Community Property and the Copyright Act: Rodrigue's Recognition of a Community Interest in Economic Benefits

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I. INTRODUCTION

George Rodrigue’s “Blue Dog” appears in most of his artistic pieces. Modeled after the family pet, George created the vivid and easily recognizable image in 1984 while married to his wife, Veronica. Since then he has seen the image become somewhat of a celebrity in itself. Advertisers have used it to sell products such as Absolute Vodka and Xerox Copiers; and, if you look closely, it can be seen on the wall of the famous coffee shop in the television series Friends. With the tremendous success of the “Blue Dog” image, George achieved both national acclaim and financial prosperity, but behind the scenes, a bitter dispute waged to determine the rights to the popular icon.1

In 1993, George Rodrigue sought a divorce from his wife of almost thirty years, sparking a boxing match of sorts over the substantial revenues generated from his copyrighted works. In an effort to gain access to the proceeds, each former spouse relied on an opposing legal regime to aid their case. In Veronica’s corner, there was Louisiana’s community property law which is based on the fundamental principle that property acquired during the marriage is shared equally between the spouses.2 Louisiana’s matrimonial regime, adopted during Spanish colonization, conceptualizes marriage as a team effort. Regardless of which spouse produced the earnings, both are entitled to an undivided half-interest of all community property upon termination of the marriage.3 With this in mind, Veronica argued her entitlement to half of “all intellectual property rights generated during the existence of the community and . . . all post-community artworks that are ‘derivative’ of that intellectual property.”4

In George’s corner, there was the federal Copyright Act of 19765 which specifies that ownership of a copyright “vests initially in the author” at the time of

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1. It is important to note that the dispute revolved around the rights to all intellectual property, including, but not limited to the Blue Dog.


3. La. Civ. Code art. 2338 provides, in part, that community property consists of “property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse”; see also Katherine S. Spaht & W. Lee Hargrave, Matrimonial Regimes § 1.1 at 1, 16 Louisiana Civil Law Treatise (2d ed. 1997) [hereinafter Spaht & Hargrave].

4. See also Spaht & Hargrave, supra note 3, § 3.2 at 47 (“No matter how married couples organize their lives—one earning income, the other managing the home . . . the basic rule is that they share equally in whatever each produces and accumulates.”)


the creation of the work. A copyright comes into existence when an author fixes an original work of authorship in a tangible medium of expression. George argued that because federal law grants ownership of a copyright solely to the author, it preempts any state law that attempts to assign any right to his ex-wife. Therefore, he claimed his copyrighted works never became community property, and were thus exempt from division and partition after divorce. He sought a declaration that he alone was the owner of all intellectual property represented in his artwork.

George won the first round when the United States District Court for the Eastern District of Louisiana held that the Copyright Act in fact preempted state law, thus recognizing George as the sole owner of his copyrighted works. The judge believed that it was not the proper role of a court of law to attempt to make the two regimes compatible. Undaunted, Veronica returned and scored a subsequent victory when the United States Court of Appeals for the Fifth Circuit reversed the district court finding a permissible coexistence between the two sources of law. In an elaborate and complex opinion, the court ingeniously harmonized state and federal law such that George maintained exclusive control of his copyrights, while granting Veronica an economic interest in the benefits generated by copyrighted artworks created during the marriage.

This article endorses the appeals court decision, arguing that it promotes Congress' effort to protect former spouses without offending the goals of the Copyright Act. Indeed, in the past, Congress has decisively reacted to Supreme Court findings of preemption of community property laws by legislatively overruling the decisions to allow for the application of state law in order to safeguard the contributions and financial interests of former spouses. Taking heed of past Congressional reactions, the Rodrigue decision carefully preempts the state community property laws that conflict with the purpose of the Copyright Act.

10. Id. at 546.
12. We are satisfied that the conclusion we reach today—that an author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright but that the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses in indivision thereafter—is consistent with both federal copyright law and Louisiana community property law and is reconcilable under both.

Id. at 435.
Act while harmlessly allowing a revenue-generating community interest to survive. This result not only satisfies the principals of federal preemption but also reflects the will of Congress.  

After summarizing the holding in Rodrigue, Part II analyzes the Supreme Court cases which found federal preemption of state community property laws, arguing that their holdings display extreme indifference to the fundamental principles of community property. Furthermore, Part II illustrates that the Congressional reactions, in the wake of these Supreme Court decisions, signify a deep concern for former spouses and possible rejection of the majorities' reasoning. Part III addresses the implications of recognizing a community interest in copyrights by quelling objections made by intellectual property scholars. Compiling the logic expressed in Part II and III, Part IV applies the test provided in the Supreme Court case, *Hisquierdo v. Hisquierdo,*  to illustrate that the Rodrigue decision not only satisfies Court's express mandate, but also recognizes the sanctity of community property.  

Finally, Part V offers a brief analysis of the potential problems that might arise when courts try to assign a value to copyrighted works in divorce proceedings. Before proceeding, however, a brief discussion of federal preemption analysis may be useful.

The thrust of George Rodrigue's argument relied on the Supremacy Clause of the United States Constitution which states that "[l]aws of the United States . . . shall be the supreme Law of the Land." When state and federal law oppose each other, state law must yield. If Congress clearly indicates that federal law governs a particular matter, the Constitution demands preemption of state law. Most of the time, however, Congressional intent is not so expressly stated and courts are left to determine the precise scope of the federal statute. The Supreme Court has recognized two forms of "implied preemption." Field preemption occurs when "the scope of a statute indicates that Congress intended federal law to occupy a field exclusively." Conflict preemption exists when it is impossible for a private party to comply with both state and federal laws, without frustrating the

14. Given that nine states composed of nearly 80 million people follow the community property theory of marital property, Rodrigue likely will become the chief authority on the subject.

15. In *Hisquierdo,* the Supreme Court of the United States announced that the test for determining if a federal statute preempts state community property laws was "whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." 439 U.S. 572, 583, 99 S. Ct. 802, 809 (1979). Because the first part of the test is a straightforward preemption analysis, and the second requires investigation into the practicability of applying state law, this article addresses both subjects.

16. Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 6A.03[A] ("The application of *Hisquierdo* to the copyright context is apparent.") [hereinafter Nimmer]; Wong, supra note 13, at 1097 ("The preemption of state community property laws by federal copyright law is governed by the *Hisquierdo* preemption test.").

17. U.S. Const. art. VI.


19. Ciolino, supra note 13, at 135.

purpose and objectives set forth by Congress. Courts resort to resources such as legislative history, preemption jurisprudence, and federal policy in order to determine a federal statute's effect on state law.

However, there is a strong presumption against preemption. The Supreme Court professed this fundamental principle, embedded in the concept of federalism, when it declared:

Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.'

Furthermore, the Supreme Court requires a heightened standard when it comes to state laws relating to the family. The Supreme Court clearly indicated that a substantially greater showing of conflict is required to find federal preemption; indeed "[a] mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." Therefore, the issue in Rodrique hinged on whether Louisiana law—which states that "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse" becomes community property—could be amicably reconciled with the Copyright Act's grant of copyright ownership to the author-spouse.

I. RODRIGUE V. RODRIGUE

The Fifth Circuit Court of Appeals began its analysis by dissecting the precise language of § 201(a) of the Copyright Act which states that ownership of a "copyright in a work . . . vests initially in the author or authors of the work." The court wasted no time in highlighting how it believed Veronica could share in the profits from the copyrighted works created during the marriage without offending the express wording of the Act. The court observed that the term "copyright," according to § 106, simply translated into the five exclusive rights:

21. 17 U.S.C.A. § 201(a) (1996) provides: "Initial Ownership: Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."
reproduction, adaptation, publication, performance, and display. It announced that "none of these rights either expressly or implicitly include the exclusive right to enjoy income or any of the other economic benefits produced by or derived from copyrights." Because revenues were not an exclusive right mentioned in the definition of "copyright," the court concluded that Louisiana law did not conflict with federal law by recognizing Veronica’s community interest in proceeds from sales or licences of George’s artwork. Furthermore, the section only addresses "initial" vesting, leaving open the implication that the copyright could later be shared with non-authors.30

The remainder of the court’s opinion elaborated on legal support for its holding. The court began by discussing the Louisiana Civil Code provisions regarding ownership of property in general. Outlining the civilian concepts of usus, abusus, and fructus, the court demonstrated how both Veronica and George could share in the copyrights while still abiding by the provisions of the federal law.31 The court explained:

The author-spouse alone holds the elements of usus and abusus . . . free of any management, consent, or participation of the non-author spouse . . . [t]he community during its existence (and the former spouses or other successors after its termination) holds the element of fructus, i.e., the right to receive and enjoy the economic benefits produced by or derived from the copyright.32

The court then moved to a discussion of the pertinent Civil Code articles covering community property. The court reiterated the Civil Code’s emphasis that

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publically;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publically; and
(6) in the case of sound recordings, to perform the copyrighted work publically by means of a digital audio transmission.

29. 218 F.3d 432, 435 (5th Cir. 2000).
30. Id. at 436.
31. The court explained the three subcategories of civilian ownership as "(1) usus—the right to use or possess, i.e., hold, occupy, and utilize the property; (2) abusus—the right to abuse or alienate, i.e., transfer, lease, and encumber the property, and (3) fructus—the right to the fruits, i.e., to receive and enjoy the earnings, profits, rents, and revenues produced by or derived from the property." Id. at 437; see also La. Civ. Code art 477 which provides that "[t]he owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."
32. 218 F.3d at 437.
marriage normally gives each spouse the right to manage, control, or dispose of community property. If this principle was applied to a copyright without restriction, the court warned it would offend the Act’s five exclusive rights granted to the author of the copyright. In an effort to reconcile this apparent conflict, the court relied on Civil Code article 2351 which states: “A spouse has the exclusive right to manage, alienate, encumber, or lease movables issued or registered in his name as provided by law.” The court complimented its discovery by offering numerous examples, such as a car title or a paycheck, where one spouse has exclusive management of community property and the other shares enjoyment of those assets. The court stated that “[u]nder Louisiana law a copyright is ‘movable,’ and under federal law a copyright is issued or registered in the name of the author-spouse.” Thus, copyrights neatly fit into the definition of a “registered movable.”

The appeals court turned next to the express preemption provision contained in the Copyright Act. Specifically, § 301(a) states that the Act governs “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.” The court easily dismissed the notion that the phrase “general scope of copyright” might cover the entire field of marital property. Furthermore, the court concluded that the very language of the Act indicates an intent to preempt only certain state laws. The court reasoned that, unless a state law was equivalent to or presented an irreconcilable clash with one of the five exclusive rights designated to the author (i.e., reproduction, adaptation, publication, performance, and display), the state law continued to operate. The court remarked:

Notably absent from the Copyright Act’s exclusive sub-bundle of five rights is the right to enjoy the earnings and profits of the copyright. Nothing in the copyright law purports to prevent non-preempted rights

33. La. Civ. Code art. 2346 provides: “Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law.”
35. 218 F.3d at 438. The court held that:
[a] paycheck issued by the employer in the name of the employee-spouse alone can be cashed, deposited, or otherwise negotiated only by that spouse; yet, the proceeds of the paycheck, representing earnings of one spouse in community, belong to the community. Likewise, a motor vehicle purchased with community funds but titled in the name of one spouse alone can be sold, leased, or encumbered only by the named spouse; yet the proceeds of any such disposition belong to the community. And when, during the existence of the community, one spouse joins an existing partnership or joins in the formation of a new one, the partner-spouse has the exclusive right to participate in the partnership and to manage, alienate, or encumber that interest; yet the economic benefits—and liabilities—flowing from the partnership belong to the community.
36. Id. at 438.
38. 218 F.3d at 439.
39. Id.; see also 17 U.S.C.A. § 301(b) (1996) which provides that “[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106.”
from being enjoyed by the community during its existence or thereafter by the former spouses in community as co-owners of equal, undivided interests.  

Finally, the court addressed George Rodrigue's contention that allowing state law to prevail would do substantial damage to important federal interests. He claimed that allowing either spouse, acting alone, to control, encumber, or dispose of the copyrights, would impair national interests in uniformity and efficient exchange of copyrights. In addition, he argued that it would lessen the incentives for authors to create. The court, however, dismissed George's uniformity argument and offered examples contained in the Act allowing for the application of differing state laws. For example, the Act permits copyrights to be transferred by conveyance, which themselves are governed by state laws covering contracts and have not disabled federal interests. As for lessening of creative incentive, the court did not believe that a husband-author would not produce a copyright simply because he would have to share the proceeds with his wife. Further, even after divorce, it would be absurd for the author to not exploit pre-divorce copyrights because he would receive no benefit himself.

In the end, the court recognized Veronica's claim to "an undivided one-half interest in the net economic benefits generated by or resulting from copyrighted works created by George during the existence of the community and from any derivatives thereof."

II. SUPREME COURT PREEMPTION OF COMMUNITY PROPERTY LAWS

Even though the Supreme Court professes to hold a deep respect for state family laws, it has nevertheless, found irreconcilable conflicts between community property and various federal statutes. It will be shown, however, that Congress has been hostile to these decisions and, in fact, has disagreed with the reasoning of the

40. 218 F.3d at 440.
41. Id. at 441.
42. Id.
43. Id.
44. Id.; see also 17 U.S.C.A. § 201(d)(1) (1996) which provides: “The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”
45. 218 F.3d at 442.
46. Id.
majority as evidenced by legislative action. Furthermore, this author suggests that the Fifth Circuit opinion in Rodrigue compliments what is evidently a strong Congressional concern for former spouses.

A. Hisquierdo v. Hisquierdo

*Hisquierdo* arose from a divorce proceeding in California where the wife claimed an interest in her husband's interest in future benefits under the Railroad Retirement Act of 1974. The Supreme Court of California had earlier held that the benefits were community property because they flowed in part from the husband's employment during the marriage. The U.S. Supreme Court, however, reversed, holding that the Railroad Retirement Act controls the allocation of the retirement benefits. The anti-alienation section of the Act, § 231m, states that the benefits could not be taken from the railroad worker "under any circumstances whatsoever." In addition, § 231d(c)(3) specifically mentioned termination of non-participant spouses' rights to individual benefits under the Act.

After creating the test to be applied, the majority relied heavily on § 231m and § 231d(c)(3) to answer "whether the right as asserted conflicts with the express terms of federal law." The court concluded that § 231m preempted any state law that attempted to take away or alienate any portion of the benefits from the intended beneficiary, i.e., the railroad worker. Furthermore, the section protects the benefits from legal process "notwithstanding any other law . . . of any State." According to the court, § 231d(c)(3) embodied a community property concept to an extent, but Congress purposefully abandoned that theory upon divorce to ensure the railroad worker alone would receive all of the accrued payments.

In deciding whether the application of community property laws would "sufficiently injure the objectives of the federal program to require nonrecognition," the court stated that allowing state law to grant the wife an interest in retirement

48. In the copyright context, some community property supporters have analyzed these Supreme Court cases in order to highlight the differences between those federal statutes and the Copyright Act, e.g., *Nayo*, *supra* note 13, at 169 ("There are significant differences between the interests implicated by the Copyright Act and those interests involved in past cases where the preemption doctrine has been applied against the . . . community property system."). Although the author agrees with these arguments, this section addresses the flawed reasoning of the majority opinions when compared to Congressional reactions.

51. 45 U.S.C.A. (1996) § 231(b) provides in part: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . ." (emphasis added).
52. "The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced." 45 U.S.C.A. § 231d (c)(3) (1996).
53. *Id.*
benefits "frustrates" the Congressional design of promoting retirement and providing for employees in their waning years.\textsuperscript{54} The majority held that Congressional goals would be thwarted because divorced employees would be encouraged to continue working to make up for lost benefits paid to an ex-spouse.\textsuperscript{55} Addressing the fate of former spouses, the justices observed that amendments to the Railroad Retirement Act permitted garnishment of the benefits for the purposes of spousal support and added that "those benefits will be claimed by those in need."\textsuperscript{56}

B. McCarty v. McCarty

In \textit{McCarty},\textsuperscript{57} the Supreme Court addressed a wife's claim to a one-half interest in her husband's military retirement pay. The Court held that federal law precludes a state court from dividing the benefits pursuant to state community property laws.\textsuperscript{58} According to the majority, the military retirement system did not confer an entitlement to retired pay upon the retired member's spouse and did not embody even a limited community property concept.\textsuperscript{59} For instance, § 3929 of the military retirement statutes stated that a "member of the Army retired under this chapter is entitled to retired pay."\textsuperscript{60} Also, Congress had announced: "[h]istorically, military retired pay has been a \textit{personal entitlement} to the retired member himself as long as he lives."\textsuperscript{61}

With this in mind, the court focused on the fact that military retired pay terminates with the retired service member's death and does not pass to the member's heirs.\textsuperscript{52} The service member, however, may designate a beneficiary, not limited to his spouse, to receive any portion that remained unpaid at death.\textsuperscript{63} Therefore, if retired pay was considered community property, the service member could not effectively provide for the beneficiary of his choosing because the wife would be entitled to a one-half interest. The court stated that "both the language of the statutes and their legislative history make it clear that the decision whether to leave an annuity is the service member's decision alone \textit{because} retired pay is his or her personal entitlement."\textsuperscript{64} Similar to \textit{Hisquierdo}, the court noted that the plight of former spouses might be allayed by the spouse's right to claim Social Security benefits and to garnish military retired pay for purposes of support.\textsuperscript{65} In the end, the

\begin{itemize}
\item \textsuperscript{54} Hisquierdo v. Hisquierdo, 439 U.S. 572, 585, 99 S. Ct. 802, 810 (1979) ("Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any diminution of that amount frustrates the Congressional objective.").
\item Id. at 590, 99 S. Ct. at 813.
\item Id. at 590, 99 S. Ct. at 812.
\item Id.
\item Id. at 224, 101 S. Ct. at 2737.
\item 10 U.S.C.A. § 3929 (1956).
\item 453 U.S. at 224, 101 S. Ct. at 2737 (citing S. Rep. No. 1480, 90th Cong., 2d sess., 6 (1968)).
\item Id. at 215, 101 S. Ct. at 2732.
\item Id.
\item Id. at 226-27, 101 S. Ct. at 2738.
\item Id. at 235, 101 S. Ct. at 2743.
\end{itemize}
Court held that community property partition of retired pay, by reducing the amounts that Congress had intended to provide solely for the retired service member, had the potential to frustrate this important Congressional objective.

C. The Dissenting Opinions

Both *Hisquierdo* and *McCarty* contained lengthy and bitter dissents. In *Hisquierdo*, Justice Stewart, joined by Justice Rehnquist, found no conflict between the Act and community property laws. He consistently reiterated the principle that state laws regarding the family were not easily preempted, but only upon a substantial showing of harm to federal interests. To Justice Stewart, the only question was "whether something in the federal Act prevents the State from applying its normal substantive property law, under which assets acquired during marriage are commonly owned by the husband and wife." He stressed that the majority misunderstood the principles underlying community property. An interest in retirement benefits, Justice Stewart argued, was co-owned by the spouses during the marriage and recognizing the wife's interest upon divorce was not a "garnishment" but rather a proper distribution of half-owned assets. According to Justice Stewart, § 231m was intended to apply to creditors; therefore, the majority's reliance on § 231m was misplaced. In addition, Justice Stewart explained that § 231d(c)(3) does not conflict with state law, rather it compliments the community property principle that the spouse's interest "attaches only to that portion of an annuity attributable to labor performed during the marriage."66

In *McCarty*, Justice Rehnquist, joined by Justice Brennan and Justice Stewart, restated the fundamental nature of state family laws. Indeed, he chastised the majority for failing to quote or cite the test for preemption established in *Hisquierdo*.

He analyzed previous cases wherein the Court preempted state community property laws and argued that in each case explicit provisions of federal law clearly commanded preemption of state law. However, Rehnquist remarked that "this forceful and unambiguous language protecting the rights of the designated beneficiary has no parallel so far as military pay is concerned." In particular, Rehnquist criticized the Court for relying on the premise that there was no community property concept at all in the statutory scheme of the federal retirement statutes. He noted that the Court in *Hisquierdo* acknowledged that Congress provided some community property rights in § 231d(c)(3) of the Railroad Retirement Act but deliberately decided to terminate them upon divorce.71

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67. *Id.* at 599, 99 S. Ct. at 817 ("For under community property law, the husband and wife are not one another's creditors; they are co-owners. Upon dissolution of the marital community, the community property is divided, not adjudicated as indebtedness.").
68. *Id.*
70. *Id.* at 240, 101 S. Ct. at 2745.
71. *Id.* at 244, 101 S. Ct. at 2747 (citing *Hisquierdo*, 438 U.S. at 584-85, 99 S. Ct. at 810 "Congress carefully targeted the benefits created by the Railroad Retirement Act. It even embodied a
Rehnquist argued that "this absence would have been thought to suggest that there was no preemption, since the argument could not be made, as it was in Hisquierdo, that Congress had addressed the question and drawn the line."\(^2\)

### D. Congressional Reaction and Observation

Even though the dissenting opinions were unable to command majority support in the Supreme Court, they found a receptive audience on Capital Hill. Congress legislatively overruled\(^3\) Hisquierdo and McCarty and amended the Railroad Retirement Act and the military retirement statutes to allow for the application of community property laws.\(^4\) In fact, after McCarty, Congress enacted the Uniformed Services Former Spouses’ Protection Act,\(^5\) which returned retired pay division to the states in an attempt to "strike a balance between the competing interests of retirees and their former spouses."\(^6\) Commenting on Congress’ actions, Professors Katherine Spaht and Lee Hargrave explain: "The United States Supreme Court was not receptive to state community property policies in deciding that federal retirement plans would be the separate benefits of the covered employees. Congress, however, reversed those decisions and provided for the application of state community property laws in significant areas."\(^7\)

The Congressional response to the insensitive treatment of former spouses in Hisquierdo and McCarty should lead not only to the conclusion that Congress is concerned about the financial well-being of former spouses, but also that Congress recognizes the efforts of non-working spouses.\(^8\) The holdings in Hisquierdo and

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\(^{72}\) See Spaht & Hargrave, supra note 3, § 3.37 at 112. ("In the following year, Public Law 98-76 was adopted to legislatively overrule Hisquierdo and to make Railroad Retirement Act annuities subject to state community property laws . . . "); Delrie v. Harris, 962 F. Supp. 931 (W.D. La. 1997) ("Congress concerned with the effects McCarty would have on divorced spouses of military personal . . . enacted the Former Spouses’ Protection Act with great alacrity in 1982"); Captain Kristine D. Kuenzli, Uniformed Services Former Spouses’ Protection Act: Is There Too Much Protection for the Former Spouse, 47 A.F. L. Rev. 1, 7 (1999) ("Criticism of the McCarty decision focused primarily on the court’s extension and application of the federal preemption doctrine.").


\(^{74}\) Captain Allison A. Polchek, Recent Property Settlement Issues for Legal Assistance Attorney, 1992 Army Law. 4, 5 (1992) [hereinafter Polchek].

\(^{75}\) Spaht & Hargrave, supra note 3, §§ 3.40, 3.45.

\(^{76}\) On the other hand, Congress acknowledged the sacrifices and contributions of military spouses. The spouses of many service members must abandon their own careers to follow the service members around the world. Only rarely can a military spouse ensure his or her own retirement security by contributing toward a pension or health system. Congress saw the USFSPA as a way to compensate spouses for these sacrifices.

Polchek, supra note 76, at 5.
McCarty did not simply recognize a participant-spouse’s sole interest in his retirement benefits; the holdings completely discarded community property’s fundamental principle that “spouses are deemed to have contributed equally to the acquisition of the property, regardless of the actual division of labor in the marriage and regardless of whether only one spouse formally ‘earned’ it.”\(^7\) As Justice Stewart’s dissent in Hisquierdo notes, the majority missed the point by assuming that former spouses would be financially protected by the availability of garnishment proceedings:

The right of each spouse to his or her share of the community assets, then, is a substantive property right entirely distinct from the right that a spouse might have to the award of alimony upon dissolution of the marriage. A community property settlement merely distributes to the spouses property which, by virtue of the marital relationship, he or she already owns. An alimony award, by contrast, reflects a judgment that one spouse—even after the termination of the marriage—is entitled to continuing support by the other.\(^8\)

The belief that alimony suffices to compensate former spouses is repugnant to the very essence of the community property theory because it denigrates the contributions of the non-breadwinner spouse.\(^9\) Former spouses are given “scraps,” i.e., support payments, instead of a recognition of their rightful ownership of a one-half interest in former community property.

The Congressional reactions also serve to discredit the majority’s conclusions that the application of state community property laws would frustrate Congressional objectives. For example, in McCarty Justice Blackmun, writing again for the majority, stated that “the reduction of retired pay by a community property award not only discourages retirement by reducing the retired pay available to the service member, but gives him a positive incentive to keep working, since current income after divorce is not divisible as community property.”\(^10\) By amending the Act to allow for the application of community property laws, Congress registered its disagreement with Justice Blackmun’s pessimistic appraisal. At the very least, these legislative responses should resuscitate the hefty requirement that, in order to find preemption, state family laws must do “major damage” to “clear and substantial

An illustration of McCarty’s tremendous insensitivity for former spouses is best reflected in Justice Blackmun’s statement that “if retired pay were community property, the service member could not so deprive the spouse of his or her interest in the property.” 453 U.S. 210, 226, 101 S. Ct. 2728, 2738 (1981) (emphasis added). When this shocking announcement is compared to legislative concern for former spouses, the majority opinion’s reasoning suffers even greater damage to its longevity.

\(^8\) Id.
\(^9\) See Roberts, supra note 13, at 1059 n.43 (“Community property systems recognize that the contribution of one spouse to raising children and maintaining a home has the dual effect of limiting that spouse’s earning capacity.”).
\(^10\) Id. at 235, 101 S. Ct. at 2742.
interests.” Referring to the enactment of the Uniformed Services Former Spouses’ Protection Act (USFSPA) after McCarty, one commentator goes a bit further and argues:

The vigorous Congressional response ... ought to restrain the Supreme Court in two ways in future preemption cases concerning state law distribution of marital property. Most broadly, this response should caution the Court against readily inferring Congressional intent from weak and equivocal sources. . . . More narrowly, Congressional dissatisfaction . . . specifically refers to federal preemption of vital substantive aspects of state domestic relations law. Regardless of the preemption standard generally used by the Court . . . a more deferential view should be taken of state marital property regulation. Under either reading, USFSPA and its history not only undercut the rationale of McCarty; they also instruct the Supreme Court to apply a more deferential preemption standard, which arguably would have yielded a different result in McCarty itself.83

In any case, Congress’ response to McCarty and Hisquierdo clearly commands courts to attempt to seek out a means of protecting former spouses.84

Because Rodrigue marked only the second time the issue was addressed in the courts, it is conceivable that Congress simply overlooked the potential conflict between state community property laws and the Copyright Act. By negative implication, Congress’ reversal of the Supreme Court’s decisions in Hisquierdo and McCarty illustrate that Congress would have approved a decision protecting former spouses.85 If the Copyright Act were to completely preempt state community property laws, it would create the potential of leaving many former spouses completely unprotected. For example, if the majority of marital income was generated from a copyright, the non-author spouse would be left with virtually nothing. The Copyright Act does not contain a provision, like the statutes in

84. In Boggs v. Boggs, 520 U.S. 833, 117 S. Ct. 1754 (1997), the Court overruled the Fifth Circuit Court of Appeals and held that the Employee Retirement Income Security Act of 1974 preempted community property laws in so far as it allowed a deceased non-participant spouse to make a testamentary transfer of her community interest to her children. The husband later remarried and died while married to his second wife. Thus, the dispute over the retirement benefits was between the second wife and the first wife’s children. Throughout the opinion, the Supreme Court noted Congress’ deep concern for the surviving spouse. (“Congress’ concern for surviving spouses is also evident from the expansive coverage of § 1055.”) Id. at 843, 117 S. Ct. at 1761. (“These provisions are essential to one of REA’s central purposes, which is to give enhanced protection to the spouse and dependant children in the event of divorce or separation, and in the event of death of the surviving spouse”) Id. at 847, 117 S. Ct. 1763. Therefore, this author believes Boggs does not demonstrate a continued trend of preempting state community property laws, but in fact illustrates the Supreme Court’s new-found recognition of the plight of former spouses.
85. See Nayo, supra note 13, at 167 (“Congress’ failure, in its revision of the Copyright Act, to take into account considerations of community property principles does not justify depriving the community of its otherwise valid interest in the fruits of the time, talent, and energy of each spouse.”).
Hisquierdo and Mcarty, which would permit garnishments for the purposes of spousal support. Therefore, the consequences of preemption would conflict with Congress' efforts to protect former spouses. In Mcarty, the majority stated that "Congress may well decide . . . that more protection should be afforded a former spouse."

Congress has made this decision and it is up to the courts to enforce it. For this reason, Congress should be receptive to Rodrigue's court-fashioned harmonization of state and federal law.

III. CALMING THE FEARS OF INTELLECTUAL PROPERTY SCHOLARS

Rodrigue's imaginative approach was so original that its reasoning had not been addressed by the majority of commentators. Most scholars assumed that courts in community property states would follow the logic espoused in Worth v. Worth and rely on § 201(d) of the Copyright Act. According to Worth, ownership of a copyright, after initially vesting in the author, transfers by operation of state community property laws and becomes co-owned by the spouses. Intellectual property scholars argued that the effects of Worth threatened to damage important federal interests in copyrights. Their arguments typically restated two common themes: (1) ownership of a copyright cannot be transferred after "initial vesting" and (2) community property principles of co-ownership would damage the marketability of copyrights.

This section addresses these issues and demonstrates that Rodrigue does not offend any of these concerns. Further, the court's holding can be expanded and made adaptable to all community property jurisdictions.

A. Transfer of Copyright Ownership.

In an attempt to counter Worth's reliance on § 201(d) of the Copyright Act, intellectual property scholars analyzed the succeeding subsection which states that "no action by any governmental body . . . purporting to . . . transfer . . . any of the exclusive rights under a copyright, shall be given effect under this title." David

86. 453 U.S. at 235-36, 101 S. Ct. at 2742-43.
87. In In re Marriage of Worth, 241 Cal. Rptr. 135 (1987), a California Court held for the first time that ownership of a copyright was a community property asset. In Worth, the court considered whether copyrights in trivia books authored by the husband during marriage survived federal preemption. As discussed in Part IV, the court relied on the fact the Copyright Act permits some involuntary transfers of copyright ownership, and thus held that California community property laws transferred an interest to the non-author spouse.
88. "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law" 17 U.S.C.A.§ 201(d) (1996) (emphasis added).
89. See Ciolino, supra note 13.
90. See Roberts, supra note 13. Carla Roberts additionally argues against recognizing copyrights as community property "because such treatment provides a disincentive for authors to create work." Id. at 1053; see also Ciolino, supra note 13, at 127, 129 (1999) (illustrating how the novelist, Tom Clancy, claimed he would rather eliminate the character, Jack Ryan, from his books then give proceeds to his ex-wife); but see Wong, supra note 13, at 1104-06, for a thorough rebuke of these claims.
Nimmer, a national authority on copyrights, notes that the House Committee Report only considered bankruptcy proceedings and mortgage foreclosures to be outside the scope of the section. Because filing for bankruptcy implies one's consent to have his copyright ownership transferred to the bankruptcy estate, Nimmer argues that "the application of community property laws to copyrighted works stands or falls based on whether married authors have at least implicitly consented to transfers of their work." Thus, he stresses the only way to circumvent the Copyright Act's prohibition against transferring ownership would be to hypothesize that, by entering into marriage, the author agreed to subject his copyrights to the laws of community property—an idea he ultimately rejects. In addition, Dane Ciolino, in a recent law review article, argues that the reasoning of *Worth* is particularly inapplicable in Louisiana. He claims that because ownership of a copyright "vests initially" in the author, it could not later be transferred to the non-author spouse because: (1) such transaction is preempted by federal law and (2) no provision of Louisiana law purports to do so.

However, Nimmer argues in favor of preemption because of a lack of theoretical evidence to support an implied consent by the author to transfer "exclusive rights under a copyright," and Ciolino refers to a copyright as a "bundle of rights." Alluding to § 106, both scholars' own definitions limit the Copyright Act's coverage to the rights of distribution, adaptation, reproduction, performance, and display. The *Rodrigue* decision, however, does not attempt to transfer any of the author's exclusive rights to the copyright, because recognizing a community property interest in revenues does not transfer anything covered under the Act. Quite simply, § 301(e) is irrelevant to the issue in light of *Rodrigue*'s holding. The appeals court expressly stated that "[w]e are cognizant of . . . the "transfer" approach of the California court in *Worth* . . . [o]ur approach is consistent yet analytically distinct."

B. Co-Ownership and Marketability

Carla Roberts, arguing for preemption of community property laws, states that "the *Worth* decision creates significant uncertainties . . . by calling into question the validity of copyright transfers that are not jointly executed by copyright transferors and their spouses." She is joined by other intellectual property commentators who fear that *Worth*'s rationale, by allowing for the application of community property laws, might be construed to suggest that spouses are co-owners of copyrights.
Thus, a non-author spouse could unfairly exploit the work personally or grant a nonexclusive licence to third parties. However, these fears are put to rest by the holding in Rodrigue that the author-spouse has the “exclusive right” to manage the copyright.

Rodrigue appears limited to Louisiana in applicability because the court based its management rule on a provision contained in the Louisiana Civil Code. In addition, Ciolino recognizes that, even amongst the nine community property jurisdictions, laws governing the management of community assets are “remarkably diverse.” For example, state law variances might permit a non-author spouse in State X to sell the copyright, while State Y affords an author exclusive control. Further, differing state community property laws would force purchasers of a copyright to familiarize themselves with divergent laws in order to be certain they are acquiring a perfect title from a person authorized by law to sell the copyright. Due to intricate conflict-of-law issues, the confusion might increase exponentially if a couple resided in numerous states during their marriage.

As Nimmer explains: “What is needed is a vehicle . . . that confers absolute, rather than primary responsibility upon the author-spouse and that applies to all community property States . . . .” A simple solution to this problem lies in allowing the Copyright Act itself to govern the management of copyrights between spouses. In community property terms, the exclusive rights provided in § 106 are “management rights” over the copyright. For instance, the right to “distribute” reflects the author’s ability to sell, lease, or otherwise alienate his work. The Copyright Act clearly demands that the author have the exclusive right to “manage” his creations. The Act preempts any state community property law that either allows the non-author spouse to dispose of the copyright or gives the author anything less than absolute control.

Thus, the Copyright Act’s §106 provides the universal rule for the management of a copyright, regardless of any variances between the community property states—the author alone has the authority to manage his copyright. Without

when joint owners are spouses.”).


100. 218 F.3d at 438-39.


102. Ciolino, supra note 13, at 149; see also Nimmer, supra note 16, § 6A.02.

103. See Roberts, supra note 13, at 1062-65; Ciolino, supra note 13, at 141-50.

104. See Roberts, supra note 13, at 1053.

105. See In re Peregrine Entertainment, 116 B.R. 194, 200 (1990) (“Because copyrights are incorporeal—they have no fixed situs—a number of state authorities could be relevant . . . . Thus interested third parties could never be entirely sure that all relevant jurisdictions have been searched.”).


107. Peter Wong was one of the first commentators to recognize the potential for having the Copyright Act provide the management rules of a copyright between spouses in community property states.

[I]t can be argued that federal copyright law preempts state community property law on the issue of joint management and control by the author and spouse as co-owners. Accordingly, even though the spouse’s ownership interests in the copyright are not preempted by federal law, the spouse’s management and control under community property laws may be
diving into the intricacies of sales law, purchasers of copyrights would be safe in the assumption that a valid transfer of ownership by sale could be effected only by the author himself. Finally, although this article makes no attempt to investigate the effects in equitable-distribution states, there is no reason to believe that the Copyright Act could not supply the rules of copyright management in those jurisdictions as well. The Act preempts any state management law to the extent it conflicts with the author’s exclusive control.

IV. APPLICATION OF HISQUIERDO’S TWO-PART TEST

A. Whether the Right as Asserted Conflicts with the Express Terms of Federal Law

_Hisquierdo_ dealt with a spouse’s right to retirement benefits upon divorce. According to the Supreme Court, the Railroad Retirement Act employed language such as “notwithstanding any other law” and “legal process under any circumstances whatsoever” to conclusively reflect Congress’ intent to prohibit state laws from attempting to classify benefits as community property. In _McCarty_, the Supreme Court noted that Congress had stated that military retirement benefits were traditionally a “personal entitlement.” When compared to the parallel provision in the Copyright Act, it is evident that these explicit directives are not present.

Section 301(a) of the Copyright Act preempts “all legal or equitable rights that are equivalent to any of the exclusive rights.” As the _Rodrique_ court noted, Congress must have been aware that community property laws were in effect in nine states. Therefore, Congress could have chosen to expressly mention the Act’s effects upon community property if they believed it would undermine the purposes of federal copyright law. For example, Individual Retirement Accounts are governed by the federal Internal Revenue Code which declares that “[t]his section shall be applied without regard to any community property... In any case, Congress did not “positively require by direct enactment” that community property is preempted.

Wong, _supra_ note 13, at 1115; see also Nayo, _supra_ note 13, at 160.


109. In a footnote, the court cited one of its past decisions for the proposition that the “case for federal preemption is especially weak when there is evidence that Congress was aware of operation of state law and nevertheless... tolerates whatever tension might exist between them.” _Rodrique_, 218 F.3d at 440 (citing Brown v. Ames, 201 F.3d 654, 661 (5th Cir. 2000)); William Patry, _Copyright and Community Property: The Question of Preemption_, 28 Bull. Copr. Soc’y 237 (1981) (arguing that “Congress was aware of the vesting of equal rights in community property states, and by its silence allowed of the vesting an implied assignment of a one-half interest to the non-author spouse by operation of the community property laws.”).

110. _See_ Gade v. National Solid Wastes Management Ass’n, 505 U.S. 88, 112 S. Ct. 2374 (1992) (Souter, J., dissenting, stated “if Congress had meant to say that any state rule should be preempted if it deals with an issue as to which there is a federal regulation in effect, the text... would have been a very inept way of trying to make the point.”).

be pre-empted. In fact, Congress arguably left the door open for the application of community property laws in the manner illustrated by Rodrigue. Section 301(b) of the Copyright Act provides:

Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .

Rehnquist states in his dissenting opinion in McCarty that if "community property law conflicts . . . then by all means override [community property law]—to the extent of the conflict." As explained in Part III, a state law that allows a non-author spouse to sell, i.e., "distribute," the copyright would certainly "conflict with the express terms of federal law." The Copyright Act has decisively bestowed this exclusive right upon the author alone. However, the Rodrigue decision cleverly avoids any interference with the author's exclusive rights. Because the recognition of a community interest in the profits from a copyright is not conflict with the rights provided within § 106, § 301(b) expressly allows it to survive preemption.

B. Whether its Consequences Sufficiently Injure the Objectives of the Federal Program to Require Non-recognition

As illustrated above, the Copyright Act does not reflect an intent to preempt all community property laws. Nevertheless, the Supreme Court stated that Congress' paramount goal in passing the Copyright Act of 1976 was to enhance predictability and certainty of copyright ownership. A quick summary of the discussion contained in Part III illustrates that the recognition of a community interest in the revenues received from copyrights does not even "scratch" these noble concerns:

When a copyright is produced during marriage, the Copyright Act grants the author exclusive control over his creation. Thereafter the author can freely assign the exclusive licence to his work, market only the right of reproduction, or sell the copyright completely without having to obtain permission from his spouse. Additionally, even if the spouses reside in numerous states, each with their own management rules, a valid sale could only be effected by the author himself.

Although intellectual property scholars warn of the dangers of allowing copyrights to become community property, most admit that allowing a spouse to receive financial income does not pose a threat to the interests of copyright ownership. For example, Roberts stresses that community property principles would damage the

author's incentive to create, produce uncertainties in copyright titles, and even impose an impermissible burden of interstate commerce.116 However, distinguishing the two elements of copyright ownership, Roberts concedes that "it is appropriate to treat the right to income element as community property, but that it is inappropriate . . . to treat the control element as community property."117 Furthermore, Nimmer states that "the goal must be to preserve the rights of author's spouses while not impinging on the author's ability effectively to exploit their copyrights."118

The recognition of a community interest in economic benefits offers the best of both worlds. It gives a non-author spouse an economic interest in property acquired during the existence of the community, while rightfully permitting the author absolute control over their copyrighted creations.119 This solution not only leaves the Congressional goals of predictability of copyright ownership undisturbed, it also furthers Congress' concern for the protection of former spouses.

V. THE PROBLEM OF VALUATION

Permitting the economic benefits of a copyright to become community property will, nevertheless, present problems for a court in determining the value of a spouse's interest in works created after termination of the marriage.120 The court in Rodrigue remanded the case, directing the district court to determine which copyrights were subject to the rules of community property, either directly as created during the marriage, or indirectly as products of such works.121 Because an economic interest represents a community asset, it must be assigned a value by a court before it can be partitioned. The responsibility of designating a value, however, is no simple task. For example, assume that George Rodrigue, five years after his divorce, places a tiny Blue Dog in the lefthand corner of an elaborate painting. Because he created the copyrighted image during the marriage, Veronica would be entitled to a portion of the proceeds received from the sale of the work. However, there remains the distinct question of how much. It would be difficult to determine what portion of the value of the painting was derivative of the original copyright and what was the value of the original production. Also, factors such as increased notoriety and market conditions after divorce might cause George's art to fetch a higher price.122

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117. Id. at 1071, n.3.
119. See Nayo, supra note 13, at 178-79 ("The Copyright Act's basic premise has always been to bestow upon copyright holders a monopoly on exploiting the aspects of the copyright, to the exclusion of all other third parties.").
120. See Nimmer, supra note 16, § 6A.02, n.16 ("Undoubtedly, questions of fact will arise as to whether a given work was composed before, during, or after marriage. Subsidiary questions will also be posed as to what proportion was written before, during, and after marriage.").
121. 218 F.3d 432, 442-43 (5th Cir. 2000).
122. See Ciolino, supra note 13, at 169 (discussing the many problems in valuing derivatives of post-community copyrights); Nimmer, supra note 16, § 6A.02 n.16.
Nevertheless, under Rodrigue the courts are burdened with the unenviable task of determining what portion of the proceeds are attributable to the community and what portion constitutes the author's separate property. Even though an infinite number of factors could influence the value of a derivative of a copyright, courts have consistently rejected the notion that a value cannot be assigned to an asset because it is too speculative. Professor Lee Hargrave adds that the "inability to make a perfect division should not be the basis to totally exclude one of the owners of a right from enjoying its benefits." Although no case has directly addressed the issue of assigning a value to the community interest of a copyright, several cases provide guidance for some of the factors that a court should take into consideration.

In Due v. Due, a lawyer's rights under a contingent fee contract were deemed to be community property. The court determined that the contract was an obligation based upon the right to receive money in the future and therefore constituted a patrimonial asset partially acquired from husband's efforts during the marriage. In order to determine the value, the court stated that the "interest in the community is determined in proportion that the value of the husband's services rendered at the date of the community's dissolution bears to the total services performed by the husband in earning the fee." The crucial consideration, the court observed, was the period of time the lawyer spent working on the case during the existence of his marriage. Therefore, the longer he worked while married compared to his efforts after dissolution, the greater the community interest in the contract.

This pro-rata approach was followed in Michel v. Michel, where the court faced the daunting task of valuing the community interest of two literary works prepared during the marriage, consisting of research notes and rough drafts, but published after divorce. The court, rejecting the author's assertion that partially completed literary works were her separate property, stated that a "[w]riter's literary works constitute a patrimonial asset which forms a part of the community insofar as its value is based upon the writer's services performed during the existence of the community." Finding that some of the author's work formed the foundation for the completed novels, the court awarded the non-author husband ownership in twenty-five percent of the value and receipts of the first novel, and five percent for the second.

123. See Lee Hargrave, Matrimonial Regimes, 53 La. L. Rev. 877, 887 (1993) (citing Michel v. Michel, 484 So. 2d 829 (La. App. 1st Cir. 1986) and Boyle v. Boyle, 459 So. 2d 735 (La. App. 4th Cir. 1984) for the proposition that courts should not refuse to value an asset because of speculation); Deliberto v. Deliberto, 400 So. 2d 1096 (La. App. 1st Cir. 1981) ("In determining the amount . . . any reasonable method may be used, even, in difficult cases, to the extent of averaging the conflicting and exaggerated estimates of witnesses.").

124. Hargrave, supra note 123, at 889; but see Ciolino, supra note 13, at 169-170 (suggesting that the difficulty in assigning a value to post-termination derivatives constitutes an additional reason Congress should not reform federal copyright law to accommodate community property jurisdictions).

125. 342 So. 2d 161 (La. 1977).
126. Id. at 163.
127. 484 So. 2d 829 (La. App. 1st Cir. 1986).
128. Id. at 833.
129. Id. at 834.
Surprisingly, a case arising out of Illinois, which is an equitable-distribution state, provides the best analogy to the copyright context. It illustrates that the difficulty of assigning a value is not unique to community property jurisdictions. *In re Marriage of Heinze* faced the dilemma of approximating each spouse's interest in future royalties generated from the wife's four speech therapy books written during the marriage. The wife claimed that future book sales would be enhanced by the fact that she would continue to give speeches and attend workshops on the subject of speech therapy. Additionally, the wife asserted that there was "a definite connection between her name recognition and the sales of her books." Further, a representative for the wife's publisher indicated that he could not predict how many books would be sold in the future or how long the company would continue to publish the books.

Even in the face of numerous uncertainties, the court overruled the trial court's finding that royalties were too "speculative" to be assigned a value. Noting that Illinois' definition of marital property was almost identical to California's definition of community property, the court was persuaded by the reasoning in *Worth* that future royalty income was marital property. The court considered all of the variables that might cause a fluctuation in the potential income and ruled that the "petitioner's efforts entitle her to a larger share of the royalties." The court thus awarded the wife seventy-five percent, and the husband twenty-five percent, of the incoming revenues from the books created during the marriage.

*Michel* and *Due* represent judicial efforts to assign a community interest in works spanning the existence and dissolution of the marriage. Although the *In re Heinze* decision arose in an equitable-distribution jurisdiction, the case is illustrative of the problems that can arise in community property states as well. All of these cases,

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131. Id. at 732.
132. *Id.* at 731.
133. *Id.*
134. *Id.* at 732. The court also relied upon *Dunn v. Dunn*, 802 P.2d 1314, 1319 (Utah Ct. App. 1990), where the court held that future royalty income derived from the husband's invention of surgical instruments constituted marital property. The court found that the wife was entitled to one-half of the royalties received from the invention, less an appropriate deduction for the time her husband spent generating the royalty income.
135. *Id.*; *In re Marriage of Heinze* also highlights the tax issues that are implicated when one spouse receives income from formerly community property and must pay a determined percentage to the other. Because the publisher pays the author directly, the court noted that the wife would bear the entire federal and state income tax liability. In an effort to correct this inequity, the court offset the husband's award in the following manner:

1. the petitioner shall compute the amount of each royalty from... [the publisher]...
2. which is attributable to sales of the four books written during the marriage...
3. the petitioner shall determine her liability for federal and state income taxes on the gross royalties based upon her applicable tax bracket;
4. the petitioner's income tax liability shall then be deducted from the gross royalties...
5. the petitioner shall pay the respondent 25 percent of the net royalties from the four books.

*Id.* at 733.
nevertheless, reflect the benefits of the pro-rata approach to valuation because "the risk that the works will not be successful and the chance of great success is shared by the spouses. To determine the value of such labor for immediate compensation would be difficult and unrealistic."\textsuperscript{136}

In determining each spouse's entitlement to future revenues from a copyright, the most important factor must be the effort expended by the author in creating the work during the marriage because it determines the community interest. The same analysis would apply to copyrights created before the marriage. For example, if an author left his copyright completely unchanged during the entire existence of the marriage, there would no community interest at all. The revenues from the copyright would be his separate property. If the author, however, made improvements or modifications to the copyright, no matter how small, a court would have to determine what portion of the changes were attributable efforts made during the existence to the community.

Artistic copyrights, of course, are exposed to numerous unforeseen factors that might lead to a fluctuation in its market value. For example, an increase in market value of the copyright caused by greater notoriety of the author would be difficult for a court to predict. As was demonstrated in\textit{Heinze}, post-termination endeavors by the artist might lead to an increase in value of the copyrighted work. In that case, the ex-spouse might realize a windfall because the increase would not be attributed to the community. Indeed, courts might try to persuade parties to enter into voluntary agreements whereby the spouses determine the valuations themselves.\textsuperscript{137} Parties then could not complain later when the share in their proceeds either increases or decreases.

\section*{VI. Conclusion}

In addressing the issue of copyright preemption of community property laws, Nimmer states that "[a] better solution . . . absent legislative redress . . . is to search out the underlying principles of both bodies of law and to work out an accommodation of the interests of each."\textsuperscript{138} Arguably, the \textit{Rodrique} court heeded his advice. The Copyright Act's main purpose is to ensure the marketability of

\begin{itemize}
\item \textsuperscript{136} Spaht & Hargrave, \textit{supra} note 3, § 3.30 at 100; \textit{see also Id.} at 101:

The courts, however, have adopted the pro rata approach in classifying incorporeal movables. It has been applied to pensions, contingent fee contracts . . . and to literary property. It seems that the trend will be to expand the use of the pro rata approach in dealing with movables. This development in the jurisprudence is supported by the similar policy adopted by the 1980 code revisions in providing for mixed ownership of sorts as a result of donations by spouses and for pro rata treatment of awards for future lost wages when those losses span a period of community and a period of separate property. (footnotes omitted).

\item \textsuperscript{137} \textit{See Due}, 342 So. 2d at 166 (Justice Tate stated the reason for remand to the trial court in order to calculate precise percentages partly revolved around the possibility of an "amicable partition and settlement in accordance with the principles noted."); \textit{see also Worth, supra} note 86 (where the spouses entered into a voluntary agreement to equally distribute the proceeds of a copyrighted work); \textit{In re Marriage of Heinze}, 631 N.E.2d at 732 (the court rejected the husband's suggestion of a 60 percent to 40 percent division of the royalties).

\item \textsuperscript{138} David Nimmer, \textit{Copyright Ownership by the Marital Community}, 36 UCLA L. Rev. 383, 402 (1988).
\end{itemize}
copyrights by vesting the copyright owner with exclusive control of his creation. Community property, in turn, recognizes the contributions of both spouses to property acquired during the marriage. As demonstrated above, permitting a community property interest to exist in the revenues of a copyright does not impact the copyright’s marketability. Nevertheless, the beauty of Rodrigue’s reconciliation of the two systems of law comes not from what it does not do, i.e., affect the author’s exclusive rights, but from what it does. Rodrigue supports the presumption against preemption of state family laws without offending the goals of the Copyright Act. More importantly, the decision compliments Congress’ growing concern for the plight of former spouses and confirms the sanctity of the community property theory.

Garth R. Backe