g> (last visited Sept. 15, 2011) [hereinafter *Terms, BLOGGER*]; *Terms of Use* §§ 6(b), 8(a), *ADOBE*, <http://www.adobe.com/misc/terms.html> (last visited Sept. 15, 2011) [hereinafter *Terms, ADOBE*].

37. *Terms, BLOGGER*, *supra* note 36, § 6. *Accord Terms, ADOBE*, *supra* note 36, § 8(a) (stating that the blogger grants Adobe 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 [the blogger’s content] (in whole or in part)”).

must also enter into an agreement and grant a license to a third party to reproduce his blog. To place a blog on the Internet, the blogger must acquire a Uniform Resource Locator (“URL”).<sup>38</sup> Some blog software providers, such as Google’s Blogger, automatically provide URLs at no charge, while others do not. In the latter case, the blogger may purchase a license to use a URL from a domain name registrar.<sup>39</sup> URLs are generally purchased for a set time period, such as two years, five years, or ten years, and paid for either in a lump sum or on a monthly basis.<sup>40</sup> At the end of the term, the blogger must renew his license in order to retain the URL.<sup>41</sup> The license for a URL is usually an assignable license with fairly non-restrictive terms,<sup>42</sup> thus giving the blogger great leeway to blog as he pleases.

Because blogs are placed on the Internet for all to read, a blogger’s central objective appears to be to convey information. Although this may be true, bloggers can have other goals such as generating revenue.<sup>43</sup> There are a variety of manners in which a blog may create money for a blogger, the most common being advertisements.<sup>44</sup> Advertisements, like blogs themselves, come in all forms. A blogger can set up pay-per-click advertisements on his blog in which a company, such as Google’s AdSense, places

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38. A Uniform Resource Locator (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.” *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 691 (6th Cir. 2003). See Richardson, *supra* note 3, at 749–52 (describing URLs).

39. See *FAQ*, ICANN, <http://www.icann.org/en/faq/#WhatisICANN> (last visited Sept. 15, 2011) (describing the process for registering a domain name). A full list of domain name registrars is available at <http://www.internic.net/regist.html> (last visited May 9, 2011). See also *Kremen v. Cohen*, 337 F.3d 1024, 1029–30 (9th Cir. 2003) (establishing a property right in registering a domain name); *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138, 1143 (9th Cir. 2010) (same).

40. See, e.g., *Go Daddy Domain Name Registration Agreement* § 2, GO DADDY (last revised Apr. 8, 2011), [http://www.godaddy.com/agreements/ShowDoc.aspx?pageid=REG\\_SA](http://www.godaddy.com/agreements/ShowDoc.aspx?pageid=REG_SA) (last visited Sept. 15, 2011).

41. *Id.*

42. E.g., *Terms*, BLOGGER, *supra* note 36, §§ 2, 6 (requiring that the blogger abide by all local, state, national, and international laws, rules, and regulations).

43. Louise Story, *As Corporate Ad Money Flows Their Way, Bloggers Risk Their Rebel Reputation*, N.Y. TIMES, Nov. 26, 2005, at C4, available at <http://www.nytimes.com/2005/11/26/technology/26blog.html?pagewanted=print>.

44. Julie Flaherty, *Many Started Web Logs for Fun, But Bloggers Need Money, Too*, N.Y. TIMES, Apr. 19, 2004, at C4, available at <http://www.nytimes.com/2004/04/19/business/technology-many-started-web-logs-for-fun-but-bloggers-need-money-too.html>.

advertisements on the blog that link to other web pages.<sup>45</sup> The blogger then receives payments based on the number of times readers click on the advertisements.<sup>46</sup> Alternatively, a company might purchase a web banner on a blog for a fixed fee, much like a company would purchase an advertisement in a newspaper or on a billboard. A blogger can also have a sponsor for his blog and be paid for advertising a particular product or a label.<sup>47</sup> With sponsorships, the advertisements may be traditional blog advertisements, may be in the form of blog posts about a particular product, or may simply be links to different web pages where the product can be purchased. Similarly, sponsorships may pay in different ways, including payments based on the number of times the blog is viewed and the number of times the advertisements are clicked.

Instead of generating revenue through advertisements, a blogger can also charge for access to his blog.<sup>48</sup> A blogger may even take donations on his blog.<sup>49</sup> Indirect money may also be generated by a blog. For example, a blogger may advertise his services on a blog and earn money by performing those services. Similarly, a blogger can develop a product line to sell on his blog.<sup>50</sup>

This description of blogs demonstrates that all blogs are different. Blogs have different focuses and purposes. They can be created using different means. They generate revenues in a variety of ways. Courts must be cognizant of these differences and concentrate on the individual characteristics of the particular blog in question when classifying the property rights the blog creates.

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45. *Terms and Conditions* § 11, GOOGLE ADSENSE, <https://www.google.com/adsense/localized-terms> (last visited Sept. 15, 2011).

46. *Id.*; Story, *supra* note 43; David A. Vise, *Advertisers Bid, You Click, They Pay*, WASH. POST, May 13, 2004, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A22435-2004May12.html>.

47. J. David Goodman, *Now in Blogs, Product Placement*, N.Y. TIMES, (June 12, 2010), <http://www.nytimes.com/2010/06/13/weekinreview/13goodman.html>.

48. Flaherty, *supra* note 44. See, e.g., Arthur Ochs Sulzberger, Jr., *A Letter to Our Readers About Digital Subscription*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/opinion/18times.html> (announcing that the New York Times would begin charging for access to its online newspaper, including its blogs).

49. Flaherty, *supra* note 44. The widely-used service PayPal allows nonprofit websites to easily accept donations from readers. See *Accept Donations through PayPal*, PAYPAL, [https://merchant.paypal.com/cgi-bin/marketingweb?cmd=\\_render-content&content\\_ID=merchant/donations](https://merchant.paypal.com/cgi-bin/marketingweb?cmd=_render-content&content_ID=merchant/donations) (last visited Sept. 15, 2011).

50. Flaherty, *supra* note 44.

*C. Classification of Blogs*

There are three main property rights in blogs for community property jurisdictions to classify: (1) the rights to the blog's domain name, (2) the rights to any revenues generated by the blog, and (3) the rights to the blog posts themselves. The property right created by having the license to the blog's domain name is the first property right that must be classified. Classifying the rights to the domain name requires an examination of how the domain name was acquired. If the blog was established using a free service, such as Google's Blogger, then at the time the blogger agreed to the terms of Google's Blogger service, he acquired the right to use the blog. Thus, the property right to the blog's domain name was acquired at a distinct point in time. In this situation, if the blog is created during the marriage, the right to use the blog's domain name should likely be considered a community asset, whereas a blog's domain name acquired outside of marriage should be considered separate property.

Suppose, however, that the blog's domain name is paid for by the blogger. In this case, states could apply either an inception of title theory or a pro rata theory to the acquisition of the right to use the domain name. Under an inception of title theory, the rights to the blog's domain name should be classified based on when the agreement with the provider of the domain name was entered into. The result, then, is the same as it was in the above example of the free blog created using Goggle's Blogger. Applying an inception of title theory, if a blogger commenced his blogging prior to the marriage but paid for his blog services on a monthly basis, the right to use the domain name would be classified as a separate asset, though the non-blogging spouse would have a right of reimbursement in most jurisdictions if community property was used to pay for the blog's domain name. Because URLs can be paid for in predictable installments, applying the inception of title theory to blogs follows the aforementioned suggestion of the Washington court as to when the inception of title theory should be used.

States are, however, inconsistent with their approaches to classifying property acquired over a period of time. Community property jurisdictions could just as easily follow a pro rata theory in determining when property rights are created in the blog's domain name. Under the pro rata theory, the portion of the domain name paid for during the marriage should be classified as community property, while the portion of the domain name paid for outside of the marriage should be classified as separate property.

For the sake of ease (and following the Washington court's suggestion), assume a state utilizes the inception of title theory for a blog. For the community blog, i.e. the blog created during the marriage, the property rights that may be created by the blog, such as the intellectual property rights in future posts or the revenues generated by the blog, should be classified as community property. Regardless of whether these items are considered earnings, profits, or increases in value, they should all be considered community property because they are created from community property (namely the community property blog).

How blog posts and revenues generated by the blog should be classified becomes more complicated when the blog is created outside of the marriage. If a man creates and publishes a blog prior to marrying, then applying the inception of title theory, the rights to that blog's domain name are presumed to be separate property. When the husband begins blogging on his separate property blog during his marriage, and generates money from that blog, how those revenues and posts should be classified depends upon the facts of the particular blog in question.

Beginning with the classification of the blog revenues, assume that on a separate property blog, advertisements are added to the blog through Google's AdSense and those advertisements are compensated using a pay-per-click compensation method. Every blog post is written prior to the marriage. The blogger weds and decides to stop posting. Though no new blog posts are published (or even written) during the marriage, readers still visit the blog and click on the advertisements, so the blog continues to generate revenue. In such a situation, there are two possible ways to classify the revenue: earnings or profits.

The revenue generated by the advertisements should be considered earnings if they were created by the blogger's effort, skill, or industry. Arguably, this is the case. If readers did not visit the blog, they would be unable to click on the advertisements. What draws readers to the blog is the blogger's posts, which required his effort, skill, and industry to write. Thus, the blog's revenues could be considered earnings. If the revenues are considered earnings, then in this situation in which all of the posts were written prior to the marriage, the income should be classified as separate property because the effort that created the blog posts was exerted outside of the community.

Remembering how pay-per-click advertisements operate, though, the revenue is created because of the blogger's *indirect* effort, skill, and industry. The real effort is exerted by the blog readers who click on the advertisement and, perhaps even more importantly, by the third party that placed the individual

advertisement on the blog initially. There is no direct effort exercised by the blogger. Further, when a reader clicks on an advertisement, the blog does not diminish in value. From this standpoint, the advertisement revenues created by the blog begin to look like profits, i.e. like property created by other property without any effort, skill, or industry of the owner, and without diminishing the substance of the underlying thing. If the revenues are treated like profits, then, in the situation in which the blog is separate property, how the profits are classified depends upon whether the state in which the blogger is located follows the American Rule or the Civil Law Rule. If the jurisdiction follows the latter, the blog's revenues would be considered community property because the Civil Law Rule states the profits of separate property are classified as community property.

The difficulty for blog revenues generated by pay-per-click advertisements is that the revenues are not entirely like profits *or* earnings but instead are like profits *and* earnings. The advertisement revenues are earned in part from the blogger's labor, but the revenues are also gained in part from the effort, skill, and industry of the reader that clicks on the advertisement and the third party that places the advertisement on the blog. Accordingly, courts facing such a classification issue must determine the extent to which the revenues are generated by the blogger's labor; if the revenues are predominantly created by the blogger's labor, the revenues should be considered earnings, but if the revenues are predominantly attributed to a source other than the blogger's labor, then the revenues should be considered profits.<sup>51</sup>

The preceding example considers revenues generated by pay-per-click advertising, but assume instead that an advertiser sponsors a blog by paying a blogger to promote the sponsor's product.<sup>52</sup> In this situation, the revenues generated from the sponsorship are directly attributable to the blogger's labor as, in exchange for the revenues, the blogger must promote the sponsor's

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51. See *Laughlin v. Laughlin*, 155 P.2d 1010, 1018 (N.M. 1944) (“[Profits] should be confined to those proceeds which arise, without the . . . *active* use of the separate property, as a capital, in carrying on some business, trade, or profession, and therefore, without the . . . *direct* labor as the agency or means for their production.” (quoting John Norton Pomeroy, *Husband's Separate Estate*, 4 WEST COAST REPORTER 193, 196 (1884))); *Paxton v. Bramlette*, 228 So. 2d 161, 163 (La. Ct. App. 1969) (“[I]f the revenue received was the result of substantial capital investment with relatively little labor, [the revenue] would be [profit] . . . ; but if the revenue represents the return on substantial labor with relatively little capital investment, [then the revenue] would be earnings.”) (quoting Howard W. L'Enfant, Jr., Comment, *Classification of Property*, 25 LA. L. REV. 95, 104 (1964))).

52. See, e.g., Goodman, *supra* note 47.

product. Thus, the blog's revenues are likely earnings. The question that arises, though, is to what are the earnings attributable: community or separate labor? Suppose a blogger promotes a product by placing links on his blog to websites where the product may be purchased. If the blogger places the links on his blog prior to entering the marriage, the labor he exerts to upload the links onto his blog is separate labor. However, the contract the blogger has with the sponsor may include a requirement that the blogger continue to update his blog with new posts in order to drive traffic to the blog, thus increasing the number of readers who will see the links to the advertised product. If the blogger continues to update his blog after he marries, the blogger's community labor helps generate the revenue created by the blog's sponsorship. However, there is a division in the labor that the blogger uses to earn the revenues: part of the labor exerted by the blogger was his separate labor in uploading the links to the product, and part of the labor was community labor in writing the new blog posts. Accordingly, there should likely be a similar split in the earnings created by the sponsorship: part of the earnings should be classified as community property because they were created by community labor and part of the earnings should be classified as separate property because they were created by separate labor.<sup>53</sup>

How revenues generated from a blog should be classified is a question that must be answered in light of the unique circumstances surrounding the individual blog in question. It is not, however, the only question revolving around blogs begun outside of marriage. The classification of blog posts presents different, though equally challenging, questions.

If a blogger begins blogging prior to his wedding and continues posting on the blog after his wedding, the blog posts—which are a form of intellectual property—must be classified, and likely should be classified as either earnings or increases in value. Which classification the new blog posts should receive is not readily apparent.

Outside of the virtual world, if a homeowner adds onto his separate property house while married, in most jurisdictions, the addition is also considered separate property.<sup>54</sup> At the point of termination of the community, the other spouse has a right of

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53. At the termination of the community, a court would need to determine the quantity of the earnings that were generated by the blogger's community labor versus the quantity generated by the blogger's separate labor. *See infra* Part III (discussing termination of the community).

54. *See, e.g.,* Wilkerson v. Wilkerson, 992 S.W.2d 719, 722–23 (Tex. App. 1999); Potthoff v. Potthoff, 627 P.2d 708, 715 (Ariz. Ct. App. 1981).

reimbursement for any community labor exerted on the separate property addition, but the addition itself remains separate property.<sup>55</sup> Applying this principal, a court may find that additional blog posts are merely increases to the blogger's separate property blog. In other words, if the blogger has the rights to the blog's domain name prior to his wedding, then that domain name may be akin to the blogger's separate property Internet home.<sup>56</sup>

While the separate property Internet home provides a nice analogy to real, tangible separate property homes, blogs create different property interests than houses do. The blogger typically does not own his blog's domain name, he merely has a license to use it.<sup>57</sup> Thus, a court could distinguish from the increases-in-value cases associated with real property, and instead examine cases concerning intellectual property.<sup>58</sup> When examining the intersection of intellectual property law and community property law, courts have found that if one spouse begins writing a book during the marriage and finishes it outside of the marriage, the non-author spouse is entitled to the percentage of the proceeds attributable to that portion of the book written during the marriage.<sup>59</sup> To reach such a conclusion, courts have held that the copyright for the material created during the marriage was a community asset.<sup>60</sup> Applying this principle, courts could consider the blog posts that are written during the marriage to be community writings capable of gaining their own community copyright.

How blog posts should be classified is unclear, but the importance of making that classification is quite evident. As mentioned above, blog posts are literary works and therefore

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55. See LA. CIV. CODE art. 2368 (2011); *Honnas v. Honnas*, 648 P.2d 1045, 1046 (Ariz. 1982); *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984); *Legg v. Legg*, 75 P. 130, 132-33 (Wash. 1904); *Jurado v. Jurado*, 892 P.2d 969, 973 (N.M. Ct. App. 1995).

56. See *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (describing registering a domain name as "like staking a claim to a plot of land at the title office").

57. See *supra* Part I.B.

58. See *Richardson*, *supra* note 3, at 742-46 (discussing intellectual property and community property).

59. *Michel v. Michel*, 484 So. 2d 829, 833-34 (La. Ct. App. 1986); see also *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000) (applying the same principle to artwork); *Miner v. Miner*, No. 13-01-659-CV, 2002 Tex. App. LEXIS 5841, at \*6-7 (Tex. App. Aug. 8, 2002) (applying the same principle to computer software).

60. *Rodrigue*, 218 F.3d at 436-39; see also *In re Marriage of Worth*, 241 Cal. Rptr. 135, 139 (Cal. Ct. App. 1987) (noting that "nothing is found in the [Copyright] Act which . . . precludes the acquisition of a community property interest by a spouse.").

intellectual property that can be protected by federal copyright law. Following the decision of the United States Fifth Circuit in *Rodrigue v. Rodrigue*, a copyright can be classified as community or separate property.<sup>61</sup> The holder of the copyright has a right to all of the profits the copyright creates. Thus, blog posts classified as community give the non-blogger spouse rights to the revenues the blog posts generate, even if those revenues are generated after the termination of the community. Blog posts classified as separate property (and thus subject to a copyright held only by the blogger-spouse) may not grant the non-author spouse a right to the profits the blog posts generate, at least if the spouses reside in a state that classifies the profits of separate property as separate property.<sup>62</sup>

Regardless of a court's decision on how blog posts, revenues from blogs, or the rights to a blog's domain name should be classified, there are two important lessons demonstrated herein. First, while classifying the rights created by blogs is complicated, it is not impossible. Classification simply requires a thorough investigation of how the particular virtual property in question operates. Judges, legislators, and lawyers in community property jurisdictions must understand how the individual blog in question works because all blogs are not the same. The differences between blogs can have real impacts on how aspects of the blog, such as revenues, blog posts, and domain names, should be classified.

This first conclusion leads to the second conclusion: community property jurisdictions do not need to craft new legislation establishing new categories for classifying virtual property. The current categories are more than adequate, so long as the virtual property in question is fully understood. Thus, great effort should be exerted to understand how virtual property works such that jurisdictions can properly apply their current classification rules to this burgeoning form of property.

## II. MANAGEMENT

Once property has been classified as part of the community, the next inquiry is which spouse has the right to manage the community property during the marriage.<sup>63</sup> Though community

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61. *Id.* See also COPYRIGHT ACT OF 1976, 17 U.S.C. § 102 (2005) (providing that literary works are protected by the Copyright Act).

62. See *supra* note 22 (noting that the American Law Rule states that the profits of separate property are separate property).

63. Management issues do not concern separate property because community property management schemes only apply to community property. See, e.g., ARIZ. REV. STAT. ANN. § 25-214(A) (West, Westlaw through 2011 amendments); IDAHO CODE ANN. § 32-904; (West, Westlaw through July 2011

property regimes have fairly well-defined management schemes, their application to community virtual property is difficult for two reasons. First, virtual property does not always naturally fall into one particular management scheme. Second, even if and when virtual property should clearly be subject to a particular management scheme, the actions taken with virtual property are not necessarily analogous to the types of actions traditionally governed by community property management rules.

### *A. Management of Community Property*

Community property regimes recognize three management schemes: equal management, joint management, and sole management.<sup>64</sup> The default form of management for almost every community property regime is equal management.<sup>65</sup> Under equal management, either spouse, acting alone, has the full power to manage, control, dispose of, and encumber community property.<sup>66</sup> Thus, if a husband and wife own as community property a computer, and that computer is subject to equal management, either the husband acting alone or the wife acting alone may sell the computer.

Though equal management is the default rule in most community property states, it is not always the most common management scheme. All community property regimes that employ equal management carve out an abundance of exceptions that require spouses to act together to manage community property.<sup>67</sup>

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amendments); WASH. REV. CODE ANN. § 26.16.010 (West, Westlaw 2011 amendments).

64. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 127 (2004); see also J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99, 106–15 (1993).

65. Oldham, *supra* note 64, at 114–15; see ARIZ. REV. STAT ANN. § 25-214(B) (West, Westlaw through 2011 amendments); CAL. FAM. CODE §§ 1100(a), 1102(a) (West 2004); IDAHO CODE ANN. § 32-912 (West, Westlaw through July 2011 amendments); LA. CIV. CODE art. 2346 (2011); NEV. REV. STAT. ANN. § 123.230 (West, Westlaw through 2010 amendments); N.M. STAT. ANN. § 40-3-14(A) (West, Westlaw through 2011 amendments); WASH. REV. CODE ANN. § 26.16.030 (West, Westlaw through 2011 amendments); WIS. STAT. ANN. § 766.51(1) (West 2011, Westlaw through July 2011 amendments).

66. SPAHT & MORENO, *supra* note 5, § 5.3; Elizabeth de Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property*, 30 GONZ. L. REV. 235, 247 (1995).

67. See ARIZ. REV. STAT. ANN. § 25-214(C) (West, Westlaw through 2011 amendments); CAL. FAM. CODE § 1100(b)–(d) (West 2004); NEV. REV. STAT. ANN. § 123.230 (West, Westlaw through 2010 amendments); N.M. STAT. ANN.

There are two predominant types of joint management exceptions. First, there are exceptions to specific types of property. Most states require joint management of any property in which both spouses are “named in a document evidencing ownership” of the property.<sup>68</sup> If a husband and wife both sign a contract for an original iPhone, then the husband and wife would need to reach a joint decision before disposing of the original iPhone to upgrade to the iPhone 4. Second, there are exceptions to particular types of activities. For example, many community property regimes restrict a spouse’s ability to donate community property without the consent of the other spouse.<sup>69</sup> Similarly, jurisdictions limit the ability of one spouse to sell, convey, or encumber real property.<sup>70</sup>

The last management system employed by community property regimes is sole management. Property that is subject to sole management may be managed only by the spouse with managing power.<sup>71</sup> Statutes establishing sole management typically do so for community property in which there is documented evidence of ownership in only one spouse<sup>72</sup> or the community property is registered in the name of only one spouse.<sup>73</sup> At least one state—Louisiana—qualifies that sole management applies only when community property is registered in the name of one spouse “as provided by law,” thus presumably excluding from sole

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§ 40-3-14(C) (West, Westlaw through 2011 amendments); WASH. REV. CODE ANN § 26.16.030 (West, Westlaw through 2011); WIS. STAT. ANN. § 766.51(2) (West, Westlaw through July 2011 amendments). *See generally* Oldham, *supra* note 64, at 107–12 (discussing joint management).

68. N.M. STAT. ANN. § 40-3-14(C)(1) (West, Westlaw through 2011 amendments). *Accord* WIS. STAT. ANN. § 766.51(2) (West, Westlaw through July 2011 amendments).

69. *See, e.g.*, CAL. FAM. CODE § 1100(b) (West 2004); LA. CIV. CODE art. 2349 (2011).

70. *See* CAL. FAM. CODE § 1102 (West 2004); IDAHO CODE ANN. § 32-912 (West, Westlaw through July 2011 amendments); LA. CIV. CODE art. 2347(A) (2011); NEV. REV. STAT. ANN. § 123.230(3) (West, Westlaw through 2010 amendments). *See also* CAL. FAM. CODE § 1100(c) (West 2004) (restricting the ability of one spouse to sell, convey, or encumber community personal property used as the family dwelling or furniture, furnishings, or fittings of the home).

71. *See* LA. CIV. CODE arts. 2350, 2351 (2011); N.M. STAT. ANN. § 40-3-14(B) (West, Westlaw through 2011 amendments); TEX. FAM. CODE ANN. § 3.102(a) (West 2006); WASH. REV. CODE ANN. § 26.16.030(6) (West, Westlaw through 2011 amendments). *See generally* Oldham, *supra* note 64, at 112–14 (discussing sole management).

72. *E.g.*, N.M. STAT. ANN. § 40-3-14(B) (West, Westlaw through 2011 amendments).

73. *E.g.*, LA. CIV. CODE art. 2351 (2011).

management “private registration services which register movables not according to some statutory scheme.”<sup>74</sup>

In addition to the three aforementioned managerial schemes, some scholars and case law have asserted that, if a spouse alone enters a contract with a third party, privity of contract applies such that the non-contracting spouse may not affect the legal relationship between the contracting spouse and the third party.<sup>75</sup> The comments to Louisiana Civil Code article 2346 further this notion by stating that a “[non-contracting] spouse may not affect the legal relations and responsibilities of the spouse who incurred the obligation and the other party or parties to that contract, because, in principle, contracts produce effects as between the parties only.” Be that as it may, there remains conflicting case law as to whether privity of contract inherently impacts how community property is managed,<sup>76</sup> and, if it does, the degree to which spouses’ rights are affected.

Excluding the possible application of privity of contract, the management possibilities in community property jurisdictions are, by and large, well-outlined. In contrast, though, the enforcement mechanisms for ensuring spouses follow the appropriate managerial system are lacking.<sup>77</sup> That little enforcement of spousal-management rules takes places is not surprising given that managing the household disputes of an intact marriage is a business that courts generally try to avoid.<sup>78</sup> Regardless, spouses may find judicial remedies in extreme circumstances. In Louisiana, spouses may sue one another during the marriage for bad faith management or fraudulent management of community property.<sup>79</sup> Such a claim generally requires a demonstration of some financial harm caused by the bad-faith spouse.<sup>80</sup> Wisconsin also allows a spouse to sue for breach of the duty of good faith if the actions of the bad faith spouse damage the claiming spouse’s separate property.<sup>81</sup> During the marriage, a spouse in California or

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74. SPAHT & MORENO, *supra* note 5, § 5.7; LA. CIV. CODE art. 2351 (2011).

75. *See* Canale v. Gus Mayer, Co., 481 So. 2d 170 (La. Ct. App. 1985); REPPY & SAMUEL, *supra* note 22, at 263–64.

76. *Compare In re Marriage of Brown*, 544 P.2d 561, 568 (Cal. 1976), with *Johns v. Retirement Fund Trust*, 149 Cal. Rptr. 551 (Cal. Ct. App. 1978).

77. *See* SPAHT & MORENO, *supra* note 5, § 5.3, at 359; Oldham, *supra* note 64, at 115–17.

78. *See* Oldham, *supra* note 64, at 116.

79. *See* LA. CIV. CODE art. 2354 (2009); LA. REV. STAT. ANN. § 9:291 (2008).

80. *See, e.g., Thigpen v. Thigpen*, 91 So. 2d 12, 19–20 (La. 1956), *overruled on other grounds by Fowler v. Fowler*, 861 So. 2d 181 (La. 2003); *Hall v. Allred*, 385 So. 2d 593 (La. Ct. App. 1980).

81. WIS. STAT. ANN. § 766.70(1) (West, Westlaw through July 2011 amendments).

Wisconsin may sue her husband to have her name added to community property.<sup>82</sup>

These detailed management structures, with their lacking means of enforcement, demonstrate the hortatory nature of community property management law. Although the law may be more goal-oriented than result-oriented, how property is managed is of great import to spouses because spouses manage community property every day. Management issues concerning virtual community property can be more challenging to confront because decisions occur on a more frequent basis and at a higher rate of speed than they do with tangible community property. An example of the difficulties present in managing community virtual property is highlighted by community Twitter accounts.

### *B. Example of Virtual Property: Twitter Accounts*

Twitter is a “real-time information network”<sup>83</sup> that allows users, or tweeters,<sup>84</sup> to announce on the Internet “[w]hat’s happening” in their lives by posting “tweets.”<sup>85</sup> Tweets are similar to blog posts in that tweets are words posted by the tweeter providing some update about the tweeter or whatever the tweeter chooses to tweet about.<sup>86</sup> Tweets, however, must be 140 characters or less,<sup>87</sup> thus making tweets shorter than most blog posts. In addition to tweeting about herself, a tweeter can also reply to the tweets of other tweeters, thereby initiating a usually public<sup>88</sup> dialogue of few words.<sup>89</sup>

To gain access to the tweeting world, a to-be Twitter user must first enter into an agreement with Twitter by signing up for a

82. CAL. FAM. CODE § 1101(c) (West 2004); WIS. STAT. ANN. § 766.70(3) (West, Westlaw through July 2011 amendments).

83. *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Aug. 23, 2011).

84. *The Twitter Glossary*, TWITTER, <http://support.twitter.com/entries/166337-the-twitter-glossary#t> (last visited Aug. 23, 2011) (defining “tweeters”). Users of Twitter are also called “twitterers.” *Id.*

85. When a tweeter posts a tweet, the question “What’s happening?” appears before the box in which the tweeter types her tweet. *See How To Post a Tweet*, TWITTER, <http://support.twitter.com/articles/15367-how-to-post-a-twitter-update-or-tweet> (last visited Sept. 15, 2011).

86. *The Twitter Glossary*, *supra* note 84 (defining “tweet” as both a noun and a verb); *see also What Is Twitter*, TWITTER, <http://business.twitter.com/basics/what-is-twitter> (last visited Oct. 5, 2011).

87. *How To Post a Tweet*, *supra* note 85.

88. Conversations can be private through the use of direct messaging. *See The Twitter Glossary*, *supra* note 84 (defining “direct message” as private tweets between the sender and recipient).

89. *How To Post a Tweet*, *supra* note 85.

Twitter account. Signing up requires that the person enter his or her name, an email address, and a password.<sup>90</sup> The person signing up is then prompted to create a unique Twitter username and agree to the terms of service.<sup>91</sup> Once this is completed, the soon-to-be tweeter must confirm the account by responding to an email sent to the provided email address, and then the Twitter account is created. In creating a Twitter account, the tweeter retains the rights to any content she posts on the Twitter account or tweets, while Twitter maintains “right, title, and interest” to the Twitter service itself.<sup>92</sup>

In order to tweet, a tweeter must log into her Twitter account.<sup>93</sup> Logging in requires that the tweeter supply her username and password.<sup>94</sup> Once signed in, the tweeter is able to see her Twitter profile, which is her Twitter page displaying the information she has chosen to display about herself, such as her name, a biography, her location, as well as all the tweets she has posted from her account.<sup>95</sup>

Although the tweeter must log in with her confidential password, the tweeter is not restricted from giving others her password. Under the Twitter terms of service, the tweeter is responsible for the safety of her password.<sup>96</sup> Unlike other forms of virtual property,<sup>97</sup> there is no limitation on how many people can use a Twitter account. In fact, a company called CoTweet has been developed to help people (typically businesses) share an account to increase visibility of the account.<sup>98</sup>

Twitter has become extraordinarily popular, boasting 460,000 new accounts created per day and 230 million tweets per day.<sup>99</sup> As of October 2011, Twitter had more than 100 million registered users.<sup>100</sup> This not only includes individual tweeters, but also businesses. “Businesses use Twitter to quickly share information with people interested in their products and services, gather real-

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90. See TWITTER, <http://twitter.com/> (last visited Sept. 15, 2011).

91. *Sign Up*, TWITTER, <https://twitter.com/signup> (last visited Sept. 15, 2011).

92. *Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Sept. 15, 2011). The tweeter is granted a “personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the [Twitter] software . . . .” *Id.*

93. *How To Post a Tweet*, *supra* note 85.

94. *See Sign In*, TWITTER, <https://twitter.com/#!/login> (last visited Sept. 15, 2011).

95. *The Twitter Glossary*, *supra* note 84 (defining “profile”).

96. *Terms of Service*, *supra* note 92.

97. *Cf. infra* Part III.B (noting that Facebook restricts the sharing of accounts between people).

98. *See About*, COTWEET, <http://cotweet.com/about/> (last visited Sept. 15, 2011).

99. *What Is Twitter*, *supra* note 86.

100. *Id.*

time market intelligence and feedback, and build relationships with customers, partners and influential people.”<sup>101</sup> For example, Best Buy uses Twitter to provide support to its customers.<sup>102</sup> Best Buy customers can post questions about Best Buy products, and a Best Buy employee will tweet an answer to the question such that the tweeting customer and other customers can see the information.<sup>103</sup>

In many respects, Twitter accounts are like blogs that provide quicker and shorter posts (or tweets) for the world to see. Just as blogs raise new classification issues for community property jurisdictions to consider, Twitter accounts also prompt new questions regarding the management of community property.

### C. Management of Twitter Accounts

Two aspects of Twitter accounts prompt a desire to determine how the accounts should be managed: logging in and tweeting. Both logging in and tweeting require the ability to use the Twitter account. How the Twitter account is managed determines which spouse should (at least theoretically under the letter of the law) have the ability to use the account. To determine which management scheme should apply to community Twitter accounts, the default rule in most jurisdictions should be that the spouses have equal management over the account unless an exception applies. A number of exceptions are contenders for applying, depending upon the facts surrounding the Twitter account in question.

One exception to equal management in some states is sole management when there is documented evidence of ownership in only one spouse. It may be argued that the spouse who registers the account in her name “owns” the Twitter account. The difficulty in applying this ownership rule is that Twitter accounts, though creating property rights, are not owned. The tweeter-wife who creates the Twitter account during the marriage has a license to use the account; Twitter remains the owner of the actual Twitter service.<sup>104</sup> Thus, rules applying sole management based on

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101. *About Twitter*, *supra* note 83.

102. *See Best Buy @twelpforce*, TWITTER, <http://business.twitter.com/optimize/case-studies/best-buy> (last visited Sept. 15, 2011).

103. *Id.*

104. Note that this is different than asking who owns (and can manage) the tweets.

As alluded to earlier, much of virtual property is intellectual property and therefore protected by copyright law. *See supra* Part I.B. The only case to discuss the intersection of community property management schemes and intellectual property is *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000). In *Rodrigue*, the United States Fifth Circuit Court of Appeals found that a

documentation of ownership in one spouse likely do not apply to Twitter accounts.

However, rules regarding registration could apply to Twitter accounts. When a Twitter account is originally registered, the spouse registering the account generally registers the account in his or her name.<sup>105</sup> If the wife lists only her name in the online registration form, then the account could be considered under the wife's sole management because the registration form indicates the Twitter account is in the wife's name. Accordingly, a Twitter account registered only in the wife's name arguably should be solely managed by her in states that recognize registration in one spouse as a cause for sole management. In a state like Louisiana that requires registration to be "as required by law," though, it is unclear whether registration of a Twitter account would fit within the registration rule when registration is not required by law.

Arguments that registration should grant the tweeter-spouse sole management also bring up privity of contract arguments. One theory that may be offered in how a Twitter account should be managed is that privity of contract should prevail, giving the spouse that registered for the Twitter account sole management of the account because the registering spouse entered into an agreement with Twitter when she created the Twitter account. If privity of contract applies, though, the limitation traditionally provided is that the non-contracting spouse cannot alter the legal relationship between the contracting parties. It is unclear whether accessing a Twitter account alters, or even affects, the relationship between Twitter and the tweeter-spouse, given that Twitter does not prohibit multiple tweeters from using one account.

Beyond the name of the registrant, other information provided to Twitter could aid in determining what management system should apply to the account. When registering, the registrant must provide a Twitter username that will be shown in all tweets. If the

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copyright was subject to sole management under Louisiana law because a copyright was a registered movable, and thus fell under the rule in Louisiana Civil Code article 2351 that all registered movables are solely managed by the registrant spouse. *Id.* at 438–39. While *Rodrigue's* discussion of sole management is applicable to written material subject to protection under federal copyright law, the question presented here is not management of written material, but management of the account under which material could be written.

105. It is also possible that in registering for the Twitter account, the registering spouse could enter the name "Joe and Jane Smith," as opposed to simply "Jane Smith." Although Twitter only provides one space to enter a name, there is nothing precluding the registrant from listing both her and her husband's name. See *Sign up*, *supra* note 91.

username provided is “JoeandJaneSmith,” this may provide some evidence that both spouses use the account, and thus joint management should apply.

Joint management schemes are also applied when certain actions are taken by spouses, such as selling, encumbering, or conveying particular types of property. These rules could perhaps prevent a spouse from shutting down a community Twitter account altogether, but tweeting is not particularly analogous to selling, encumbering, or conveying. Moreover, the states with joint management rules that limit one spouse’s ability to sell, encumber, or lease typically apply those rules to only real property, not to intangible personal property. Thus, this joint management exclusion might be inapplicable to Twitter accounts.

If the joint management and sole management exclusions do not apply, then the default scheme of equal management should govern the Twitter account. This means that both spouses should have an equal right to manage the account. In practice, applying an equal management scheme to the Twitter account means that both spouses should be able to access the account, change the account’s password, or tweet without the approval of the other spouse.<sup>106</sup> These rules of equal management apply regardless of whether the Twitter account is predominantly (or even only) used by the wife;

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106. Whether a husband can access his wife’s Twitter account may initially seem like an inconsequential question unlikely to ever find its way into a courtroom. At least one state has begun considering this question with serious consequences. Whether it is criminal for a spouse in Michigan (a non-community property state) to access her spouse’s separate email account is the issue currently being tried in the case of Leon Walker. See L.L. Brasier, *Appeals Court to Review Charge Against Man for Reading Wife’s E-mail*, DETROIT FREE PRESS, Sept. 7, 2011. Mr. Walker accessed his wife’s email account to find evidence that she was having an affair. *Id.* After finding the evidence in her email account and using that evidence during his divorce proceeding, Mr. Walker was prosecuted for violating a Michigan state statute that makes it a felony—punishable by up to five years in prison—to “intentionally and without authorization . . . [a]ccess or cause access to be made to a computer program, computer, computer system or computer network to acquire . . . property . . . .” MICH. COMP. LAWS § 752.795. A Michigan Court of Appeals halted the trial in June 2011 and agreed to hold an appellate hearing regarding whether the charges should be dismissed, as the Appeals Court had reservations about whether the criminal statute was ever intended to be applied to domestic relations cases. Brasier, *supra*. As of the time of publication, the Appeals Court had not held its hearing.

Regardless of what the Michigan court determines in the case of Mr. Walker, management of virtual property creates a certain twist to a fact pattern like that of Mr. Walker. In community property states, the right of a spouse to access a community email account could be clearer if the email account is subject to equal management. However, if the email account were classified as separate property or as community property subject to sole or joint management, the rights of the individual spouses are called into question.

the husband should still, applying equal management rules, have a right of access to the account.

Although spouses with a community Twitter account may have equal management of the account, whether the benefits associated with equal management are enforceable is questionable. A wife could arguably sue for bad faith management of a Twitter account in Louisiana or Wisconsin if her husband tweeted in such a manner as to harm the Twitter account. While this may be a theoretical option provided by community property law, cases involving bad faith management generally involve monetary loss. Thus, the wife may have to prove that the harm to the community Twitter account caused some economic damage. In California, a spouse could likely file suit to have his name added onto the Twitter account created by the wife, but it is not clear that the California statute allowing a spouse to sue to have his name added to community property would also allow the husband to sue to enforce his right to day-to-day access to the account.

That there is no clear method of enforcing equal management or, for that matter, any management scheme of a Twitter account may be disheartening, but it follows community property jurisdictions' general propensity to stay out of management issues between spouses. Continuing this general trend to let spouses manage as they want to manage, community property jurisdictions may make the policy decision to leave spouses to their own devices and not provide any clear guidance as to what management scheme virtual property, such as Twitter accounts, falls under. To the extent, though, that jurisdictions wish to offer some guidance—even if it is merely hortatory guidance—as to which spouse can manage which piece of virtual property, community property jurisdictions might consider amending their laws to clarify what management scheme applies to different types of virtual property. What states do not need to do, however, is re-write management rules to create a new management system solely for virtual property. The structures of equal management, joint management, and sole management are adequate to govern virtual property; it is simply unclear under which management regime a particular piece of virtual property should fall.

While jurisdictions need not do a wholesale revision of community property management schemes, what jurisdictions must do is understand the nature of the virtual property in question should management issues arise or should states opt to add more clarity to which spouse may manage community virtual property. It would be faulty for a state to determine that all Twitter accounts automatically fall under equal management because not all Twitter accounts are the same. Instead, if states wish to expressly govern

how virtual property should be managed, states should—as they do now with most management rules—consider the aspects of Twitter accounts that make the individual account more likely to be subject to joint or sole or exclusive management. For example, a state could establish a presumption that a Twitter account in which the husband and wife are named in the registration or in the account name is subject to joint management. Such a rule would examine the pertinent facts surrounding the specific Twitter account in question, as opposed to just grouping all Twitter accounts together and considering them to be the same.

As virtual property continues to grow in its social and economic importance, management issues between spouses of virtual community property are sure to arise. Regardless of whether states provide guidance for how spouses should manage their virtual community property, management is something that spouses should consider themselves; for as one commentator has written, “[m]ost spouses who are unable to agree informally regarding management decisions presumably decide to divorce.”<sup>107</sup>

### III. TERMINATION

When couples decide to divorce, courts—and couples—care tremendously about how the couple’s community property should be divided and valued. Division and valuation of former community property is difficult, but it is made easier when particular pieces of property naturally should be allocated to one spouse and when there is a market for the property to help determine its value. With virtual property, the property may naturally (or contractually) be assigned to one spouse, but the value of the virtual property may be more difficult to discern.

In addition to evening up assets between the former spouses, courts must also ensure that spouses are properly reimbursed for certain expenses they incurred during the marriage. Just as valuing virtual property may prove challenging, determining the amount that spouses should be reimbursed for expenditures on virtual property may also create complications.

#### *A. Termination of the Community*

Upon termination of the community by divorce, community property must be divided between the former spouses.<sup>108</sup> Dividing

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107. Oldham, *supra* note 64, at 122.

108. See, e.g., ARIZ. REV. STAT. ANN 25-318(A) (West, Westlaw through 2011 amendments); IDAHO CODE ANN. § 32-712 (West, Westlaw through July

community property means that all property must be valued and, if possible, assigned to one spouse or, if not possible, co-owned by the former spouses.<sup>109</sup> In Louisiana, courts are guided in assigning community property between the former spouses: “[i]n allocating assets and liabilities . . . [t]he court shall consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant.”<sup>110</sup>

While assigning property between spouses can be contentious, the more difficult aspect of dividing former community property—particularly in the context of virtual property—is valuing the property.<sup>111</sup> Former community property must be valued in order to ensure that former spouses receive their fair share of the former community property. In some states, “fair share” means an equal distribution of the former community property between the spouses, while in other states it means an equitable distribution between the spouses.<sup>112</sup>

Regardless of whether spouses are to receive their equal or equitable portion, states generally value property by determining the fair market value of the property,<sup>113</sup> and then, in some instances, adding or subtracting value onto the property to compensate for additional factors, such as post-divorce tax consequences.<sup>114</sup> A frequent addition made to the fair market value

2011 amendments); LA. REV. STAT. ANN. § 9:2801(A)(4)(b) (2009); NEV. REV. STAT. ANN. § 125.150(1)(b) (West, Westlaw through 2010 amendments); WIS. STAT. ANN. § 767.61 (West, Westlaw through July 2011 amendments); see generally REPPY & SAMUEL, *supra* note 22, at 351–52 (discussing the division of property in equal division states).

109. See LA. CIV. CODE art. 2369.1 (2009); WIS. STAT. ANN. § 766.75 (West, Westlaw through July 2011 amendments).

110. LA. REV. STAT. ANN. § 9:2801(A)(4)(c) (2009).

111. Katherine Shaw Spaht, *Post-Dissolution Management of Former Community Property: An Unresolved Problem*, 1990 WIS. L. REV. 705, 705-06 (1990) (noting that “more often than not, the division of property must be preceded by a resolution of complicated questions of classification and valuation of property by seemingly endless discovery and lengthy negotiations”).

112. Compare CAL. FAM. CODE § 2550 (West 2004) (dividing former community property equally), and LA. REV. STAT. ANN. § 9:2801(A)(4)(b) (2009) (same), with ARIZ. REV. STAT. ANN. § 25-318(A) (West, Westlaw through 2011 amendments) (dividing former community property equitably). See generally James Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn’t Equal Equal*, 72 LA. L. REV. 21 (2011).

113. See, e.g., *Dorbin v. Dorbin*, 731 P.2d 959, 964 (N.M. 1986).

114. Compare *In re Marriage of Fonstein*, 552 P.2d 1169, 1176–77 (Cal. 1976) (in valuing a husband’s community law practice, refusing to include

of some community property, and thus a frequent source of debate for divorcing couples, is goodwill.<sup>115</sup> Goodwill is

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.<sup>116</sup>

As evidenced by the definition of goodwill, it only applies to professional practices, like medical and legal practices.<sup>117</sup>

States have taken different approaches in allocating goodwill between spouses. Some states find that the goodwill of a community-owned professional practice is community property to the extent it was created during the community.<sup>118</sup> After placing a

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future tax consequences that would be created if the husband received taxable withdraw payments from his law practice in order to pay his wife her community share of the practice), *with Koelsch v. Koelsch*, 713 P.2d 1234, 1244 (Ariz. 1986) (“[I]f the future maturity date [of a deferred voluntary compensation plan] were close to the trial date, the tax consequences could be immediately and specifically determined. In such a case, the court should consider the effects of taxation on the valuation.” (quoting *Johnson v. Johnson*, 638 P.2d 705, 710 (Ariz. 1981))).

115. See Richardson, *supra* note 3, at 734–37; Bryan Maudlin, Comment, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at the Dissolution of the Marital Community*, 56 TUL. L. REV. 313 (1981) (noting the difficulty in valuing goodwill in community property regimes).

116. Richardson, *supra* note 3, at 752 (citations and quotations omitted); see also Wisner v. Wisner, 631 P.2d 115, 119 (Ariz. Ct. App. 1981) (defining goodwill as an “asset, intangible in form, which is an element responsible for profits in a business”); *In re Marriage of Fleege*, 588 P.2d 1136, 1138 (Wash. 1979) (defining goodwill as “property of an intangible nature [that creates an] expectation of continued patronage”).

117. See, e.g., *Nail v. Nail*, 486 S.W.2d 761, 763–64 (Tex. 1972); *Ford v. Ford*, 782 P.2d 1304, 1308–09 (Nev. 1989); *In re Marriage of Campbell*, 589 P.2d 1244, 1247–48 (Wash. 1978).

118. *Mitchell v. Mitchell*, 732 P.2d 208, 212 (Ariz. 1987); *In re Marriage of Rosen*, 130 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 2002); *Williams v. Waldman*, 836

value on the goodwill, these states add that goodwill value onto the value of overall practice to be monetarily divided between the former spouses. Other states do not allow goodwill that is attributable to an individual spouse to be added onto the valuation of a community professional practice.<sup>119</sup> These states recognize that there is a difference between goodwill attributable to a business and goodwill attributable to an individual. The former may be included in the valuation of the community enterprise, whereas the latter may not.<sup>120</sup>

Once courts have properly valued and divided all property, courts still must reimburse spouses for certain expenses incurred during the marriage.<sup>121</sup> As previously discussed, community labor and resources used to increase the value of separate property creates a right of reimbursement for the community in most states.<sup>122</sup> Similarly, the use of separate property to satisfy community debts may create a right of reimbursement in the spouse whose separate property was used.<sup>123</sup>

Though virtual property, such as Facebook profiles, may not be sold on the free market,<sup>124</sup> it may still have value and, in particular, it may generate goodwill. Furthermore, virtual property may create rights of reimbursement that must be settled at divorce. Such circumstances with virtual property are issues that courts no doubt will one day face.

### *B. Example of Virtual Property: Facebook Profiles*

Facebook is a social-network website.<sup>125</sup> Social networking websites “are web-based services that allow individuals to (1)

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P.2d 614, 616 (Nev. 1992); *Hertz v. Hertz*, 657 P.2d 1169, 1174 (N.M. 1983); *In re Marriage of Fleege*, 588 P.2d 1136, 1140 (Wash. 1979).

119. LA. REV. STAT. ANN. § 9:2801.2 (2009); *Nowzaradan v. Nowzaradan*, No. 01-05-00094-CV, 2007 WL 441709, at \*23–24 (Tex. App. Feb. 8, 2007); *Finn v. Finn*, 658 S.W.2d 735, 740–41 (Tex. App. 1983); *Holbrook v. Holbrook*, 309 N.W.2d 343, 350–51 (Wis. Ct. App. 1981).

120. See *Richardson*, *supra* note 3, at 736–37.

121. See generally *REPPY & SAMUEL*, *supra* note 22, at 358.

122. See *supra* Part I.A.

123. See, e.g., CAL. FAM. CODE § 2640(c) (West 2004); LA. CIV. CODE art. 2364 (2009); see also *SPAHT & MORENO*, *supra* note 5, § 7.14.

124. See *infra* Part III.B. However, there are types of virtual property that are regularly sold on the free market, such as property acquired in multiplayer online games. See generally Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier 2* (CESifo, Working Paper No. 618, 2001).

125. See FACEBOOK, <http://www.facebook.com> (last visited Aug. 22, 2010).

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.”<sup>126</sup>

To create a Facebook profile,<sup>127</sup> the user signs up for a Facebook account, much like he would sign up for a Twitter account. As with a Twitter account, a Facebook profile can contain as much (or as little) information about the user as he desires.<sup>128</sup> In creating a Facebook profile, the Facebook user has only a license to use his Facebook profile, but he owns all of the content and information he posts to Facebook, all of which is considered the user’s intellectual property.<sup>129</sup> Also much like Twitter accounts, the Facebook 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.”<sup>130</sup> According to the terms of service to which the user must agree when he first creates his Facebook account, he may not transfer his Facebook account to anyone without Facebook’s written consent.<sup>131</sup> Moreover, the user agrees to not share his password or let anyone else access his account.<sup>132</sup> Thus, by its terms of service, Facebook (at least theoretically) prohibits a husband and wife from sharing one account.

Once a Facebook profile has been set up, the Facebook user may become “friends” with other Facebook users, thereby allowing him to see and interact with his Facebook friends’ profiles. Private messages can be sent through Facebook’s online messaging service. The user may post photos or videos of himself or others. Similarly, he can leave comments on the “walls” of his Facebook profile or others’ Facebook profiles. A user can keep up

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126. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 11 (2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (last visited Sept. 15, 2010).

127. A Facebook profile is a personal page that allows the user to share his interests, activities, and anything else he wants to include with people he connects to on Facebook; it serves as “a complete picture of [the user] on Facebook.” *Facebook Glossary*, FACEBOOK, <http://www.facebook.com/help/glossary> (last visited Sept. 15, 2011).

128. *Id.* Accord *supra* Part II.B.

129. See *State of Rights and Responsibilities* § 2, FACEBOOK, <http://www.facebook.com/home.php#!/terms.php> (last revised April 26, 2011) [hereinafter *Rights and Responsibilities*, FACEBOOK]. See also *Intellectual Property: About Intellectual Property*, FACEBOOK, <http://www.facebook.com/help/?faq=147439341994136> (last visited Sept. 15, 2011).

130. *Rights and Responsibilities*, FACEBOOK, *supra* note 129, § 2(1).

131. *Id.* at § 4(9).

132. *Id.* at § 4(8).

with a Facebook friend without actually interacting with the friend in the non-virtual world by simply viewing the friend's profile to see what new photos, videos, and comments have been posted. Facebook's news feed application can notify the user of the latest updates made to his Facebook friends' profiles,<sup>133</sup> depending upon the privacy settings used by his friends. Because Facebook allows a user to change his privacy settings, a user may opt out of notifying his friends when he makes changes to his profile, when he "friends" another user, or when, as discussed below, he signifies that he "likes" a business.<sup>134</sup>

Businesses use Facebook, too, by creating their own Facebook pages.<sup>135</sup> Facebook business pages help the "entity communicate and engage with their audiences, and capture new audiences virally . . . ."<sup>136</sup> This type of viral marketing allows businesses to easily reach millions of potential customers.<sup>137</sup> Unlike personal profiles, business pages can be administered by multiple people.<sup>138</sup> Because updates to a business page are announced on Facebook's news feed, followers of the business are notified of any announcements the business makes every time its followers log onto Facebook. A Facebook user can virtually indicate that he "likes" a business' page.<sup>139</sup> That the user "likes" a particular business is then announced via the Facebook news feed application to the user's friends, thus creating virtual word-of-mouth advertising for the business.<sup>140</sup>

While Facebook profiles and pages themselves are, in many ways, a mixture of blogs and Twitter accounts, Facebook profiles have one aspect that blogs and Twitter accounts do not: games. The most popular game on Facebook as of September 2011 is

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133. See *News Feed: What is News Feed?*, FACEBOOK, [https://www.facebook.com/help/?faq=210346402339221&ref\\_query=what+is+news+fee](https://www.facebook.com/help/?faq=210346402339221&ref_query=what+is+news+fee) (last visited Sept. 15, 2011); CHRIS TREADAWAY & MARI SMITH, *FACEBOOK MARKETING: AN HOUR A DAY* 43-45 (2010).

134. *Privacy: How do I control who can see my profile?*, FACEBOOK, <http://www.facebook.com/help/?faq=167941163265974> (last visited Sept. 15, 2011).

135. *Facebook Pages: What is a Facebook Page?*, FACEBOOK, <http://www.facebook.com/help/?faq=174987089221178> (last visited Sept. 15, 2011).

136. *Id.*

137. See TREADAWAY & SMITH, *supra* note 133, at 34-36.

138. *Facebook Pages: Can multiple people use the same account to administer a Page?*, FACEBOOK, <http://www.facebook.com/help/?faq=112010735553116> (last visited Sept. 15, 2011).

139. See *What is the Like feature?*, FACEBOOK, <http://www.facebook.com/help/?faq=200273576682757> (last visited Sept. 15, 2011).

140. See *What's the difference between "liking" an item a friend posts and "liking" a Page?*, FACEBOOK, <http://www.facebook.com/help/?faq=228578620490361> (last visited Sept. 15, 2011).

FarmVille, boasting more than 55.5 million active users each month.<sup>141</sup> To play FarmVille, a Facebook user, logging on through Facebook, utilizes an avatar to farm a virtual plot of land. As the player farms more crops, the player progresses through the levels of the game and is able to engage virtually in other traditional farming behavior, such as purchasing virtual animals. The virtual FarmVille marketplace operates in a currency of Farm Cash, which may be obtained by advancing through levels or can be purchased for real life money.<sup>142</sup>

Facebook profiles offer means to have short, quick banter with other users like Twitter and also provide space for longer-form posting like blogs. Just as blogs are difficult to classify and Twitter accounts cause problems for management, Facebook profiles also raise interesting and novel issues during the termination of a community.

### *C. Termination and Facebook Profiles*

Upon termination of a marriage, a Facebook profile must be valued and assigned to one of the spouses. Additionally, any rights of reimbursement the community has due to the Facebook profile must be settled.

Because Facebook, by its terms, restricts the sharing and transferring of accounts, assigning the Facebook profile should be simple: the Facebook profile should be assigned to the spouse who created the profile and, assumedly, registered for the account.<sup>143</sup> Thus, the Facebook profile will likely be assigned to the spouse who used his name in registering the profile, regardless of whether the profile was—in violation of the terms promulgated by Facebook—jointly used by the spouses.

In addition to assigning the profile to one spouse, the profile must also be valued. The profile itself may not be valuable in that it cannot be sold on the free market, but that does not mean that aspects of the profile may not be valuable. For example, the posts

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141. *List of the 10 Most Popular Facebook Games*, FACEBOOK, <http://www.facebook.com/notes/facebook-game-center/list-of-the-10-most-popular-facebook-games/198474696831258> (last visited Sept. 14, 2011); see *FarmVille*, FACEBOOK, <http://www.facebook.com/home.php#!/FarmVille> (last visited Sept. 15, 2011).

142. See Jill Insley, *Warning over Facebook FarmVille game*, GUARDIAN (Nov. 4, 2009) (discussing how FarmVille encourages players to use real money to purchase virtual cash).

143. This assumes the profile was created during the community and considered community property. If the Facebook profile was created outside of the marriage, the Facebook profile would be considered separate property and there would be no need to assign the profile to one spouse.

on a Facebook profile are the intellectual property of the user and may be of economic value. If the husband Facebook user turns his posts written during the marriage into a book, the wife would have a right to share in the proceeds of the book because it was produced, at least in part, based on the intellectual property of the husband created during the marriage.<sup>144</sup> The wife would maintain this right even if the husband did not generate revenues based on the community Facebook profile posts until after the marriage terminated.<sup>145</sup>

Although there are examples of authors of Facebook profiles, blogs, and Twitter accounts gaining profitable book and movie contracts,<sup>146</sup> in reality, overnight virtual sensations are far from the norm. Most posts on Facebook consist of statements that are far from profitable. Be that as it may, Facebook profiles still may have value. Particularly, they may create goodwill. If a husband creates a Facebook profile during the marriage for his law practice, every Facebook friend (if he uses his own personal profile) or “like” (if he uses a business profile) he accumulates may be viewed as a potential future client or may even be a current or past client. That he has a Facebook profile may generate new business for him and keep clients returning to use his legal services. Additionally, if he posts his legal victories or commentaries about certain legal topics, he may gain some virtual celebrity status that helps him attract more clients.

These examples are all indications of goodwill. Though not all community property states add goodwill onto the value of professional practices,<sup>147</sup> in the states that do, the wife has a strong argument that the Facebook profile should be valued as helping to

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144. See, e.g., *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000); *In re Marriage of Worth*, 241 Cal. Rptr. 135 (Cal. Ct. App. 1987); *Michel v. Michel*, 484 So. 2d 829 (La. Ct. App. 1986); *Miner v. Miner*, No. 13-01-659-CV, 2002 WL 33955151, at \*6-7 (Tex. App. 2002).

145. See *Rodrigue*, 218 F.3d at 443. In *Rodrigue*, the court found that a spouse has rights not only to works created directly from the community intellectual property but also from works derivative of those created from the community intellectual property. *Id.* Thus, if the husband turned his Facebook profile posts into a book and then wrote a sequel to the book, the wife would have a right to some portion of the revenues generated from the sequel, too.

146. See, e.g., JULIE POWELL, *JULIE AND JULIA: 365 DAYS, 524 RECIPES, 1 TINY APARTMENT KITCHEN* (2005) (amateur female chef becomes an internet celebrity after starting a blog that documents her goal of cooking 524 recipes in one year); JEREMY BLACHMAN, *ANONYMOUS LAWYER* (2006) (a law student portraying himself as a partner at a New York law firm starts a popular blog about law office politics).

147. See *supra* Part III.A.

create goodwill.<sup>148</sup> In considering such an argument, a court should evaluate the specific facts surrounding how the Facebook profile has generated goodwill. If the husband's law practice profile has 1,000 users who have "liked" it, and all of the users have open privacy settings, thus notifying their Facebook friends of their interest in the husband's law practice, then those "likes" may be considered more valuable than if the husband's law practice profile has only 50 users who have closed privacy settings that do not notify their Facebook friends when they "like" something. The question a court will have to decide is, if the Facebook profile does create goodwill, how much goodwill does it create? In other words, how much is a particular Facebook friend worth?

In addition to determining whether a Facebook profile creates goodwill, community property jurisdictions will also have to settle potential reimbursement claims between the spouses for Facebook profiles. If the husband enters the marriage with a Facebook profile and a FarmVille account, the Facebook profile, i.e. the license to use the Facebook profile, would likely be his separate property right.<sup>149</sup> During the marriage, assume the husband played FarmVille and paid community money into Facebook to purchase Farm Cash for the game, which he spends on virtual animals. This situation could create a possible reimbursement claim for the community, depending upon how the Farm Cash and virtual animals are classified. A court would have to first determine whether the Farm Cash and virtual animals purchased were community property or separate property. As previously discussed in the context of blogs,<sup>150</sup> both the Farm Cash and the virtual animals could be considered an increase in the value of the husband's separate property, namely the husband's Facebook profile. In this case, the majority of states would grant the wife a reimbursement right for community funds used to initially purchase the Farm Cash.<sup>151</sup>

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148. See *In re Marriage of Campbell*, 589 P.2d 1244, 1247-48 (Wash. Ct. App. 1978) ("The fact that a business is not salable does not necessarily mean its goodwill has no value.").

149. See Part I.C.

150. See *supra* Part I.C.

151. The same would be true if the husband used the wife's separate property to purchase the Farm Cash and virtual animals for his separate property Facebook profile. See *supra* Part III.A. This does assume, though, that the expenditure of community property or the wife's separate property is not deemed a donation by the community or the wife, respectively, to the husband's separate property. See, e.g., LA. CIV. CODE art. 2343 (2009) (allowing one spouse to donate his community interest to his spouse such that his former community interest becomes his spouse's separate property).

Instead of considering the virtual animals and Farm Cash an increase in value of the husband's separate property, a court could consider them to be community property if a court viewed the Farm Cash and virtual animals as earnings attributable to the husband's effort during the marriage. If the Farm Cash and virtual animals are considered earnings, then at the termination of the marriage, they would need to be divided between the spouses. Because Farm Cash and virtual animals in FarmVille are attached to the Facebook profile, the husband, as creator of the Facebook profile, would likely be assigned them. The value of the Farm Cash and virtual animals would then be added to the husband's portion of former community property he was to receive and, at least in states that divide former community property evenly, the wife would receive an offsetting amount of community property.

While community funds used to purchase items like Farm Cash on the husband's separate property Facebook profile create a fairly clear and discernible right of either reimbursement in the community or offsetting amount to be given to the wife at divorce, community labor expended on the husband's separate property Facebook profile may also create a right of reimbursement. Suppose that the husband uses his law practice's Facebook page to advertise his law practice. As discussed, gaining more "likes" on his page could help generate goodwill for his professional practice. If the wife spends her time enhancing the husband's law practice's Facebook page by adding information about the husband, posting information about his legal victories, and getting other Facebook users to "like" the page, the wife would be spending her community labor to enhance the husband's Facebook page. Assuming the wife is uncompensated for her labor, the wife may have a claim of reimbursement for her community labor expended to improve the husband's separate property Facebook page.

To reach the final decision of how a Facebook profile is valued at termination of the community and what rights of reimbursement are created, courts and jurisdictions must consider the Facebook profile in question. How the Facebook profile was registered will help determine who should receive the profile at divorce. The individual Facebook friends a husband has may determine the value of the husband's profile. The specific activities a wife does to improve her husband's Facebook page should be considered in determining whether the wife has a right of reimbursement for the community labor she spent on the husband's separate property profile. As stated with regards to classification and management, Facebook in general and the individual Facebook profile in question must be understood before a decision can be rendered regarding how the profile should be divided between the spouses and valued.

Though community property jurisdictions must learn about the virtual property at issue when the community terminates, community property states do not need to draft new termination rules in order to accommodate virtual property. The current rules some states have regarding how property should be divided between the spouses, or whether goodwill should be added onto property, or how the community should be reimbursed for expenditures on separate property, are more than sufficient to govern virtual property, like Facebook profiles. To apply the current rules, courts must fully understand how the Facebook profile in question operates, and then courts—as they routinely do for other forms of property—can determine who should get what at the end of the marriage and how much it is worth.

### CONCLUSION

The repeating conclusions throughout this Article are (1) that virtual property must be fully understood before it is classified, managed, or divided and valued at termination of the community and (2) that in general, the current community property laws do not need to be rewritten wholesale in order to govern virtual property. As stated initially, these conclusions are perhaps not novel, but they should bring community property jurisdictions some comfort as we move further into the digital age. Although issues concerning virtual property have not, thus far, arisen in the community property context in court, they will soon. Blogs, Twitter accounts, and Facebook profiles are becoming too economically valuable for divorcing spouses not to argue about at some point in the near future. Community property jurisdictions should rest assured that, by and large, the current laws can adequately govern these new forms of property.

Although community property jurisdictions do not need to rush out and create new laws, they would be wise to begin learning about virtual property in order to be prepared when issues concerning virtual property arise. Divorce lawyers should take time to understand how virtual property operates because virtual property may create legitimate claims for their current and future clients. Judges should not be caught off guard on the bench when disputing parties debate the value of a Twitter account. Spouses should realize what rights arise when they create a blog during marriage or bring a Facebook profile with them into holy matrimony. Now is the time for all who work in the community property field to accept that virtual property is here to stay and begin learning how it can affect married persons living under a community property regime.

