

Why Copyrights are Not Community Property

Dane S. Ciolino

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Why Copyrights Are Not Community Property

Dane S. Ciolino*

This Article argues that copyrights created during the legal regime of community property are the separate property of the author-spouse. Although community property law purports to vest ownership of all property—including copyrights—in both spouses in the community, federal copyright law vests ownership of copyrights solely in the author. Given this conflict, federal law preempts state community property law on the issue of initial vesting of copyright ownership. Furthermore, no provision of state community property law purports to transfer vested copyrights from the author to the community. Indeed, no state law could do so, given that federal law prohibits most involuntary copyright transfers. Arguing that federal classification of copyrights as the separate property of the author-spouse is fair, this Article concludes that such classification is essential not only to further important interests advanced by community property law, but also to comply with the Copyright Clause of the Constitution.

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I. INTRODUCTION

The Copyright Act of 1976¹ provides that the ownership of a copyrighted work vests initially in its author.² Thus, a screenwriter, novelist or artist who creates a work becomes the owner of that work as soon as he fixes it in a screenplay, manuscript, painting or other tangible medium of expression. As the copyright owner, the author is free to exploit his work through making and distributing copies and adaptations, through publicly performing or displaying the work,³ through granting licenses, or through transferring copyright ownership.⁴

However, the issue of copyright ownership becomes more complicated, as do so many things,⁵ upon marriage. Community property law provides that ownership of things acquired during marriage through the labor of a spouse vests in the community rather than in the separate patrimony of the laboring spouse.⁶ Thus, a welder, banker or lawyer who earns a salary at his job typically shares ownership of that income with his spouse. Although this is clear, who owns the copyrights created through the labors of a screenwriter, novelist or artist? Under community property law, the answer is simple: both spouses in the community. Under copyright law, the answer is likewise simple: the author alone. In these two simple answers lies a difficult problem.

How the law resolves this conundrum can have significant economic consequences upon the termination of an author's marriage. Consider, for example, one screenwriter, one novelist, and one artist. Screenwriter Gene Roddenberry divorced his first wife in 1969 just after his then-unsuccessful television series, *Star Trek*, had been canceled by NBC after a miserable three-season run.⁷ Apparently assuming that all copyrights in the series were community property, Mr. and Mrs. Roddenberry agreed to allocate the copyrights to Mr. Roddenberry and to allocate a "one-half interest" in future *Star Trek* profits to Mrs. Roddenberry.⁸ Since then, Mrs. Roddenberry has received well over \$13 million in *Star Trek* revenues.⁹ Similarly, Wanda Clancy sought a share of \$190 million

1. 17 U.S.C. §§ 101-1101 (1996 and Supp. 1999).

2. 17 U.S.C. § 201(a) (1996) (initial ownership of copyright).

3. 17 U.S.C. § 106 (1996) (enumerating exclusive rights in copyrighted works).

4. 17 U.S.C. § 201(d) (1996) (transfer of copyright ownership).

5. See John Gray, *Men are From Mars, Women are From Venus* (1992).

6. La. Civ. Code art. 2338.

7. See *Roddenberry v. Roddenberry*, 51 Cal. Rptr. 2d 907, 910 (Cal. Ct. App. 2d Dist. 1996).

8. *Id.*

9. See Bob Egelko, "Star Trek" Creator's First Wife Denied Profits From Show Spinoffs After

dollars in publishing revenues earned during her 20-year marriage to novelist Tom Clancy. Among other things, Mrs. Clancy demanded a share of "all 'intellectual property,' including [Mr. Clancy's] most famous character Jack Ryan." The prospect of sharing future book revenues with his ex-wife prompted the novelist to begin "plotting to bump [Jack Ryan] off."¹⁰ Finally, and closer to home, Veronica H. Rodrigue sought to have the copyright in a *Blue Dog* character¹¹ created by her ex-husband, Lafayette artist George G. Rodrigue, classified as community property so that she could recover a share of the profits garnered from his creation of *Blue Dog* artworks in the years following their 1992 divorce.¹²



Absolute Rodrigue

Although copyright ownership as between spouses can be financially significant, uncertainty on this issue abounds. Courts have reached different conclusions regarding spousal co-ownership of copyrighted works.¹³ Commentators have disagreed about the nature and extent of the problem and, in so doing, have suggested a range of proposed solutions.¹⁴ Moreover, most courts and commentators

Divorce, L.A. Daily News, Aug. 1, 1996, at N11. A California appellate court held that the agreement between Mr. and Mrs. Roddenberry to share profits was not intended to cover profits generated by *Star Trek* spin-offs, but only those generated by the original television series. *Id.*; see also *Roddenberry*, 51 Cal. Rptr. 2d at 907.

10. *Breaking Up is Hard to Do*, Dallas Morning News, Aug. 2, 1998, at 2A; see also *Tom Clancy's Cold War: The Author's Divorce Involves a Custody Dispute Over a Fictional Character*, Greensboro News & Rec., Aug. 9, 1990, at D16 ("who gets custody of [Tom Clancy's] literary alter ego, Jack Ryan"). While the state in which the Clancys' dispute arose, Maryland, is not a community property jurisdiction—it is an "equitable distribution" jurisdiction, see *id.*, many related issues arise in allocating copyrights and copyright revenues upon termination of an author's marriage.

11. See Figure 1 (George G. Rodrigue, *Absolute Rodrigue*).

12. See *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534 (E.D. La. 1999). The author represented Mr. Rodrigue's former business associate, Richard Steiner, in related claims joined in this litigation.

13. Compare *Worth v. Worth*, 241 Cal. Rptr. 135, 139-40 (Cal. Ct. App. 1st Dist. 1987) (copyrights are community property) with *Rodrigue*, 55 F. Supp. 2d at 534 (copyrights are not community property).

14. See 2 Matthew Bender & Co., *Valuation and Distribution of Marital Property* § 23.07 (1998); 1 Paul Goldstein, *Copyright* § 4.4.4.2 (2d ed. 1998); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 6A.01-6A.04 (1996); Lydia A. Nayo, *Revisiting Worth: The Copyright as Community Property Problem*, 30 U.S.F. L. Rev. 153 (1995); Francis M. Nevins, Jr., *When an Author's Marriage Dies: The Copyright-Divorce Connection*, 37 J. Copyright Soc'y 382 (1990); David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 U.C.L.A. L. Rev. 383 (1988); William F. Patry, *Copyright and Community Property: The Question of Preemption*, 28 Bull. Copr. Soc'y 237 (1981) (also published at 8 Comm. Prop. J. 205 (1981)); Michael J. Perlstein, *Copyright as Community Property: Questions About Worth are More Than Merely Trivial*, 9 Ent. L. Rep. 3 (1988); Debora Polacheck, *The "Un-Worth-Y" Decision: The Characterization of a Copyright as Community Property*, 17 Hastings Comm./Ent. L.J. 601 (1995); Peter J. Wong, *Asserting the Spouse's Community Property Rights in Copyright*, 31 Idaho L. Rev. 1087 (1995); Note, Carla M. Roberts, *Worthy of*

have failed to address critical constitutional issues presented by the problem and to distinguish issues relating to initial copyright vesting from those relating to subsequent copyright transfer. Finally, no commentator has considered the peculiar issues presented in this context by Louisiana's community property system.

This Article explores why copyrights created by an author subject to the legal regime of community property are the separate property of that author. Although Louisiana community property law purports to vest ownership of copyrights in both spouses in the community, federal copyright law vests ownership solely in the author-spouse. Given this conflict, Part II argues that federal copyright law preempts Louisiana community property law on the issue of initial vesting of copyright ownership.¹⁵ Furthermore, no provision of Louisiana community property law purports to transfer vested copyrights from the author to the community. As explained in Part III, no state law could do so given that federal law prohibits most involuntary copyright transfers.¹⁶ Because federal classification of copyrights as the separate property of the author-spouse is fair, Part IV concludes that such classification is essential not only to further important interests advanced by community property law, but also to comply with the Copyright Clause of the Constitution.¹⁷

II. AUTHORS, SPOUSES, AND INITIAL VESTING OF COPYRIGHT OWNERSHIP

Under Louisiana community property law, all things acquired through the industry of either spouse vest initially in the patrimonial mass comprising the community of acquets and gains.¹⁸ Under federal copyright law, however, all copyrights vest initially in the "author" of the work.¹⁹ This Part addresses the initial vesting of copyrights as between authors and spouses subject to the legal regime. In so doing, it evaluates the apparent conflict between state law and federal law on the issue of copyright vesting, and considers whether federal copyright law preempts state community property law.

A. Copyright Vesting Under Community Property Law

Louisiana's community property system is a set of principles and rules governing the ownership and management married persons' property.²⁰ Formally

Rejection: Copyright as Community Property, 100 Yale L.J. 1053 (1991).

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See La. Civ. Code art. 2338; *id.* art. 2336, cmt. c ("The community of acquets and gains is not a legal entity but a patrimonial mass, that is, a universality of assets and liabilities."); Matthew Bender, *supra* note 14, § 20.01[1], at 20-7 ("the community is not regarded as a legal entity separate and apart from the spouses composing it").

19. 17 U.S.C. § 201(a) (1996) ("Copyright in a work protected under this title vests initially in the author or authors of the work.")

20. See La. Civ. Code arts. 2325-2337.

denominated by the Louisiana Civil Code as the "legal regime of community of acquets and gains,"²¹ these principles apply to all spouses domiciled in Louisiana who fail to opt out through a matrimonial agreement.²² Under the legal regime, property typically is classified as "either community or separate," with each spouse owning a "present and undivided one-half interest in the community property."²³

The community property regime has a long history both in Europe and in Louisiana. Although many principles of Louisiana family law stem from Roman sources, the community property system traces its roots to Visigothic Spain.²⁴ From there, it branched to Spain's New World colonies including Louisiana, which was under Spanish colonial rule from the signing of the Peace of Paris in 1763²⁵ until retrocession to France in the 1800 Treaty of San Ildefonso.²⁶ Hence, Louisiana's community property system descends directly from Spanish law rather than from French or Roman law.²⁷

The policy rationale undergirding Louisiana's longstanding community property system is spousal equality.²⁸ Particularly, the system reflects the legislative judgment that spouses metaphorically are partners in a family enterprise who should share equally in the fruits of their combined efforts.²⁹ Thus,

21. La. Civ. Code art. 2327; *id.* art. 2334.

22. See La. Civ. Code art. 2334 ("The legal regime of community of acquets and gains applies to spouses domiciled in this state, regardless of their domicile at the time of marriage or the place of celebration of the marriage."). On opting out of the legal regime through a matrimonial agreement, see La. Civ. Code arts. 2328-2333.

23. See La. Civ. Code arts. 2334-2336.

24. See William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 1, at 3 (2d ed. 1971); *id.* § 7; 3 Marcel Planiol & George Ripert, *Treatise on the Civil Law*, pt. 2, ch. 1, no. 891, at 74 (La. St. L. Inst. trans., 11th ed. 1959) ("It is most probable that the community system came into being in the late Middle Ages, perhaps between the 8th and 10th centuries."); *id.* no. 889, at 73 (community property law not of Roman origin); see also Richard A. Ballinger, *A Treatise on the Property Rights of Husband and Wife, Under the Community or Ganancial System* § 1 (1895) (discussing the Spanish origins of community property); Nimmer & Nimmer, *supra* note 14, § 6A.01, at 6A-2 n.2.

25. See Light Townsend Cummins, *By the Stroke of a Pen: Louisiana Becomes Spanish*, in *Louisiana: A History* 52 (Bennett H. Wall ed., 2d ed. 1990).

26. See Light Townsend Cummins, *The Final Years of Colonial Louisiana*, in *Louisiana: A History* 82-83 (Bennett H. Wall ed., 2d ed. 1990); see also 1 Katherine S. Spaht & W. Lee Hargrave, *Matrimonial Regimes* § 1.1 in 16 *Louisiana Civil Law Treatise* (2d ed. 1997).

27. See, e.g., Spaht & Hargrave, *supra* note 26, § 3.46, at 175; Nina N. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 La. L. Rev. 1, 2 (1969); deFuniak & Vaughn, *supra* note 24, § 37, at 55 ("the Spanish law displaced the French law in the Louisiana territory, and although France later regained that territory from Spain, it was sold to us so soon after the French repossession that the Spanish law was still in force"); Matthew Bender, *supra* note 14, § 20.01[3][a], at 20-11 (Louisiana "relies on a community property system based largely upon Spanish law.").

28. See Spaht & Hargrave, *supra* note 26, § 3.2, at 47 ("From the earliest times, the most important legislative policy underpinning the Louisiana community property regime has been that spouses share equally 'the produce of the reciprocal labor and industry of both husband and wife.'").

29. See Matthew Bender, *supra* note 14, § 20.01[1], at 20-7 ("the community is analogous to a partnership in which the spouses are equal partners"); deFuniak & Vaughn, *supra* note 24, § 11.1, at

community property exists largely to recognize and respect the contributions made by each working spouse, irrespective of whether he or she works within the home or elsewhere.³⁰

Given this rationale, not all property in the possession of a spouse during the legal regime is classified as community property.³¹ Indeed, property acquired through means other than spousal labor during the marriage is often classified as separate property. For example, things acquired prior to the establishment of the legal regime or through individual inheritance or donation are classified as separate property.³² The "very nub" of the Spanish community property system adopted by Louisiana is that whatever is earned by the spouses during the marriage "belong[s] to both by halves."³³

Copyrights created by an author-spouse during marriage would seem to fit within the category of "community property"—at least as that category is delimited by Louisiana law. The logic appears straightforward enough: all copyrighted works are property;³⁴ all property acquired during the legal regime through the labor of a spouse is community property; ergo, all copyrights acquired during the legal regime through the labor of an author-spouse are community property.³⁵ Thus, when a

24; 3 Planiol & Ripert, *supra* note 24, pt. 2, ch. 1, no. 894, at 76 (community property regime developed as "a special kind of partnership"); *id.* ch. 2, no. 901, at 82 (community property regime is a "property partnership between spouses"); Ann L. Estin, *Love and Obligation: Family Law and the Romance of Law and Economics*, 36 Wm. & Mary L. Rev. 989, 1053-54 (1995) ("Where property division is concerned, the image of marriage as a partnership has been deployed in support of relatively equal division of 'marital assets.'"); Wong, *supra* note 14, at 1095 ("Community property is based on the theory that the marital community is a partnership between husband and wife.").

30. See Roberts, *supra* note 14, at 1059 (goal of community property is to "recognize in economic terms the contribution of nonbreadwinner spouses").

31. See Ballinger, *supra* note 24, at 4 (the civil law system "regards the husband and wife as distinct persons, with separate rights and capable of holding distinct and separate estates").

32. See La. Civ. Code art. 2338; *id.* art. 2341. Thus, Louisiana's ganancial system of community of acquets and gains differs markedly from the traditional French model of "community of movables and acquets." Under that system, all movables owned by both spouses at the time of marriage became community property. In contrast, under the Spanish ganancial system of "acquets and gains," the spouses retain the things that they owned prior to the marriage as separate property. See Spaht & Hargrave, *supra* note 26, § 3.46, at 175; Pugh, *supra* note 27, at 1. France ultimately adopted a ganancial system in 1965. See Robert L. Mennell & Thomas M. Boykoff, *Community Property in a Nutshell* 11 (1988).

33. deFuniak & Vaughn, *supra* note 24, § 66, at 140.

34. Copyrights, as "assets that are exchangeable with a value determined by the market," are "property" even under the most restrictive use of the term. See Estin, *supra* note 29, at 1056. See, e.g., *Monslow v. Monslow*, 912 P.2d 735, 744 (Kan. 1996) ("Copyrights . . . generally are regarded as property."); 1 Nimmer & Nimmer, *supra* note 14, § 6A.02[A], at 6A-4; Patry, *supra* note 14, at 240 ("Copyright is generally regarded as a form of property.").

35. 2 Matthew Bender, *supra* note 14, § 23.07[1], at 23-135 ("From a functional perspective, intellectual property is indistinguishable from other marital property assets subject to division at dissolution. Like other marital assets, intellectual property is acquired by the labor of one of the spouses."); see Nimmer & Nimmer, *supra* note 14, § 6A.02[A][3], at 6A-6 (given that copyright law creates a property interest, "it follows that such works, if qualified with respect to the time and manner of acquisition or creation, fall within the ambit of community property").

copyright comes into existence,³⁶ it vests in the community patrimonial mass in which the spouses have "present, equal, and existing interests."³⁷ Perhaps as a result of the apparent validity of this syllogism, every court that has considered this issue has so held as a matter of state community property law.³⁸ Irrespective of the soundness of this syllogism, federal law precludes its application to copyrights.³⁹

B. Copyright Vesting Under Federal Law

Under the Copyright Act of 1976, "[c]opyright in a work protected under this title vests initially in the author or authors of the work."⁴⁰ Initial vesting of copyright ownership occurs at the moment the author creates a work by fixing it for the first time in a tangible medium of expression.⁴¹ Once vested, the bundle of rights known collectively as "the copyright" gives the author the exclusive rights to reproduce, to adapt, to distribute, to perform publicly, and to display publicly the copyrighted work.⁴²

Federal copyright law vests all copyrights in "authors" and not in nonauthor-spouses. An "author" is the person to whom the work "owes its origin," its "originator" or "maker."⁴³ To qualify as an "author," a person must contribute

36. A copyright comes into existence when an author fixes an original work of authorship in a tangible medium of expression. *See, e.g.*, 17 U.S.C. § 102(a) (1996). Once created, the copyright gives the author the exclusive right to reproduce, to adapt, to distribute, to perform publicly and to display publicly the copyrighted work. *Id.* at § 106(a) (Supp. 1999).

37. Matthew Bender, *supra* note 14, § 20.02[1][b][i], at 20-19 ("From the moment community property is acquired, the interests of the husband and wife in the community property are present, equal, and existing interests."); *see* La. Civ. Code art. 2336 ("Each spouse owns a present undivided one-half interest in the community property.").

38. *See, e.g.*, *Worth v. Worth*, 241 Cal. Rptr. 135, 136-37 (Cal. Ct. App. 1st Dist. 1987); *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534, 538 (E.D. La. 1999); Matthew Bender, *supra* note 14, at 23-135 ("In recent years, all state courts that have addressed the issue have either assumed or have explicitly held that copyrights, and the royalties therefrom, are marital (or community) property to the extent that the copyrighted work or profits therefrom were generated by spousal labor during marriage.").

39. The fallacious nature of the argument lies not in its structure, but rather in the soundness of its minor premise. *See generally* Ruggero J. Aldisert, *Logic for Lawyers* 68-69 (3d ed. 1997). ("Validity deals only with form. It has absolutely nothing to do with content. Arguments, therefore, may be logically valid, yet absolutely nonsensical.") Particularly, the premise "all property acquired during the legal regime through the labor of a spouse is community property," is false: *some* property acquired during the legal regime through spousal labor is classified as separate property by federal law. *See infra* Part II.B.

40. 17 U.S.C. § 201(a) (1996). *See generally* Marshall Leaffer, *Understanding Copyright Law* § 5.1, at 147 (2d ed. 1995); Nimmer & Nimmer, *supra* note 14, § 5.01[A]; 1 William F. Patry, *Copyright Law and Practice* 359 (1994).

41. *See* 17 U.S.C. § 102(a) (1996); *see also* William S. Strong, *The Copyright Book: A Practical Guide* 35 (4th ed. 1993) ("Copyright comes into existence at the moment of a work's creation, just as, in some theologies, the soul enters the body at birth. At that time ownership vests in the author or authors.").

42. *See* 17 U.S.C. § 106(1-6) (1996 and Supp. 1999).

43. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 4 S. Ct. 279, 283 (1884);

significant copyrightable expression to a work.⁴⁴ One who merely contributes ideas, concepts or other noncopyrightable elements is not an "author" in whom copyright can vest.⁴⁵ Likewise, a person who contributes financially toward the creation of a work is not an "author" of that work.⁴⁶ Therefore, federal law does not permit vesting of copyright ownership in a nonauthor-spouse merely because she may have contributed ideas, concepts or partner-like financial and emotional support that facilitated the creation of a copyrighted work by the author-spouse.⁴⁷

C. Copyright Vesting and Federal Preemption

Although Louisiana law would vest copyrights in the community, federal law would vest them solely in the author-spouse. Put in civilian terms, although Louisiana community property law would vest the real rights in copyrighted works in the patrimonial mass of community property, federal copyright law would vest all copyrights solely in the patrimonial mass of the author-spouse. Given this conflict, which law governs?

1. Preemption Generally

The Supremacy Clause of the United States Constitution provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land."⁴⁸ Since Chief Justice Marshall's 1819 opinion in *M'Culloch v. Maryland*,⁴⁹ federal courts have relied upon the Supremacy Clause⁵⁰ to preempt state laws that conflict with federal laws

Committee for Creative Non-Violence v. Reid, 490 U.S. 730, 737, 109 S. Ct. 2166, 2172 (1989) ("the author is the party who actually creates the work, that is, the person who translates the idea into a fixed, tangible expression entitled to copyright protection").

44. See, e.g., *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061, 1067-71 (7th Cir. 1994); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990); *Napoli v. Sears, Roebuck & Co.*, 858 F. Supp. 101 (N.D. Ill. 1994); *Balkin v. Wilson*, 863 F. Supp. 523, 527 (W.D. Mich. 1994). See generally *Nimmer & Nimmer*, *supra* note 14, § 6.07, at 6-23—6-27.

45. See, e.g., *Strong*, *supra* note 41, at 35 ("the 'idea person' cannot claim joint authorship simply on the bases of having contributed ideas, no matter how original or how critical to the work's success").

46. See *Nimmer & Nimmer*, *supra* note 14, § 6.07, at 6-25. Of course, the Copyright Act by its terms denominates employers and certain other commissioners of works as "author[s] for purposes of this title." 17 U.S.C. § 201(b) (1996).

47. See *Matthew Bender*, *supra* note 14, § 23.07[3][b], at 23-144 ("there is no evidence of any congressional intent to accord authorship status to the 'nonauthor' spouse").

48. U.S. Const. art. VI.

49. 17 U.S. (4 Wheat.) 316 (1819).

50. For judicial opinions suggesting that preemption doctrine is rooted in the Supremacy Clause, see *Gade v. National Solid Waste Mgmt Assoc.*, 505 U.S. 88, 108, 112 S. Ct. 2374, 2383 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1825) ("acts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress" are preempted because "the act of Congress . . . is supreme"). For commentators who question the notion that preemption is rooted in the Supremacy Clause, see *Stephen A. Gardbaum, The Nature of Preemption*, 79 *Cornell L. Rev.* 767 (1994); *S. Candice Hoke, Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*,

and regulations.⁵¹ While every preemption analysis ultimately presents delicate federalism issues regarding the allocation of power between the federal government and the states,⁵² as a practical matter, preemption turns on whether Congress, in enacting a particular federal statute, intended to invalidate related or conflicting state laws.⁵³ Congress can manifest an intent to preempt either expressly or impliedly: preemption "is compelled" when "Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."⁵⁴

While express preemption is relatively straightforward, "implied" preemption is more problematic.⁵⁵ The Supreme Court has recognized two varieties of "implied" preemption, namely "field preemption," and "conflict preemption."⁵⁶ "Field preemption" exists when "the scheme of federal regulation is 'so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.'"⁵⁷ "Conflict preemption" exists either when "'compliance with both federal and state regulations is a physical impossibility,'"⁵⁸ or when state law, "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁵⁹

24 Conn. L. Rev. 829 (1992).

51. See Chester James Antieau & William J. Rich, *Modern Constitutional Law* § 43.17, at 33 (2d ed. 1997).

52. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 5.2.1, at 287 (1997).

53. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219 (1963)) ("The purpose of Congress is the ultimate touchstone" in every preemption case."); *Gade*, 505 U.S. at 96, 112 S. Ct. at 2381 ("The question of whether a certain state action is preempted by federal law is one of congressional intent."); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S. Ct. 1904, 1910 (1985) (the "purpose of Congress is the ultimate touchstone" of any preemption analysis); see also *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 1190 (1978). See generally Lawrence H. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988) ("the question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction"); Antieau & Rich, *supra* note 51, § 43.18, at 36; Chemerinsky, *supra* note 52, § 5.2.1, at 285-86; John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 9.1, at 319 (5th ed. 1995).

54. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383 (citations omitted).

55. See Chemerinsky, *supra* note 52, § 5.2.1, at 284 ("As in so many other areas of constitutional law, there is no clear rule for deciding whether a state or local law should be invalidated on preemption grounds.")

56. *Id.* at 285. The *Gade* test "has been frequently repeated by the Court." *Id.* at 286.

57. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383 (citations omitted). See generally Antieau & Rich, *supra* note 51, § 43.17, at 35; *id.* § 43.20, at 44; Chemerinsky, *supra* note 52, § 5.2.3, at 291; Tribe, *supra* note 53, § 6-27; Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. Rev. 187, 193-94 (1993); Gardbaum, *supra* note 50, at 811.

58. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383; see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217 (1963).

59. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383; see *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941); see also *Perez v. Campbell*, 402 U.S. 637, 649, 91 S. Ct. 1704, 1711 (1971). See generally Antieau & Rich, *supra* note 51, § 43.19, at 44; Tribe, *supra* note 53, § 6-26, at 481; Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 Vand. L. Rev. 1149, 1151 (1998).

The United States Supreme Court has considered a number of preemption cases involving the relationship between federal law and state marital property law. In *word*, the Court has been most respectful of state law. Stating that "the whole subject of domestic relations" law "belongs to the laws of the States and not to the laws of the United States,"⁶⁰ the Court has held that state "family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law will be overridden."⁶¹ In *deed*, however, the Court has been less than deferential toward state family law. On the contrary, state marital property law in general, and Louisiana community property law in particular, have fared poorly against federal law in past Supreme Court preemption cases.⁶²

Although the Supreme Court and numerous lower courts have addressed preemption issues in the context of state marital property law, few courts have considered whether federal copyright law preempts state community property law. Moreover, those which have considered the issue have reached different conclusions. Compare, for example, a California appellate court's opinion in *Worth v. Worth*,⁶³ with a federal district court's opinion in *Rodrigue v. Rodrigue*.⁶⁴ In *Worth*, the court considered whether copyrights in trivia books authored by Mr. Worth during his marriage to Mrs. Worth were separate property or community property under California law. Noting that the Copyright Act permits some involuntary transfers of copyrights, the court held that "nothing is found in the Act

60. *In re Burrus*, 136 U.S. 586, 593-94, 10 S. Ct. 850, 853 (1890).

61. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352, 86 S. Ct. 500, 507 (1966)). See generally *Wong*, *supra* note 14, at 1099.

62. See, e.g., *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754 (1997) (ERISA preempts Louisiana community property law); *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (ownership of nondisability military retirement pay governed by federal law); *Hisquierdo*, 439 U.S. at 572, 99 S. Ct. at 802 (ownership of benefits under federal Railroad Retirement Act governed by federal law); *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089 (1962) (ownership of United States savings bonds governed by federal law); *Wissner v. Wissner*, 338 U.S. 655, 70 S. Ct. 398 (1950) (ownership of veterans' life insurance benefits governed by federal law); *McCune v. Essig*, 199 U.S. 382, 26 S. Ct. 78 (1905) (ownership of land possessed pursuant to federal homestead laws governed by federal law); see also *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534, 537 (E.D. La. 1999) ("community property law has not fared well in preemption battles"). See generally 2 Matthew Bender, *supra* note 14, § 23.07[3], at 23-140 ("While the literal language of federal preemption doctrine would appear to give wide berth to state family law regulation, recent Supreme Court decisions have in fact held state marital property law preempted on the basis of relatively weak inferences drawn from the federal provisions."); *Nimmer & Nimmer*, *supra* note 14, § 6A.03[A], at 6A-14 ("The United States Supreme Court has repeatedly held that federal laws pre-empt conflicting provisions of state community property laws."); *Spaht & Hargrave*, *supra* note 26, § 3.40, at 147 ("The United States government, under the Supremacy Clause, may and frequently does override state property law in regulating the property interests, entitlements and institutions that it establishes."). Perhaps not surprisingly, state family law has fared better in preemption cases decided in state rather than federal courts. See *Nimmer & Nimmer*, *supra* note 14, § 6A.03[A], at 6A-15—6A16.

63. 241 Cal. Rptr. 135, 139-40 (Cal. Ct. App. 1st Dist. 1987).

64. 55 F. Supp. 2d 534 (E.D. La. 1999).

which either precludes the acquisition of a community property interest by a spouse, or which is otherwise inconsistent with community property law."⁶⁵ In *Rodrigue*, the court considered whether copyrights in art works authored by Mr. Rodrigue during his marriage to Mrs. Rodrigue were separate property or community property under Louisiana law.⁶⁶ In sharp contrast to *Worth*, the *Rodrigue* court held that "[a]ny community property ownership provision . . . that permits copyright ownership to vest initially in anyone other than the author is . . . preempted."⁶⁷ A conflict-preemption analysis demonstrates that there are as many reasons to commend the reasoning in *Rodrigue* as to discount that in *Worth*.⁶⁸

2. Conflict Preemption

Congress has not "expressly" preempted the application of community property law on the issue of initial vesting of copyrights. While Section 301 of the Copyright Act of 1976 expressly preempts all state laws creating "legal or equitable rights that are equivalent to any of the exclusive rights" of copyright,⁶⁹ that section does not expressly preempt state laws that merely affect works protected under federal law.⁷⁰ Likewise, as to "field" preemption, Congress has not so occupied the realm of copyright that no room exists for states to regulate matters pertaining to copyrighted works of authorship.⁷¹ Thus, if the Copyright Act is to

65. *Worth*, 241 Cal. Rptr. at 139; see also *In re Marriage of Heinze*, 631 N.E.2d 728, 731 (Ill. Ct. App. 3d Dist. 1994) (although it did not specifically address the preemption issue, the court noted generally, "we find persuasive the legal reasoning of the court in *Worth*").

66. See *Rodrigue*, 55 F. Supp. 2d at 541.

67. *Id.*

68. The *Worth* opinion should have little import in Louisiana. First, and most obviously, the case is not controlling because it was rendered by a California state court applying California law. Second, the opinion was, by the court's own admission, moot when it was decided. See *Worth*, 241 Cal. Rptr. 135, 135 n.1; see also Nimmer & Nimmer, *supra* note 14, § 6A.02[A][3], at 6A-7 n.21 ("*Worth* itself was moot when decided."). Third, the state court that decided *Worth* arguably lacked jurisdiction to decide the issue of copyright ownership, given that federal courts have exclusive jurisdiction to adjudicate copyright matters. See 28 U.S.C. § 1338(a) (Supp. 1999); Perlstein, *supra* note 14, at 5. Fourth, given that the *Worth* court considered neither the scheme of the Copyright Act nor its legislative history nor its jurisprudence, the opinion was inadequately researched and poorly reasoned. For these reasons, it is perhaps not surprising that *Worth* has been roundly criticized by nearly all commentators who have thoughtfully analyzed it. See, e.g., Nimmer & Nimmer, *supra* note 14, § 6A.02; Nevins, *supra* note 14, at 398 (characterizing *Worth* as a "travesty on judicial reasoning"); Nimmer, *supra* note 14; Roberts, *supra* note 14. But see Nayo, *supra* note 14.

69. 17 U.S.C. § 301(a) (Supp. 1999).

70. See *Rodrigue*, 55 F. Supp. 2d at 540-41; Nimmer & Nimmer, *supra* note 14, § 6A.03[A], at 6A-14 n.1 (Section 301 applies only to "state laws that accord copyright-like protection to works of authorship"); see also Scott M. Martin & Peter W. Smith, *The Unconstitutionality of State Motion Picture Film Lien Laws (or How Spike Lee Almost Lost It)*, 39 Am. U. L. Rev. 59, 86 (1989) (arguing that Section 301 does not expressly prohibit states from permitting and enforcing security interests in copyrighted works of authorship).

71. See Antieau & Rich, *supra* note 51, § 44.62, at 264-65 ("In general terms, states retain concurrent authority to enact laws that affect . . . copyrights . . . when they have not been precluded by Congress and there is no conflict between the federal and state regulations."); Chemerinsky, *supra* note

preempt Louisiana community property law, it must do so through "conflict" preemption.

The federal Copyright Act conflicts with Louisiana community property law on the issue of initial vesting of copyright. A federal statute impliedly preempts⁷² any state law with which it conflicts.⁷³ As discussed more fully below, the Copyright Act conflicts with Louisiana law for two independent reasons. First, complying with both federal and state law on the issue of copyright vesting would be an absolute impossibility. Second, permitting Louisiana law to vest copyrights in the community patrimonial mass would frustrate important congressional purposes and objectives of the federal Copyright Act. For these two reasons, federal copyright law preempts community property law and classifies all copyrights as the separate property of the author-spouse.

a. Impossibility of Simultaneous Compliance

Federal law impliedly preempts state law when "compliance with both federal and state regulations is a physical impossibility."⁷⁴ Put another way, when federal law and state law are "mutually exclusive," such that "a person could not simultaneously comply with both," the conflicting provision of state law is preempted.⁷⁵ Implied preemption cases presenting instances of physical impossibility typically are "easy," "obvious," and "rarely giv[e] rise to extended litigation."⁷⁶

It is impossible to give effect to Louisiana Civil Code article 2338 on the one hand, and the Copyright Clause of the Constitution and the Copyright Act on the other.⁷⁷ Civil Code article 2338 provides that "property acquired during the

52, § 5.2.3, at 296. *Cf.* *Goldstein v. California*, 412 U.S. 546, 93 S. Ct. 2303 (1973) (no field preemption under 1909 Copyright Act).

72. Some commentators have quibbled with the use of the term "preemption" in this context. Particularly, Professor Gardbaum has argued that "[t]he trumping of an otherwise valid state law by supreme federal law is simply not an instance of preemption, but of supremacy." *See* Gardbaum, *supra* note 50, at 809. Irrespective of the terminology employed (the terminology of "supremacy" or the more traditional rubric of "preemption"), the result is the same: state law must give way to conflicting federal law. *Id.* at 784.

73. *See, e.g., Gade v. National Solid Waste Mgmt Assoc.*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383 (1992); *see also Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 82 S. Ct. 1210, 1217 (1963); *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

74. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383; *see also Florida Lime*, 373 U.S. at 142-43, 83 S. Ct. at 1217.

75. Chemerinsky, *supra* note 52, § 5.2.4, at 297.

76. Antieau & Rich, *supra* note 51, § 43.19, at 39; Jordan, *supra* note 59, at 1171 ("Cases where it is impossible to comply with both federal and state laws are the easy preemption cases which generate no real controversy.").

77. *See Nimmer & Nimmer, supra* note 14, § 6A.03[A], at 6A-14 ("[W]hile the federal Act purports to confer an exclusive property right in the author, state community property laws as applied to copyrights would render author and spouse equal owners of the copyright.").

existence of the legal regime through the effort, skill, or industry of either spouse" is community property.⁷⁸ If given effect, this article would cause all copyrighted works created during the marriage to form part of the co-owned⁷⁹ mass of community property. In essence, Article 2338 would, if given effect, vest ownership of all copyrighted works jointly in the author-spouse and the nonauthor spouse.

It is impossible to give effect both to Civil Code article 2338 and to the Copyright Clause of the Constitution. The Copyright Clause of the Constitution provides as follows: "The Congress shall have the Power . . . To Promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Rights to their respective Writings"⁸⁰ Adopted by the Framers without debate,⁸¹ the Copyright Clause is one of several provisions constituting Article I, section 8—the section of the Constitution enumerating Congress' most significant powers.⁸²

Louisiana community property law conflicts with the Copyright Clause in a number of respects. First, the Copyright Clause expressly provides that only "[a]uthors" can secure "exclusive Rights" in "Writings." However, Louisiana Civil Code article 2338 attempts to grant property rights in copyrighted works to nonauthors. Second, the Copyright Clause expressly provides that persons may obtain exclusive rights only to "their respective Writings"⁸³ However, Civil

78. La. Civ. Code art. 2338.

79. La. Civ. Code art. 2336.

80. U.S. Const. art. I, § 8, cl. 8.

81. See *Nimmer & Nimmer*, *supra* note 14, § 1.01[A], at 1-4.

82. See *Tribe*, *supra* note 53, § 5-2, at 298 ("The chief powers of Congress are listed in Article I, § 8.")

83. U.S. Const. art. I, § 8, cl. 8 (emphasis added). Note that the Copyright Act grants exclusive rights to employers and certain commissioners of works of authorship under the rubric of "works made for hire." See 17 U.S.C. § 201(b) (Supp. 1999); 17 U.S.C. § 101 (Supp. 1999) (defining "work made for hire"). Such persons are not paradigmatic "authors." Nevertheless, the work-made-for-hire provision has been held to be constitutional despite that it confers copyright entitlements to nontraditional "authors." See *Scherr v. Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting); *Childress v. Taylor*, 945 F.2d 500, 505 n.5 (2d Cir. 1991) (the conferral of "'authorship' status on the employer of the creator of a work made for hire . . . is not constitutionally suspect."). Nevertheless, that the work-made-for-hire provision has passed constitutional muster does not necessarily mean that Civil Code article 2338 would as well. First, these decisions may be wrong. Second, the work-made-for-hire provision can be distinguished from Article 2338. The work-made-for-hire provision confers authorship status to a very limited class of persons who generally fit the traditional definition of "principals" under agency law. See *Nimmer & Nimmer*, *supra* note 14, § 5.03[B][1][a], at 5-21 ("traditional agency law principles" guide work-made-for-hire analysis). Thus, it is entirely consistent with longstanding principles of agency law to treat the principals of "true-author" agents as "authors." In contrast, spouses in Louisiana are, and have never been, agents (mandataries) for one another. See, e.g., *Spaht & Hargrave*, *supra* note 26, § 5.2, at 227 (spouses are "not mandataries or agents of each other"). See generally *Patry*, *supra* note 14, at 249 ("Since under agency principles we may say that the employee is acting for the employer-principal in the employment context, the fiction of the employer qua author is not too attenuated."). Finally, the work-made-for-hire provisions were enacted by Congress—not by a state legislature, thus avoiding the constitutional problems attendant to the State of Louisiana granting copyright entitlements to a nonauthor. See *Patry*,

Code article 2338 attempts to grant property rights to persons in works created by others. Finally, the Copyright Clause specifically gives only "Congress"—not state legislatures—the power to grant copyright entitlements.⁸⁴ However, the Louisiana legislature, through Article 2338, attempts to grant copyrights to nonauthors. For these reasons, it is impossible to give effect to both Civil Code article 2338, which purports to grant a copyright entitlement to nonauthors, and the Copyright Clause of the Constitution, which requires that copyright entitlements be granted only by Congress, and then only to authors in works created by them.

It is also impossible to give effect both to Civil Code article 2338 and to Section 201(a) of the Copyright Act of 1976. Section 201(a) provides that copyright "vests initially in the author or authors" of a work of authorship.⁸⁵ In contrast, Civil Code article 2338 attempts to vest copyright in the patrimonial mass shared by the author-spouse and the nonauthor-spouse. Such a clear conflict between federal and state law presents an easy preemption analysis. Because the Copyright Act preempts Civil Code article 2338, Section 201(a) of that Act initially vests copyright solely in the author-spouse.⁸⁶

b. Frustration of Congressional Purposes

Federal law impliedly preempts state law not only when state law and federal law cannot be applied simultaneously, but also when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives

supra note 14, at 249 (Congress "expressly provided for this fiction [employer as author] in Section 201(b).").

84. See U.S. Const. art. I, § 8, cl. 8 ("Congress shall have Power . . . To Promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .") (emphasis added); *id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives.") (emphasis added); see also *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992) (states cannot exercise power delegated to Congress).

85. 17 U.S.C. § 201(a) (Supp. 1999).

86. See *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534, 541 (E.D. La. 1999) ("Ownership cannot vest simultaneously in both the author alone and in the community."); Nevins, *supra* note 14, at 399 ("community ownership comes into being under state law at the moment the work comes into legal existence under the Copyright Act and is therefore also 'initial' in nature, thus creating a conflict which permits of only one resolution under the Supremacy Clause"); Patry, *supra* note 14, at 272 (community property's "automatic vesting in the nonauthor spouse is in possible conflict with the Copyright Act's grant of exclusive rights"); Polacheck, *supra* note 14, at 604; *id.* at 607 ("community property law and federal copyright law . . . conflict").

Note that under the 1909 Copyright Act, there was no conflict between state community property law and federal copyright law at the point of initial vesting. Prior to the effective date of the 1976 Copyright Act, state law protected copyrightable works from the moment of their creation until federal copyright protection later attached. Thus, at inception these copyrightable works were subject to applicable state copyright laws and, arguably, state community property laws. See 1 Nimmer & Nimmer, *supra* note 14, at § 6A03[C][1], at 6A-18—6A-19 ("no federal-state conflict because both common law copyright and community property [were] creations of state law").

of Congress."⁸⁷ Although a frustration-of-purpose preemption analysis is unnecessary when, as here, the federal and state laws in issue cannot be applied simultaneously,⁸⁸ such an analysis confirms descriptively that the Copyright Clause and the Copyright Act in fact preempt community property law with regard to copyright vesting. Moreover, such an analysis demonstrates normatively why this should be so. Indeed, to permit state law to classify copyrighted works as community property not only would undermine the economic market that Congress created for such works, but also would frustrate Congress' goal to promote greater uniformity in domestic and international copyright law. In so doing, state community property law would inflict "major damage" to "clear and substantial" federal interests.⁸⁹

i. Facilitating a Market for Copyrighted Works

The singular goal of copyright is, and constitutionally must be, "[t]o Promote the Progress of Science."⁹⁰ Acting pursuant to the power expressly granted to it by the Copyright Clause, Congress enacted the Copyright Act of 1976 to further the "important public purpose" of promoting the production of new works of authorship.⁹¹ To encourage authorship, federal copyright law grants authors

87. *Gade v. National Solid Waste Mgm't Assoc.*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383 (1992); see *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S. Ct. 1879 (1974); *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941); see also *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704 (1971). See generally *Antieau & Rich*, *supra* note 51, § 43.19, at 38; *Chemerinsky*, *supra* note 52, § 5.2.5, at 300; *Tribe*, *supra* note 53, § 6-26, at 482-83; *Jordan*, *supra* note 59, at 1151; *Gardbaum*, *supra* note 50, at 808, 810. In evaluating whether the application of a particular state law would frustrate congressional objectives, courts consider the structure, text and legislative history of the federal statute in question. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S. Ct. 2240, 2250 (1996); see also *Antieau & Rich*, *supra* note 51, § 43.19, at 40-43; *Chemerinsky*, *supra* note 52, § 5.2.1, at 285.

88. See, e.g., *Tribe*, *supra* note 53, § 6-26, at 482 n.7 ("[W]hen the governing federal law simply cannot be read to leave room for a challenged state measure to operate, inquiry into Congress' purposes cannot properly avoid a conclusion on preemption."); *Jordan*, *supra* note 59, at 1157 ("Of course, if the federal and state laws actually conflict, the Supremacy Clause operates to supersede state law and there is arguably no need to infer congressional intent to preempt the state law.")

89. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808 (1979); *Rodrigue*, 55 F. Supp. 2d at 538, 541 ("Article 2338 not only literally conflicts with the Act . . . , it does major damage to the substantial federal interest in providing exclusive rights to authors.")

90. U.S. Const. art. I, § 8, cl. 8 (Patent and Copyright Clause). Although somewhat counterintuitive, the term "Science" refers to the writings of authors. See *Graham v. John Deere Co.*, 383 U.S. 1, 5-6, 86 S. Ct. 684, 687-88 (1966). See generally *Craig Joyce et al.*, *Copyright Law* 63 n.1 (4th ed. 1998).

91. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 104 S. Ct. 774, 782 (1984); see *Feist Publ'g, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50, 111 S. Ct. 1282, 1290 (1991) ("The primary objective of copyright is not to reward the labors of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8"); see also *L. Ray Patterson & Stanley W. Lindberg*, *The Nature of Copyright: A Law of Users' Rights* 138 (1991) (copyright protection is "granted in return for quid pro quo—the creation of a work of authorship to benefit the public"); *Wendy J. Gordon*, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 *J. Legal Stud.* 449, 449 (1992) ("Legal protection for intellectual property is based on the benefits the producers generate.")

exclusive rights in their creations, including the rights to reproduce, adapt, distribute, publicly perform, and publicly display copyrighted works.⁹² These property-like rights force would-be users to bargain with authors for permission to use copyrighted works,⁹³ thus creating an economic market that promotes artistic creation.⁹⁴

For any such market to flourish, there must be reasonable certainty regarding the ownership and transferability of the exclusive rights to be exchanged.⁹⁵ After all, potential acquirers presumably pay more money and more often when they are reasonably certain that a transaction actually will get them what they want.⁹⁶ The potential uncertainty surrounding ownership and transferability of works of authorship threatens the market that Congress has attempted to create through enacting copyright legislation.⁹⁷ For this reason, when Congress overhauled American copyright law in the Copyright Act of 1976, it purposely sought to assure that the ownership of copyrights remained "clear and definite, so that such property will be readily marketable."⁹⁸ Indeed, the United States Supreme Court has noted that "enhancing predictability and certainty of copyright ownership" was "Congress' paramount goal" in revising American copyright law in 1976.⁹⁹

92. See 17 U.S.C. § 106 (Supp. 1999).

93. See, e.g., Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 Wm. & Mary L. Rev. 1585, 1606 (1998); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 328-29 (1989); Stewart E. Sterk, *Rhetoric and Reality in Copyright*, 94 Mich. L. Rev. 1197, 1204 (1996).

94. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 Stan. L. Rev. 1343, 1389 (1989) ("the copyright statute . . . facilitates the use and development of copyrighted works through markets"); Wendy J. Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-by-Case Responses to Market Failure*, 8 J. Law & Info. Sci. 7, 11 (1997) (a "private market" for copyrighted works generates incentives for production).

95. See, e.g., Richard A. Posner, *Economic Analysis of Law* § 3.11, at 86 (5th ed. 1998) ("Efficiency requires that property rights be transferable, and if many people have a claim on each piece of property, transfers will be difficult to arrange."); see also William M. Landes & Richard A. Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in *Economics of the Arts* 177, 183-84 (Victor A. Ginsburgh & Pierre-Michel Menger eds., 1996) (as to tangible artifacts, "[t]he more secure that property rights in works of art [are], the more likely those works are to circulate, conferring value on art lovers, scholars, and artists").

96. See *Committee for Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 4 S. Ct. 2166, 2177 (1989) ("In a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the . . . work.").

97. This is particularly so given that copyright lacks a mandatory system of recorded titles. See 17 U.S.C. § 408(a) (1994) (owner "may obtain registration of the copyright claim"; "registration is not a condition of copyright protection") (emphasis added); *id.* § 205(a) (Supp. 1999) ("Any transfer of copyright ownership or other document pertaining to copyright may be recorded in the Copyright Office . . .") (emphasis added).

98. *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992); see *Konigsberg Int'l, Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994) (Kozinski, J.) (enhancing predictability and certainty of ownership was "'Congress's paramount goal' when it revised the Act in 1976") (quoting *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990)).

99. See *CCNV*, 490 U.S. at 749, 109 S. Ct. at 2177.

To further this "paramount goal," Congress enacted provisions restrictively delimiting those persons in whom copyrights initially vest. Under Section 201(a) of the 1976 Act, copyright "vests initially in the author or authors of the work."¹⁰⁰ Congress and the courts have purposely circumscribed the term "author" to include only those who contribute copyrightable expression to the creation of a work.¹⁰¹ The only exception to this rule is a carefully drafted provision relating to works classified as "works made for hire," that is, works (1) made by employees within the scope of their employment, or (2) "specially ordered or commissioned" for a limited number of particularized uses when "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."¹⁰² The "author" of a work made for hire is the employer or the commissioner of the work.¹⁰³ Thus, Congress and the courts have sharply limited the persons who can qualify as an "author" in whom copyright can initially vest.

In a similar effort to enhance the predictability of copyright ownership, Congress in 1976 clarified the manner in which vested copyrights can be transferred to others. In so doing, Congress strictly limited the acts that can effect a valid transfer.¹⁰⁴ These provisions relating to vesting and transfer have worked together to resolve much of the confusion regarding copyright ownership that predated the 1976 Act.¹⁰⁵

Allowing state community property law rather than federal copyright law to prescribe ownership of copyrights would obstruct Congress's goal of facilitating a

100. 17 U.S.C. § 201(a) (Supp. 1999).

101. See, e.g., *CCNV*, 490 U.S. at 737, 109 S. Ct. at 2171 ("As a general rule, the author is the person who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."); see also Strong, *supra* note 41, at 38.

102. 17 U.S.C. § 101 (Supp. 1999) (defining "work made for hire"). The particularized uses are limited to works ordered for use as "a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas . . ." *Id.* Congress' decision to classify employers and commissioners as "authors" was "hotly contested," and ultimately, deliberately made. See Patry, *supra* note 14, at 248-49.

103. See 17 U.S.C. § 201(b) (1996).

104. For example, as to the voluntary transfer of copyrights, Section 204(a) provides that no such transfer is valid "unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed. . . ." See 17 U.S.C. § 204(a) (1996). Section 202 provides that the transfer of a "material object . . . does not of itself convey any rights in the copyrighted work embodied in the object. . . ." See 17 U.S.C. § 202 (1996). To further enhance predictability in the context of voluntary transfers, Congress in the 1976 Act provided that certain certificates of acknowledgment constitute prima facie evidence of the execution of the transfer, and enacted provisions relating to the recordation of copyright transfers and priority as between conflicting transfers. See 17 U.S.C. § 205 (1996).

As to the involuntary transfer of copyrights, Section 201(e) provides that, other than in the context of a bankruptcy proceeding, no involuntary transfer can occur absent a prior voluntary transfer. See 17 U.S.C. § 201(e) (1996).

105. See Leaffer, *supra* note 40, § 5.11[A], at 169 (writing requirement "serves as a guidepost to resolve disputes by rendering the ownership rights clear and definite"); Nevins, *supra* note 14, at 390-91.

market for copyrighted works by undermining the predictability of both copyright vesting and transfer.¹⁰⁶ As to initial vesting, this threat to predictability seems, at first blush, exaggerated. After all, if state community property law were to govern copyright vesting, ownership would simply vest in the patrimonial mass that is co-owned in indivision by the author- and nonauthor-spouse, and no uncertainty would exist. Although this may be true with regard to works created entirely during marriage, it would certainly not be as to works created partly during and partly after termination of the legal regime. Under federal copyright law, a work is "created" when fixed for the first time by the author in a tangible medium of expression.¹⁰⁷ However, when an author prepares a work "over a period of time," the portion that happens to be fixed at "any particular time constitutes the work as of that time."¹⁰⁸ Applying this principle to a work in progress upon termination of the legal regime would be problematic. For example, a single painting by a single author presumably could include some brush strokes co-owned by the author and his spouse, and some owned solely by the author.¹⁰⁹ Thus, if state community property law were to govern the initial vesting of copyrights, uncertainty would exist as to the ownership of works the creation of which straddled the termination of the legal regime.

As to copyright transfers, permitting state community property law to regulate copyright conveyances would also create uncertainty regarding ownership. For example, if Louisiana law were permitted to classify copyrights as community property, it would be unclear whether state law or federal law would govern which spouse would have the authority to execute valid transfers of community works. Under federal law, a joint owner acting alone cannot execute a valid copyright transfer.¹¹⁰ Although state community property laws vary widely on many management issues,¹¹¹ Louisiana community property law provides that spouses in a legal regime share equal authority to alienate most community property. Thus,

106. See Nimmer, *supra* note 14, at 397 (noting that indeterminacy "threatens chaos for both the copyright creative and consuming communities").

107. See 17 U.S.C. § 102(a) (1996); *id.* § 101 (Supp. 1999) (defining term "created").

108. *Id.* § 101 (Supp. 1999).

109. Under the Copyright Act, those in whom copyright vests initially are termed "authors." See 17 U.S.C. § 101 (Supp. 1999); *id.* § 201 (1996). If, by initially vesting copyright in the co-owned patrimonial mass, community property law somehow made those portions of a work created during marriage "joint works," a single painting conceivably could have component copyrights that expire at different times. Compare 17 U.S.C. § 302(a) (Supp. 1999) (copyright "subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death") with *id.* § 302(b) (Supp. 1999) ("In the case of a joint work . . . the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.").

110. See, e.g., Nimmer & Nimmer, *supra* note 14, § 6A.02[B][1], at 6A-10 ("One joint owner acting alone . . . cannot convey an exclusive license in the work. For given that each co-owner owns an undivided share in the whole, such an exclusive license, if given effect, would effectively deprive the remaining co-owners of their coordinate right to license the work."); Nimmer, *supra* note 14, at 393; see also Nayo, *supra* note 14, at 164-65 ("all joint owners of a copyright must join in a transfer of an exclusive right").

111. See Patry, *supra* note 14, at 270-71. This variation itself is an additional source of uncertainty.

in sharp contrast to federal copyright law,¹¹² Louisiana law generally permits each spouse to alienate community property without the consent, and even over the objection, of the other spouse.¹¹³

Furthermore, whether Louisiana community property law would permit a nonauthor-spouse to alienate copyrights created by the other could depend on the registration status of the work. Under Louisiana community property law, only the spouse in whose name a "registered movable" is registered can alienate it.¹¹⁴ If a registered copyright is a "registered movable,"¹¹⁵ then only the registering spouse could validly transfer the work. The uncertainty associated with these management issues would give rise to substantial doubt regarding the validity of copyright transfers executed by Louisiana authors.¹¹⁶

In addition to the adverse market effects resulting from uncertainty, applying state community property law to copyrights may reduce the incentives created by copyright law to spur artistic creation. This problem would be most acute in the wake of divorce. Take for example a divorced author contemplating the creation of a work based in part on one created during the former marriage.¹¹⁷ If he and his ex-spouse had not partitioned their former community property, then they would be co-owners of all former-community copyrights and would share all civil fruits generated through the exploitation of those copyrights.¹¹⁸ Because community

112. See Nimmer & Nimmer, *supra* note 14, §6A.02[C], at 6A-12 (the "schemata for the disposition of community assets and of copyrights differ markedly").

113. See La. Civ. Code art. 2346 and cmt. a; *see also* Spaht & Hargrave, *supra* note 26, § 5.2, at 227-29.

114. See La. Civ. Code art. 2351.

115. Under Louisiana community property law, it would not even be certain whether a registered copyright would constitute a "registered movable." Professors Spaht and Hargrave have argued that Louisiana Civil Code articles 2351 and 2347 "should apply only to those movables for which the registration scheme provided by law is one that purports to protect those who rely on the ownership inferences that come from registration or issuance in one's name." See Spaht & Hargrave, *supra* note 26, § 5.7, at 241. Copyright's registration scheme provides little protection to those who act in reliance on any inferences drawn from registration.

116. See *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 524, 546 (E.D. La. 1999); Nimmer & Nimmer, *supra* note 14, § 6A.02[C], at 6A-13 (indeterminacy regarding transfers "threatens chaos for both the copyright creative and consuming communities"); Nimmer, *supra* note 14, at 392-97; Perlstein, *supra* note 14, at 6; Roberts, *supra* note 14, at 1053.

117. For example, if author Tom Clancy had created the literary character Jack Ryan while subject to a community property regime, presumably his decision to write additional novels around this character would be affected by community ownership of the copyright in the character. For an interesting discussion of the marital property issues raised by Tom Clancy's divorce, see Laura Lippman, *In Tom Clancy's Divorce Case, Wife Seeks Custody of Jack Ryan*, *The Seattle Times*, Jun. 16, 1998, at A10.

118. See La. Civ. Code art. 2369.2 ("Each spouse owns an undivided one-half interest in former community property and its fruits and products."). Although the ex-spouses would be co-owners of such former-community copyrights, neither could grant copyright licenses without the concurrence of the other. *Id.* art. 2369.4 (Unless the copyright in question were considered a "registered movable" which was registered in the name of the spouse seeking to grant the copyright licenses. See *id.* art. 2369.5). The danger of competition between former spouses driving down the value of community copyrights, and thereby reducing the incentives to create derivative works based thereon, would appear

property law mandates the sharing of such fruits, the author presumably would be less inclined to create derivative works based on a former-community copyright than to create wholly-original works.¹¹⁹ Moreover, if a former-community copyright were allotted to the *nonauthor* upon partition, then the author's creative decisions would forever be affected. Because the nonauthor would have the exclusive right to prepare derivative works based on the former community copyright,¹²⁰ the author could not freely adapt his earlier work. On the contrary, doing so would render him an infringer of copyright.¹²¹

This problem is potentially profound. Indeed, it is significantly more nettlesome than it may at first appear. An author who co-owns a copyright with another, or who transfers a copyright to another, faces the risk that he may be forced to share ownership of subsequent works that were not even intended to be adaptations of the co-owned or transferred work. Consider the copyright infringement case brought against musician John Fogerty by the record company to which he had transferred the copyrights in his song *Run Through the Jungle*. Fogerty was sued because a song written by him many years later, *The Old Man Down the Road*, sounded similar to *Run Through the Jungle*.¹²² Fogerty claimed that any similarity between the works was attributable to the simple fact that he wrote both songs. Because both emanated from "the same musical vocabulary," argued Fogerty, both had a strikingly similar "'swamp rock' and bluesy sound."¹²³ While Fogerty ultimately was vindicated at trial,¹²⁴ the case raises the ominous issue of "whether composers, writers and artists [can] be barred from creating new works that bare the stamp of their own distinctive style. . . ."¹²⁵ The same problem

to be minimal. Cf. George D. Cary, *Study No. 12: Joint Ownership of Copyrights*, in 1 *Studies on Copyright* 713 (Copyright Soc'y of the U.S.A. ed. 1963) (1958) (discussing the potential problem of co-owners competing with one another "with the normal result that both may suffer financially").

119. For example, the prospect of sharing future book revenues with his ex-wife prompted novelist Tom Clancy to begin "plotting to bump [Jack Ryan] off." *Breaking Up is Hard to Do*, Dallas Morning News, Aug. 2, 1998, at 2A.

120. See 17 U.S.C. § 106(2) (1996).

121. As an infringer, the author would potentially be liable to his ex-spouse for actual damages, statutory damages or all profits attributable to infringement. See 17 U.S.C. § 504 (Supp. 1999). See generally Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 Emory L.J. 1 (1999). If liable for infringer's profits, the author would be permitted to retain any profits attributable to factors other than the infringed work. See 17 U.S.C. § 504(b) (Supp. 1999). However, the process of apportioning profits between the infringed work and a myriad of other revenue-generating factors is notoriously difficult. See Ciolino, *supra*, at 20-25.

122. See Harvey W. Geller & Thomas M. Hines, *Intellectual Property: Copyright Used to Challenge "Self-Plagiarism": Should David Letterman Be Required to Revamp His Humor*, Nat'l L.J., Nov. 1, 1993, at S9; see also Katherine Bishop, *A Victory for the Creative Process*, N.Y. Times, Nov. 11, 1988, at B5.

123. Geller & Hines, *supra* note 122, at S9.

124. One member of the jury explained the verdict in favor of Mr. Fogerty as follows: "Creative people have got to have rights to create without being harassed by too many business types." See Bishop, *supra* note 122, at B5.

125. *Id.*; see also Christopher Man, *The Scope of Intellectual Property's Protection of Stylistic Rights*, 47 Wash. U.J. Urb. & Contemp. L. 213, 250 (1995) (noting that "most of the artists who have

would confront a divorced spouse contemplating the creation of a post-divorce work in a style similar to that reflected in a predivorce work. Such an author's incentive to create nonderivative yet stylistically similar works would undoubtedly be diminished.¹²⁶

ii. *Fostering Uniformity of Copyright Law*

In addition to undermining the market that Congress intended to facilitate for copyrighted works, permitting state community property law to prescribe ownership of copyrighted works would also frustrate Congress' goal of fostering greater uniformity in copyright law. When state legislation obstructs Congress' effort to promote uniformity in an area of federal concern, that legislation is subject to preemption.¹²⁷ In enacting the 1976 Copyright Act, one of Congress' principal goals was to foster uniformity in national and international copyright law.¹²⁸ This congressional goal is evident from the structure, text and legislative history¹²⁹ of the Copyright Act and related legislation.

The text of the Copyright Act reflects Congress' concern about fostering uniformity. Section 301 explicitly preempts state laws that grant rights equivalent to those within the general scope of copyright.¹³⁰ Moreover, Congress explicitly vested exclusive jurisdiction in the federal courts to adjudicate copyright disputes.¹³¹

sold the copyrights to their works probably never considered the possibility that they could be selling the backbone of their careers"). As Judge Posner has observed, an artist is:

more likely to duplicate one's own work without copying than another person would be likely to do. If Cézanne painted two pictures of Mont St. Victoire, we should expect them to look more alike than if Matisse had painted the second, even if Cézanne painted the second painting from life rather than from the first painting.

Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 414 (7th Cir. 1992).

126. See Man, *supra* note 125, at 252 (noting that "the inability to distinguish between the public domain and protected style may reduce the incentive for the public to create"). The only way to ameliorate this problem would be to allocate to the author-spouse all former-community copyrights during partition.

127. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 98 S. Ct. 988 (1978); see also Tribe, *supra* note 53, § 6-26, at 486 (a "conflict with federal objectives may occur when state action undermines a congressional decision in favor of national uniformity of standards"); Hoke, *supra* note 50, at 890 (discussing the importance in a preemption analysis of considering "the congressional purpose to create at the national level a uniform regulatory scheme").

128. See, e.g., H.R. Rep. No. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5745; see also Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 540 (E.D. La. 1999); Patry, *supra* note 14, at 264 (one of Congress' fundamental purposes underlying the 1976 Act was to "promote national uniformity and avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various states . . .").

129. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 484, 116 S. Ct. 2240, 2250 (1996).

130. See 17 U.S.C. § 301(a) (1996).

131. See 28 U.S.C. § 1338(a) (1993); see also Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 n.7, 84 S. Ct. 784, 788 n.7 (1964) ("The purpose of Congress to have national uniformity in . . . copyright laws can be inferred from such statutes as that which vests exclusive jurisdiction to hear . . .

The legislative history of the 1976 Act likewise reflects Congress' concern about uniformity in copyright. That history notes that Congress intended to create a "single federal system" to "improve the operation of the copyright law," and thereby to promote "writing and scholarship."¹³² This concern for uniformity transcended domestic concerns. Noting that the "[a]doption of a uniform national copyright system would greatly improve international dealings in copyrighted material," the House Report to the 1976 Act presaged the explosion of the internet and related technologies: "In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance."¹³³

The importance of uniformity in the law governing initial vesting of copyrights is likewise clear in the Supreme Court's opinion in *Community for Creative Non-Violence v. Reid*.¹³⁴ In determining whether the copyright at issue in *Reid* vested in the person hired to create a sculpture or, rather, in the hiring person, the Court turned to "the general common law of agency," and forged federal common law in resolving the issue.¹³⁵ Significantly, the Court did not apply the agency law of the state in which the hiring actually took place. Doing so would have opened the door to disunity regarding copyright vesting.¹³⁶

The fact that Congress and the Court have sought to promote national uniformity in copyright is not surprising in light of the Framers' decision to include the Copyright Clause as part of the Constitution. That clause, which empowers Congress to enact legislation securing to authors "the exclusive Right to their . . . Writings,"¹³⁷ exists because the Framers believed that the states could not "separately make effectual provisions" to protect authors' rights in writings.¹³⁸

copyright cases in federal courts, 28 U.S.C. § 1338(a) . . ."); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858 (5th Cir. 1979).

132. H.R. Rep. No. 94-1476, *supra* note 128, at 5745.

133. *Id.* at 5746.

134. 490 U.S. 730, 109 S. Ct. 2166 (1989).

135. *See id.* at 751-53, 109 S. Ct. at 2178-80. The Court has used this federal common law standard regarding employment in noncopyright cases. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S. Ct. 1344, 1348 (1992).

136. *See generally* *Nimmer & Nimmer*, *supra* note 14, § 5.03[B][1][a], at 5-21 n.61 ("Given that federal statutes are intended to have uniform nationwide application, the Court looked to general common law, rather than the law of any particular state.")

137. U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .").

138. The Federalist No. 43 (James Madison) ("The States cannot separately make effectual provisions for [patents and copyrights], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."); *see also* H.R. Rep. No. 94-1476, *supra* note 128, at 5745 (noting that "[o]ne of the fundamental purposes behind the copyright clause of the Constitution . . . was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States"); *Goldstein v. California*, 412 U.S. 546, 555, 93 S. Ct. 2303, 2309 (1973) ("The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope."); *Mitchell Bros. v. Film Group*, 604 F.2d

Permitting state community property law to prescribe the ownership of federal copyrights would substantially interfere with the uniformity that the Framers, Congress and the Supreme Court have sought to establish and to maintain in copyright law in general, and in the vesting of copyright ownership in particular.¹³⁹ Among the states and territories, only nine employ a community property system to govern the ownership, management and post-termination distribution of marital property. All other jurisdictions utilize some variant of the equitable-distribution system.¹⁴⁰ Thus, if community property law were permitted to vest ownership in the spouses jointly rather than in the author-spouse alone, spousal joint vesting would be the rule in only nine jurisdictions. Moreover, even among these nine jurisdictions, the laws governing the classification of assets and the management of community assets are remarkably diverse.¹⁴¹ Therefore, applying state community property law to govern copyright ownership and management could lead to disunity not only as between American community property jurisdictions and equitable-distribution jurisdictions, but also within the community property jurisdictions themselves.

The detrimental effects that would flow from such disunity in the law governing ownership and transfer of copyrights are perhaps obvious. Rather than looking to a single federal source to determine whether a would-be transferor in fact owns and can transfer the copyright sought to be acquired, a prudent potential transferee, whether from this country or abroad, would have to consider the following issues: whether the transferor was, or was at some time, married; if so, whether the transferor was ever domiciled in a community property jurisdiction; if so, whether the transferor opted out of the default community property regime through a valid matrimonial agreement; if not, whether the transferor created the work sought to be acquired during that marriage; and, if so, where the transferor was domiciled at the time of creation. Only then could the transferee begin his research into the substantive law of the relevant jurisdiction(s) to determine who owned and could validly transfer or license the copyrighted work in question. While these issues would be problematic for a would-be domestic transferee, they would seem particularly daunting for one living abroad. Given that Congress had foreign transferees in mind in 1976 when it attempted to adopt "a uniform national

852, 858 n.10 (5th Cir. 1979).

139. See Nimmer, *supra* note 14, at 397 (observing that the "Balkanization of copyright transfers would benefit no one—not the grantees of copyrights, not the author-spouses, and ultimately not even the non author-spouses").

140. See, e.g., Matthew Bender, *supra* note 14, § 1.01, at 1-3 (community property jurisdictions include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington); Mennell & Boykoff, *supra* note 32, at 1.

141. See, e.g., Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 7.2, at 296 (2d ed. 1988) (observing that there are "many variations among the eight states" that have adopted community property); Matthew Bender, *supra* note 14, § 20.02[1], at 20-17 ("the marital property laws of the eight community property states, although based on common principles, vary significantly"); see also Mennell & Boykoff, *supra* note 32, at 1; Nimmer, *supra* note 14, at 388.

copyright system" to "improve international dealings in copyrighted material,"¹⁴² such disunity would obstruct the congressional purpose of creating a uniform, "single Federal system" of copyright law,¹⁴³ in addition to undermining the substantially related goal of enhancing predictability of ownership.¹⁴⁴

For all of these reasons, federal law impliedly preempts Louisiana community property law on the issue of initial vesting of copyright. Indeed, giving effect to Louisiana community property law not only would render it impossible to comply with the Copyright Clause of the Constitution and the vesting provisions of the Copyright Act, but also would frustrate important objectives underlying the Clause and the Act. Considering these compelling circumstances, the preemption of community property law by federal law does not offend federalism principles. Indeed, because the copyright entitlement is neither a natural right nor a creature of state law, but rather, a purely federal entitlement that exists solely as a result of federal positive law,¹⁴⁵ foreclosing states from regulating initial ownership of a federal entitlement poses no meaningful threat to state sovereignty.

III. FEDERAL LAW, STATE LAW, AND INTERSPOUSAL TRANSFERS OF COPYRIGHT OWNERSHIP SUBSEQUENT TO VESTING

Although federal copyright law vests initial ownership of a work solely in the author of the work, a nonauthor-spouse could nonetheless become a co-owner through a subsequent transfer of copyright ownership. Under federal copyright law, such an interspousal transfer could occur voluntarily or, perhaps, involuntarily.¹⁴⁶ After briefly addressing the manner in which an author-spouse can voluntarily transfer co-ownership of a copyright to his spouse, this Part considers whether Louisiana community property law effects an involuntary interspousal transfer of copyright co-ownership.

142. H.R. Rep. No. 94-1476, *supra* note 128, at 5746.

143. *Id.* at 5745

144. See *supra* Part II.C.2.b.(1); Roberts, *supra* note 14, at 1059 ("Having a single national standard gives all authors the same rights and protections, and allows copyrighted works to be exchanged efficiently."); see also Patry, *supra* note 14, at 265 ("it would greatly avoid the practical difficulties of determining and enforcing an author's or his assignee's rights if the community property laws were preempted and the author deemed to possess wholly all copyright interests in his or her work").

145. See Nimmer & Nimmer, *supra* note 14, § 1.04, at 1-66.12 (citing *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (1834)); Patterson & Lindberg, *supra* note 91, at 110 (stating that in 1976 Copyright Act, Congress "clearly selected a single theory on which to build the new law: the statutory-grant theory"); Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1108 (1990) (copyright exclusive rights are not "absolute or moral right[s], inherent in natural law," but rather "exist only by virtue of statutory enactment").

146. See, e.g., 17 U.S.C. § 201(d) (1996). See generally Nevins, *supra* note 14, at 392 ("[t]ransfers during the author's lifetime are . . . subdivided into two categories: voluntary and involuntary").

A. Voluntary Transfers

The most obvious and least controversial way in which a nonauthor-spouse could become a co-owner of a copyright is through a voluntary transfer of such an interest from her author-spouse. Section 201(d)(1) of the Copyright Act provides, "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance"¹⁴⁷ Any such transfer, whether between spouses or other persons, can be effected only through a signed writing: a voluntary transfer "is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."¹⁴⁸ Congress imposed this signed-writing requirement on voluntary transfers to enhance the predictability of copyright ownership, to increase the marketability of copyrights, and to ensure that copyright owners are not inadvertently divested of rights in their works.¹⁴⁹ To further these goals, courts typically construe ambiguities in transfer instruments in favor of transferors.¹⁵⁰

Although the federal Copyright Act permits an author to transfer co-ownership of a copyright to his spouse through a signed-writing, Louisiana community property law presents a potential problem in this regard. In Louisiana, a spouse can donate separate property to the community only through an "authentic act."¹⁵¹ Thus, although federal law provides that any copyright interest is transferrable to any person through a signed writing, Louisiana law provides that separate property can be transferred to the community only through an authentic act. Given this conflict, Section 204(a) of the Copyright Act¹⁵² should preempt the authentic-act requirement of the Louisiana Civil Code and thus set forth the exclusive means by

147. 17 U.S.C. § 201(d)(1) (1996). The term "transfer of copyright ownership" includes "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." See *id.* § 101 (Supp. 1999) (defining "transfer of copyright ownership").

148. 17 U.S.C. § 204(a) (1996).

149. See, e.g., *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992) (holding that the signed-writing requirement was "designed to protect people against false claims of oral agreements" and "to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable").

150. See, e.g., *Philipp v. Jerome H. Remick & Co.*, 145 F. Supp. 756, 758 (S.D.N.Y. 1936) ("The clearest language is necessary to divest the author of the fruits of his labor."). See generally Goldstein, *supra* note 14, § 4.6.1.1, at 4:85-4:87 ("The nascent federal common law of copyright contract interpretation . . . favor[s] authors over their transferees."); Leaffer, *supra* note 40, § 5.11[A], at 169; 3 Nimmer & Nimmer, *supra* note 14, § 10.03[A][3], at 10-39; Patry, *supra* note 40, at 388; *id.* at 392.

151. La. Civ. Code art. 2343.1 ("As to both movables and immovables, a transfer by . . . gratuitous title must be made by authentic act."). In so doing, "the transferor conveys to the other spouse one-half of what he owns and retains the other half as co-owner under the regime of acquets and gains." See *id.* art. 2343.1, cmt. b. Presumably, if the author-spouse sought gratuitously to transfer an undivided one-half interest in a copyright to his spouses' *separate patrimony*, then community property law would impose no special form requirements.

152. See 17 U.S.C. § 204(a) (1996).

which all owners, whether married or not, can effect voluntary copyright transfers.¹⁵³ This exclusive means—a transfer in an unambiguous writing signed by the author-spouse—should, as Congress intended, present few problems.

B. Involuntary Transfers by Operation of Law

In contrast to the straightforward nature of voluntary copyright transfers, the issues presented by *involuntary* copyright transfers are more complicated. Section 201(d)(1) of the Copyright Act, which explicitly permits involuntary transfers, appears simple enough: “[t]he ownership of a copyright may be transferred in whole or in part . . . by operation of law.”¹⁵⁴ Although the legislative history and case law relating to involuntary transfers are sparse,¹⁵⁵ Congress apparently enacted Section 201(d)(1) to permit seizures in the context of “[t]raditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures.”¹⁵⁶

The argument that Section 201(d)(1) and state community property law combine to effect a copyright “transfer by operation of law” goes as follows: even if copyrights vest solely in the author-spouse by preemptive operation of federal copyright law, copyright ownership is subsequently transferred to the community by operation of state community property law. For the reasons discussed below, this argument is fundamentally flawed not only as a matter of Louisiana community property law, but also as matter of federal copyright law.

1. Interspousal Copyright Transfers by Operation of Community Property Law?

As a threshold matter, in order for Section 201(d)(1) of the Copyright Act to permit an interspousal transfer “by operation of law,” some operative provision of state law must purport to effect a transfer. However, neither legislation, nor case law, nor any other principle of Louisiana community property law operates to transfer any portion of one spouse’s separate property to the community.

Louisiana generally classifies assets as either community property or separate property at the time of acquisition.¹⁵⁷ Once the law classifies an asset as a spouse’s “separate property,” it remains that spouse’s separate property until he transfers it

153. See *supra* Part II.C.

154. 17 U.S.C. § 201(d)(1) (1996).

155. See H.R. Rep. No. 94-1476, *supra* note 128, at 5738-39; *Brooks v. Bates*, 781 F. Supp. 202, 205 (S.D.N.Y. 1991) (“Case law on transfer of copyright by operation of law is sparse.”).

156. H.R. Rep. No. 94-1476, *supra* note 128, at 5739.

157. See, e.g., *Spaht & Hargrave*, *supra* note 26, § 2.1, at 23 (“In classifying an asset the issue normally is whether it is community or separate and the focus is usually on the time of acquisition and the nature of the transaction by which the asset is acquired.”); see also *Matthew Bender*, *supra* note 14, § 20.03[2], at 20-57 (noting that Louisiana generally follows the “vesting-of-right theory” in classifying property at the time of acquisition); de Funiak & Vaughn, *supra* note 24, § 106, at 264.

through a voluntary juridical act¹⁵⁸ to the community or to another person.¹⁵⁹ As discussed previously, any such voluntary transfer to the community must be executed in accordance with certain statutory formalities.¹⁶⁰ In short, separate property remains separate property. Any contrary rule causing the automatic transmutation of separate property to community property would be a radical departure from Louisiana's community property system.¹⁶¹ Indeed, to tolerate the automatic conversion of separate property into community property would be to disregard the respect long paid to the separate estates of husband and wife by Louisiana's gananical system of community property law and the Spanish system from which it originated.¹⁶²

Given that federal copyright law vests all copyrights solely in the author-spouse rather than in the spouses jointly,¹⁶³ copyrighted works created during marriage are the separate property of the author-spouse. As separate property, such copyrights remain separate unless transformed into community property. Because no provision of Louisiana law operates to transmute involuntarily an author-spouse's separate copyrights into both spouses' community property, the possibility that Section 201(d)(1) of the Copyright Act might have permitted such a transfer "by operation of law" is a matter of only hypothetical interest.¹⁶⁴

158. "A juridical act is any manifestation of the will meant to have legal effects." See Alain A. Levasseur, *Louisiana Law of Obligations in General* 6 (3d ed. 1996).

159. As summarized by Professors Spaht and Hargrave:

It is of course possible, through sales, donations or other transmutation agreements, to convert separate property into community assets, *but this transformation does not occur by operation of law.*

Spaht & Hargrave, *supra* note 26, § 3.46, at 175 (emphasis added); see also Matthew Bender, *supra* note 14, § 3.03[5], at 3-37 to 3-38 ("transmutation occurs through an exercise of actual intention, objectively expressed," not by operation of law).

160. See *supra* Part III.A.

161. See Spaht & Hargrave, *supra* note 26, § 3.49, at 186 (stating that a rule allowing "transmutations of separate assets could lead to an increasing departure from the community system").

162. See, e.g., Ballinger, *supra* note 24, at 4 (community property system "regards the husband and wife as distinct persons, with separate rights and capable of holding distinct and separate estates"). In contrast to a gananical system, the French community property system originally provided for the automatic conversion of separate movable property into community property upon marriage. See, e.g., 3 Planiol & Ripert, *supra* note 24, pt. 1, ch. 1, no. 915, at 94 ("In principle, and except for several items noted later, all the personalty of the spouses enters the community. This includes all the *present* personalty, that is personalty the spouses own on the day of marriage; and all the personalty to be acquired afterwards."); *id.* no. 918, at 98 ("It is quite rare to find personalty in separate ownership of either spouse, living in a community."); see also Spaht & Hargrave, *supra* note 26, § 3.46, at 175 ("Louisiana never adopted the French community of movables and acquets under which the movables owned by both spouses at the time of marriage became community property."). Interestingly, one type of property that never became community property under the French system was intellectual property, particularly copyrights. See 3 Planiol & Ripert, *supra* note 24, pt. 1, ch. 1, no. 917, at 97 ("The rights of author are simply a monopoly of exploitation. As such they are merely part of the exercise of his profession. Hence, they should remain in separate ownership."). France ultimately adopted a gananical system of community property (of acquets and gains) in 1965. See Mennell & Boykoff, *supra* note 32, at 11.

163. See *supra* Part II.

164. By contrast, in an equitable-distribution jurisdiction, any "transfer by operation of law" would

2. Federal Limitations on Copyright Transfers by Operation of State Law

Even if Louisiana community property law actually purported to transfer one spouse's separate copyright to the community, a substantial federal obstacle to such transfers would still remain. Although Section 201(d)(1) of the Copyright Act explicitly permits transfers "by operation of law," a related provision—Section 201(e)—sharply limits which copyrights can be so transferred.¹⁶⁵ Section 201(e) provides that no "action by any governmental body or other official or organization purporting to . . . transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect" if the copyright "has not previously been transferred voluntarily by that individual author. . . ."¹⁶⁶ Read together, Sections 201(d)(1) and 201(e) combine to permit the involuntary transfer of a copyright only after a prior voluntary transfer.¹⁶⁷

a. Generally

Applied to community property law, Sections 201(d)(1) and 201(e) would permit states to effect a transfer "by operation of law" of only those copyrights that have "previously been transferred voluntarily" by the author-spouse. The universe of copyrights eligible for transfer by operation of community property law is limited. Indeed, it is difficult to understand how *any* copyrights, other than those that vest in an employer-spouse as works made for hire,¹⁶⁸ would be eligible for

take place at or after divorce. Thus, if a court were to attempt to allocate a copyright to a nonauthor-spouse in the context of a distribution of marital property, then a "transfer by operation of law" presumably could occur at that time. See generally Brett R. Turner, *Equitable Distribution of Property* § 2.07, at 40 (2d ed. 1994). Of course, significant obstacles to such a transfer by operation of equitable-distribution law would remain, including Section 201(e) of the Copyright Act and federal preemption doctrine.

165. See Patry, *supra* note 40, at 388 n.116 ("Section 201(e) contains an exception to the transfer by operation of law provision of § 201(d)(1).").

166. 17 U.S.C. § 201(e) (1996) ("Involuntary transfer. When an individual author's ownership of a copyright . . . has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect under this title, except as provided under title 11."). Title 11 relates to bankruptcy proceedings. See 11 U.S.C. §§ 1-1330 (1984).

167. See 1 Nimmer & Nimmer, *supra* note 14, § 6A.03[C][2][b], at 6A-23 ("by operation of law" provision applicable only if there has been no prior voluntary transfer); Nevins, *supra* note 14, at 392 ("How is [Section 201(d)(1)'s 'by operation of law' provision] to be squared with Section 201(e)? Obviously by reading Subsection (e)'s voluntariness requirement into Subsection (d)(1), or in other words, by requiring that the transfer, whether by the author or by operation of law, be grounded in the author's consent in one form or another.").

168. Because Section 201(e) refers to "individual" authors, it presumably does not apply to involuntary transfers of works made for hire. See Goldstein, *supra* note 14, § 4.4.4.1, at 4:58 ("By limiting section 201(e) to transfers from 'individual' authors, Congress presumably intended to exclude works made for hire from the provision's operation."). Thus, any copyrights that vested in a spouse

such a transfer in a community property jurisdiction that classifies at acquisition. This is so because at the very moment of creation, copyrights vest solely in the author-spouse and are his "separate property" as of that moment.¹⁶⁹ Therefore, any voluntary transfer by the author-spouse that could potentially satisfy the previous-transfer requirement of Section 201(e) would necessarily occur at some time *after* the copyright vested in his separate patrimony.

Considering this, to harmonize community property law with Sections 201(d)(1) and 201(e), the Louisiana legislature would have to legislate (quite artfully) that separate copyrights are transmuted "by operation of law" into community copyrights at some point following a voluntary transfer by the author-spouse. Alternatively, the legislature could permit courts either to partition separate copyrights or to order that some sort of equalizing payment be made by the author-spouse to the nonauthor-spouse at partition. Either provision would be a most curious addition to Louisiana community property law.¹⁷⁰ For these reasons, it appears that Section 201(e) effectively prohibits involuntary transfers by operation of state community property law.

b. The Counterarguments

Courts and commentators have posited a number of counterarguments which, if valid, might remove the substantial federal obstacle to community copyright ownership presented by Section 201(e). Although some of these arguments are less frivolous than others, all are unpersuasive.

i. Legislative History

Some have relied upon the sparse legislative history of Section 201(e) to argue that Congress did not intend to apply that provision to domestic copyright transfers or to marital-property transfers.¹⁷¹ Granted, in enacting Section 201(e), Congress was primarily concerned about protecting foreign dissidents from the seizure of

solely because he was the employer of a paradigmatic "author," would be eligible for transfer to the community (if state law so provided) irrespective of whether the employer-spouse had ever before voluntarily transferred them.

169. See *supra* Part II.B.

170. In addition, any such provision would likely be preempted by federal copyright law, notwithstanding that it otherwise complied with Section 201(e). See *supra* Part II.B.

171. See Goldstein, *supra* note 14, § 4.4.4.2, at 4:60 ("a state's allocation of entitlements between husband and wife falls outside of the censorship concerns that motivated section 201(e)'s adoption"); Nayo, *supra* note 14, at 176 ("Section 201(e) clearly targets the evil of the government retaining the copyright interest, without mentioning whether the copyright attaches to a work authored during marriage."); Patry, *supra* note 14, at 247 (arguably, "Congress was aware of the vesting of equal rights in community property states, and by its silence allowed an implied assignment of a one-half interest to the non-author spouse by operation of the community property laws."). Cf. Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 Tex. L. Rev. 685, 711 (1989) (arguing from the legislative history of the 1976 Copyright Act that Section 201(e) should not prevent states from expropriating federal copyrights).

their American copyrights by disapproving totalitarian governments.¹⁷² And granted, the legislative history of the 1976 Act is completely devoid of any indication that Congress intended for Section 201(e) to prevent involuntary interspousal copyright transfers.¹⁷³ Nevertheless, neither the legislative history nor the plain language of Section 201(e) supports these arguments.

First, the legislative history¹⁷⁴ of Section 201(e) offers contrary indications suggesting that Congress actually intended for that section to apply to *all* copyright transfers, not just to those in the context of foreign censorship. For example, a precursor to Section 201(e) provided that copyright would "remain the property of the author . . . regardless of any law, decree or other act of a foreign state or nation which purports to divest the author . . . of the United States copyright in his work."¹⁷⁵ However, Congress deleted this limiting language when it enacted Section 201(e) into law.¹⁷⁶ That Congress' deletion was not inadvertent¹⁷⁷ is

172. See, e.g., H.R. Rep. No. 94-1476, *supra* note 128, at 5739 ("[S]ubsection (e) would protect foreign authors against laws and decrees purporting to divest them of their rights under the United States copyright statute, and would protect authors within the foreign country who choose to resist such covert pressures."); Nimmer & Nimmer, *supra* note 14, § 10.04, at 10-53; Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. Rev. 1107, 1109 (1977) ("Behind section 201(e) is the fear that the Soviet Union will use the copyright law to suppress the publication of dissident Soviet works in the United States."); *id.* at 1127 ("Some courts may read the legislative history closely and confine the section's operation to the occasion that motivated it—fears over Soviet suppression of dissident works."); Kwall, *supra* note 171, at 695-96; Martin & Smith, *supra* note 70, at 92 ("prohibition contained in section 201(e) was intended to restrict foreign abuses of copyright protections"); Nayo, *supra* note 14, at 176; Nevins, *supra* note 14, at 382-83 ("The primary and originally the sole intended target of [201(e)] is the expropriation of copyright interests by a foreign government.").

Despite Congress' desire to protect foreign dissidents from censorship through enacting Section 201(e), that provision was probably unnecessary. Not only had the Soviet Union never attempted such censorship, but the Universal Copyright Convention would not have required American courts to recognize the validity of such a seizure. See Nimmer & Nimmer, *supra* note 14, § 10.04, at 10-53. Moreover, given that copyright law protects only expression and not ideas, the Soviet Union could never have suppressed the dissemination of unpopular ideas merely through copyright seizure. See Goldstein, *supra*, at 1124.

173. See H.R. Rep. No. 94-1476, *supra* note 128; see also Nevins, *supra* note 14, at 382 ("the members of Congress who worked on [the Copyright Act of 1976] seem not to have known that they were forging a link between copyright and divorce"); *id.* at 386 (Congress did not consider transfers in which "the court forcibly transfers some of an author's copyright interests to his or her ex-spouse"); Patry, *supra* note 14, at 247 ("Neither the Act nor the Committee Reports address the issue of a joint authorship status for nonauthor spouses in community property states.").

174. Note that the "value of legislative history as a tool of statutory construction is not universally accepted." Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 29 (1997); see also *Thompson v. Thompson*, 484 U.S. 174, 191-92, 108 S. Ct. 513, 522 (1988) (Scalia, J., concurring) (legislative materials are "frail substitutes for bicameral vote upon the text of a law and its presentment to the President"); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 375.

175. S. 1359, 93d Cong., 1st Sess. 1, 1-2 (1973) (emphasis added) (discussed in Kwall, *supra* note 171, at 695-96).

176. See 17 U.S.C. § 201(e) (1996). See generally Kwall, *supra* note 171, at 695-96.

177. Further confirming that Congress has always understood that Section 201(e) applies to

confirmed by the House Report to the 1976 Act, which describes the purpose of Section 201(e) as follows: "The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer."¹⁷⁸ This legislative purpose confirms that Section 201(e), rather than being an anomaly, actually embodies a deep-seated principle of American copyright law¹⁷⁹—the notion that authorship is special and that, as a result, authors have a special interest in their creations.¹⁸⁰ Thus, the legislative history of the Copyright Act simply does

domestic involuntary transfers is that Congress amended Section 201(e) just two years later to qualify its anti-alienation language as follows: "except as provided under title 11." See 17 U.S.C. § 201(e) (1996) (as amended by Pub. L. 95-598). This amendment specifically authorized involuntary copyright transfers in the context of bankruptcy proceedings. If Congress had believed that Section 201(e) did not already apply to domestic transfers, this amendment obviously would have been unnecessary. See Martin & Smith, *supra* note 70, at 95 ("The fact that Congress found it necessary to carve out a specific exception to the general prohibition on involuntary transfers for involuntary bankruptcy proceedings serves to underscore how narrowly the exceptions to this prohibition should be construed."); Nimmer, *supra* note 14, at 408; Nevins, *supra* note 14, at 383 ("[T]he six final words of the provision, added after the effective date of the Copyright Revision Act and excluding bankruptcy proceedings under Title 11 from the scope of the rule, confirm the view that all other domestic copyright expropriations are subject to Section 201(e).").

178. H.R. Rep. No. 94-1476, *supra* note 128, at 5739 (emphasis added).

179. Some provisions of the Copyright Act reflect Congress' concern for protecting artists' personal interests in their creations. For example, the distribution right protects a right similar to the moral right of divulgation. See 17 U.S.C. § 106(3) (1996); 2 Nimmer & Nimmer, *supra* note 14, § 8D.02[C] ("[T]he author's right to control publication of his work can be seen as a species of the *droit de divulgation*."). Likewise, the Act's termination-of-transfers provision gives an artist a continuing interest in his work of authorship even after transferring the copyright to another. See 17 U.S.C. § 203 (1996). Finally, Section 106A gives authors certain limited rights in their works of visual art even after they have transferred the copyrights embodied in such works. See *id.* § 106(a) (1996); *id.* § 101 (1996) (defining "work of visual art").

180. See Roberts, *supra* note 14, at 1065 ("there is something special about authorship that demands we give creators ultimate control over the marketing and disposition of their works [at least until voluntary transfer]"); see also Joyce et al., *supra* note 90, § 1.04, at 27-28; Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517, 537 n.136 (1990) (Section 201(e) seems "grounded in natural law, and not economics"). Perhaps this view springs from the civil law notion that an author's work is "an extension of his or her personality." See, e.g., Leaffer, *supra* note 40, § 1.1, at 3 ("In the civil law world, an author is deemed to have a moral entitlement to control and exploit the product of his or her intellect.").

Nevertheless, because the special relationship between an author and his work can diminish over time, Section 201(e) adjusts the author's entitlement accordingly. Professor Margaret Jane Radin has persuasively argued that some types of property warrant greater protection than do other types. See Margaret J. Radin, *Rethinking Property* (1993) (reprinting Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982)). Namely, Professor Radin argues that "personal property" has a stronger moral claim to protection than does "fungible" property. *Id.* at 48. Where on the personal-fungible spectrum a particular thing falls can change over time as the holder's relationship with the object changes, or as the object is transferred from person to person. *Id.* at 16-17, 54. Arguably, Section 201(e) reflects the notion that once an author has transferred his copyright in a work, the transferred work has, at least in the author's eyes, moved a bit closer toward the fungible end of this spectrum. Once the copyrighted work becomes more fungible than personal, the author's interest in preventing involuntary transfers diminishes.

not support the argument that Congress enacted Section 201(e) to prevent only involuntary foreign transfers.

Second, the plain language of Section 201(e) unambiguously provides that "no action by any governmental body or other official or organization purporting to . . . transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect" absent a prior voluntary transfer.¹⁸¹ When the language of a statute is clear and unambiguous, the plain-meaning rule¹⁸² of statutory interpretation dictates that any further search for legislative intent is inappropriate. Section 201(e) is clear and unambiguous. It applies to "any governmental body," foreign, state or federal, and forbids any action by such a body purporting to "seize, expropriate, transfer or exercise rights" of copyright ownership.¹⁸³ Therefore, Section 201(e) applies to any purported interspousal copyright transfer by operation of state community property law or by any judge acting pursuant to such law.¹⁸⁴ A contrary purposivist interpretation of Section 201(e) would run afoul of the fundamental "constitutional truism that the judicial will must bend to the legislative command."¹⁸⁵

ii. Consent

Other proponents of state community property law, arguing within the four corners of Section 201(e), have suggested that Section 201(e) is not an obstacle to interspousal transfers because author-spouses residing in community property jurisdictions have impliedly consented to such transfers.¹⁸⁶ The argument goes as

181. 17 U.S.C. § 201(e) (1996) (emphasis added).

182. See *Texas Food Indus. Assoc. v. United States Dept. of Agriculture*, 81 F.3d 578, 581 (5th Cir. 1996) (stating plain-meaning rule); *United States v. Meeks*, 69 F.3d 742, 744 (5th Cir. 1995) (noting that legislative body presumably "says in a statute what it means and means in a statute what it says").

183. Even if Congress did not intend this, it is nevertheless the law. See Goldstein, *supra* note 172, at 1124 ("What began as a bit of misplaced xenophobia has evolved into a bizarre rule of nullification."). That Section 201(e) may have had unintended consequences is perhaps not unusual. See, e.g., Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 Wm. & Mary L. Rev. 145, 158 (1998) ("Legal change is rarely simple, and unintended consequences are probably the rule rather than the exception.").

184. See *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534, 542 (E.D. La. 1999); 3 Nimmer & Nimmer, *supra* note 14, §10.04, at 10-53 (Section 201(e) is "not limited to [seizures and transfers] by foreign governments, officials and organizations"); Goldstein, *supra* note 172, at 1124 (Section 201(e) "invalidat[es] domestic as well as foreign involuntary transfers"); Nevins, *supra* note 14, at 383 ("the plain meaning of the section's language is that it . . . applies to copyright expropriations by the federal government itself or by any of the states"); *id.* ("Since January 1, 1978, state courts have been precluded from involuntarily awarding any share of a married author's copyrights to his or her non-author spouse as matrimonial property in a divorce action."); see also Robert A. Kreiss, *Ten Theories For Hiring Parties Who Want to Own Works Created or Invented by Independent Contractors*, 5 Computer L. Wkly. 10 (1991); Martin & Smith, *supra* note 70, at 92.

185. Mikva & Lane, *supra* note 174, at 4; *id.* at 9 ("judicial avoidance of a clear legislative command, whether based on a judicial view of legislative intent or on a judicial policy preference, is a unique exercise of judicial power").

186. See Nimmer, *supra* note 14, at 414 ("by virtue of Section 201(e), community property may

follows: Section 201(e) permits copyright transfers by operation of law if the individual author has previously transferred his copyright in a voluntary transaction; an individual author's consent to a *future* copyright transfer is itself a "voluntary transfer" within the meaning of the Section 201(e); an author-spouse impliedly consents to future interspousal copyright transfers by not opting out of the legal regime; ergo, Section 201(e) permits interspousal transfers by operation of state community property law.¹⁸⁷ This argument is hopelessly flawed for a number of independent reasons.

First, an author's mere consent to a *future* copyright transfer is not a "voluntary transfer" within the meaning of Sections 201(e) and 101 of the Copyright Act. Section 201(e) prohibits involuntary transfers when "ownership" of the copyright "has not previously been *transferred* voluntarily."¹⁸⁸ The term "transfer of copyright ownership" is a term of art that Congress has specifically defined in Section 101 to include, "an assignment, mortgage, exclusive license, or other conveyance, alienation, or hypothecation of a copyright . . ."¹⁸⁹ These listed juridical acts give rise to *present* conveyances of real rights in a copyrighted work.¹⁹⁰ They do not give rise to the mere *expectation* that such a right will be conveyed in the future. To equate an author's consent to a future transfer with a true "transfer," would disregard the plain language of Section 101 of the Copyright Act. For this reason alone, a spouse's consent to a future copyright transfer can not satisfy the prior-transfer requirement of Section 201(e).

Second, even if an author's consent to a future copyright transfer could constitute a "transfer," that consent cannot be "implied." The Copyright Act

exist in the copyright sphere only through finding the author-spouse's consent to sharing author status").

187. See, e.g., 2 Matthew Bender, *supra* note 14, § 23.07[3][b], at 23-146 ("consent can be inferred by the very act of marriage, at least in cases where the parties do not 'opt out' of the state classification system"); Goldstein, *supra* note 14, § 4.4.4.2, at 4:60-4:61 ("marriage" and "dissolution" of marriage "imply mutual consent to at least the same extent as mortgage foreclosures and bankruptcy filings"); Kreiss, *supra* note 184, at 16 ("residence in a community property state constitutes voluntary consent to transfers to one's spouse under community property rules"); Nimmer, *supra* note 14, at 409 ("one can plausibly maintain that such 'consent' automatically accompanies the decision to marry"); Patry, *supra* note 14, at 272 ("a court faced with a preemption challenge would be well advised to find an implied voluntary transfer under the traditional operations of law permitted under Section 201(e)"); Perlstein, *supra* note 14, at 5; Polacheck, *supra* note 14, at 625 ("Admittedly, the decision to marry in California arguably establishes consent to California community property law and its effects on the ownership, management and division of copyright."); Wong, *supra* note 14, at 1101 ("section 201(e) does not prohibit transfers by operation of law where the author's consent is implied by overt acts"); Roberts, *supra* note 14, at 1072 n.62 ("201(e) essentially prohibits transfers by operation of law where . . . consent cannot be implied"). Cf. Nayo, *supra* note 14, at 177 (parties have "consented to the application of community property law by pursuing dissolution of their marriage, and division of their accumulated property").

188. 17 U.S.C. § 201(e) (1996) (emphasis added).

189. 17 U.S.C. § 101 (1996) (defining "transfer of copyright ownership").

190. For example, the Louisiana Civil Code provides that "[m]ortgage is an indivisible *real right* that burdens the entirety of the mortgaged property and that follows the property into whatever hands the property may pass." La. Civ. Code art. 3280 (emphasis added).

strictly forbids implied copyright transfers. Section 204(a) provides that no voluntary copyright transfer is "valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." Furthermore, Section 202 provides that a transfer of copyright is not implied from the transfer of a material object embodying the work.¹⁹¹ And Section 106A provides that an artist's waiver of rights in a tangible work of visual art "shall not constitute a transfer of ownership" of copyright "[e]xcept as may otherwise be agreed by the author in a written instrument signed by the author."¹⁹² Considering these straightforward provisions—all of which confirm the absolute necessity of a signed instrument to effect a copyright transfer—it is most difficult to understand how an "implied" voluntary transfer could ever be valid. In fact, Congress intended to prevent, and has effectively foreclosed, any implied copyright transfers.¹⁹³ Therefore, although some are mistaken on this issue,¹⁹⁴ there is simply no such thing as an "implied" copyright transfer.¹⁹⁵

Third, even if an author's consent to a *future* copyright transfer could constitute a present voluntary "transfer," and even if the Copyright Act recognized "implied" transfers, consent to a future transfer cannot be implied from the mere fact that the author-spouse is a married person domiciled in Louisiana who did not opt out of the legal regime.¹⁹⁶ The Louisiana Civil Code distinguishes between

191. See 17 U.S.C. § 202 (1996).

192. 17 U.S.C. § 106A(e)(2) (1996).

193. See H.R. Rep. No. 94-1476, *supra* note 128, at 5738-40; *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) ("Copyright law dovetails nicely with common sense by requiring that a transfer of copyright ownership be in writing. Section 204 ensures that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price.").

194. See *Brooks v. Bates*, 781 F. Supp. 202, 205 (S.D.N.Y. 1991) ("transfers of copyrights by operation of law are limited in number, and depend upon circumstances which establish the author's express or implied consent") (emphasis added); *Nimmer & Nimmer, supra* note 14, § 6A.03[C][2][b], at 6A-24 ("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 works"); *id.* § 10.04, at 10-54; *Nimmer, supra* note 14, at 408 ("Section 201(e) requires at least implied consent of the author"); see also *supra* note 187.

195. Indeed, recognizing the viability of such an implied transfer would be a precarious step onto a slippery slope that could lead to implied transfers under other state laws—something Congress clearly did not intend. For example, it could lead the partners of an author to claim co-ownership of works created during the existence of their partnership. To date, courts have not been willing to imply transfers under state partnership law. See *Nimmer & Nimmer, supra* note 14, § 10.03[A][6], at 10-43 ("[I]t is unavailing to argue that an author orally agreed to transfer her copyright interest to a partnership. That latter circumstance would require a signed instrument, an author of course can validly contribute his work to a partnership."); see also *Koningsberg Int'l, Inc. v. Rice*, 16 F.3d 355, 357-58 (9th Cir. 1994); *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984). It is difficult to understand why courts would or should recognize implied transfers under state community property law, particularly when the marital community is often analogized to a partnership.

196. See *Nevins, supra* note 14, at 392 ("an author's marriage *per se* cannot be held to constitute implied consent to judicial division of his or her copyright interests upon divorce without doing violence to the pro-author policies of the Copyright Act").

obligations arising from "declarations of will," and those arising "from the law, regardless of a declaration of will."¹⁹⁷ In sharp contrast to conventional obligations, which arise from the "consent" of the parties,¹⁹⁸ the rights and obligations created by Louisiana community property law¹⁹⁹ do not arise from a "declaration of will." Rather, they arise from nothing more than one's status as a married person domiciled in the State of Louisiana.²⁰⁰ For this reason, the obligations created by community property law are among those that the Civil Code denotes as arising "from the law, regardless of a declaration of will."²⁰¹ Given the nonconsensual source of such obligations, it is difficult to understand how merely being a spouse subject to the legal regime can, in and of itself, constitute "implied consent" to future interspousal copyright transfers. Two rejoinders, however, come to mind.

197. La. Civ. Code art. 1757. See generally *Levasseur*, *supra* note 158, at 4 ("The law . . . may impose obligations regardless of any declaration of will or fact on the part of an obligor." Such obligations "are created by law on the basis of a particular juridical situation.").

198. See La. Civ. Code art. 1927 ("A contract is formed by the consent of the parties established through offer and acceptance.").

199. The legal regime of community property gives rise to both real and personal rights and real and personal obligations. For example, spouses in a legal regime have a *real* right in all things acquired by the other spouse during the existence of the legal regime through that spouse's effort, skill or industry. See La. Civ. Code arts. 2336 (ownership of community property); *id.* art. 2338 (community property). The source of the real right and corresponding real obligation is community property law. Likewise, spouses formerly in a legal regime may have a *personal* right against the other spouse for certain reimbursements. *Id.* art. 2358. The source of this personal right and corresponding personal obligation is community property law. For a discussion of the differences between real rights/obligations and personal rights/obligations, see 1 Saúl Litvinoff, *Obligations* § 1.5, at 9-11 in 5 *Louisiana Civil Law Treatise* (1992); *Levasseur*, *supra* note 158, at 26-28.

200. See La. Civ. Code art. 2334 ("The legal regime of community of acquets and gains applies to spouses domiciled in this state, regardless of their domicile at the time of marriage or the place of celebration of the marriage."). See generally Litvinoff, *supra* note 199, § 1.2, at 4 (various obligations between spouses are "called *institutional*, because the parties are immersed in an institution which, in this context, is to be understood as a situation existing between persons, or between persons and things, regulated by the law according to ideas and patterns of behavior deeply rooted in societal life").

This default system of community property is termed a "legal system," to distinguish it from a "conventional system" of community property which arises not by operation of law, but by "agreement between [the spouses] that the marital property shall be held in some form of community." See de Funiak & Vaughn, *supra* note 24, § 54, at 92-93 (noting that "[t]he conventional community is thus to be distinguished from the legal community which arises by operation of law upon the marriage of the parties"). Unlike Louisiana, which has always had a *legal* system of community property, Oklahoma and Oregon initially adopted *conventional* community property systems. See *id.* § 54, at 93 n.6.

201. Litvinoff, *supra* note 199, § 1.6, at 12. Professor Litvinoff notes that Pothier recognized in the eighteenth century that "there are some obligations of which either natural or positive law is the immediate and only source . . . which [do] not arise from any contract made by the person bound but [are] wholly imposed directly by the law without regard to that person's will." See *id.* (citing 1 Pothier, *A Treatise on the Law of Obligations or Contracts* 73 (Evans transl. 1806)). Put another way, community property obligations arise from the juridical fact of marriage ("an event which, by itself, brings about legal effects"), rather than from any "juridical act" (a "manifestation of will meant to have legal effects"). See *Levasseur*, *supra* note 158, at 6.

The first is that an author-spouse arguably "consents" to the effects of the legal regime simply by living in a community property jurisdiction as a married person. But a similar argument could be made that all persons in Louisiana "consent" to all duties imposed by law, whether by criminal law, tort law or family law.²⁰² If credited, this argument would effectively obliterate the distinction made by the legislature in differentiating obligations that arise from "declarations of will," and those that arise from "the law."²⁰³ Indeed, although positive law is the ultimate source of all legal obligations, our Civil Code recognizes the fundamental distinction between those that arise from declarations of will and those that do not.²⁰⁴ Therefore, the mere fact that an author-spouse may be subject to the legal regime because he is a married person domiciled in Louisiana simply does not mean that he "consented" to it.²⁰⁵

The second rejoinder is that an author-spouse arguably "consents" to the effects of the community property system simply by not opting out of the legal regime. Granted, a person can avoid some or all of the effects of the legal regime through a valid matrimonial agreement.²⁰⁶ And granted, some people voluntarily enter into such matrimonial agreements and thereby opt out of the community property regime.²⁰⁷ However, both on an institutional level and an individual level,

202. See W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. Cal. Interdisc. L.J. 29, 35 (1993) (noting that the claim that "people consent to default rules every time they make a contract that does not preempt them . . . to include the traffic laws and the laws of tort shows at once its absurdity . . . Consent spread so thin is meaningless.").

203. See La. Civ. Code art. 1757. On the practical importance of this distinction, see Litvinoff, *supra* note 199, § 1.6, at 14.

204. See Litvinoff, *supra* note 199, § 1.6, at 12-14 (citing 2 Savatier, *Cours de droit civil* 41-43 (1949)).

205. By analogy, when a court in a contract case seeks to fill an unprovided-for gap in the parties' agreement, the court cannot resolve the issue "on the basis of the agreement—that is, of contract as promise." Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 60 (1981). When spouses have never agreed to live under a community property system, but the law nonetheless imposes such a system by default, the resulting rights and obligations cannot fairly be said to arise from the spouses "agreement." Thanks to Professor Saúl Litvinoff for his thoughts on this issue.

206. See La. Civ. Code art. 2329. For this reason, the community property regime is largely one of "default rules" that the parties can contract around, rather than "immutable rules" that they cannot alter. See, e.g., Mary Moers Wenig, *Taxing Marriage*, 6 S. Cal. Rev. L. & Women's Stud. 561, 568 (1997) ("Community property is the default rule that can be opted out of by agreement before the marriage or, for most of the community property states, at any time during marriage."). On the distinction between default rules and immutable rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989). Civilian analogues to the terms "default rules" and "immutable rules" are, respectively, "suppletive rules" and "imperative rules." See, e.g., E.L. Burns Co., Inc., 302 So. 2d 297, 300 (La. 1974) ("[a] suppletive rule . . . applies only if those affected by it have not excluded its application"); *Picard v. Picard*, 708 So. 2d 1292, 1294 (La. App. 3d Cir. 1998); Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 La. L. Rev. 1007 (1981); see also Dana Patrick Karam, Student Symposium, *Conflict of Laws—Contracts*, 47 La. L. Rev. 1181, 1185 (1987) ("suppletive laws may be said to apply in default of an appropriate contractual expression").

207. Perhaps this is all the more likely given that Louisiana law mandates that marriage-license applicants shall receive "a printed summary of the then current matrimonial regime laws of this state."

the mere fact that a person fails to opt out of the regime does not mean that he has thereby "consented" to its effects.

On an institutional level, Louisiana's community property system is a default regime that does not even purport to be theoretically rooted, like many default rules,²⁰⁸ in hypothetical consent manifested in a hypothetical bargain.²⁰⁹ That is, the Louisiana Legislature did not embrace this default regime after determining that community property was the regime that most couples would choose anyway.²¹⁰ Rather, the legislature adopted this default system because it believed that the community property partnership model was the fairest means by which to allocate and to manage the property of married persons.²¹¹ Because Louisiana's default regime does not reflect the considered legislative judgment that "most couples would have consented to it anyway," to infer a spouse's "consent" to the regime from the mere fact that he is subject to it would be inappropriate at an institutional level.²¹²

On an individual level, there are innumerable reasons short of unbridled "consent" why an individual author-spouse in any given case may have failed to opt out of the legal regime: he may have been ignorant of the community property regime or its effects on the ownership of copyrighted works when he became

See La. R.S. 9:237(A) (1991); Bix, *supra*, note 183, at 195 (Louisiana is the "one state in fifty" that requires the distribution of such information to marrying couples).

208. The recent commentary on the substance of default rules, particularly in contract law, is extensive. See, e.g., Robert A. Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (1997); Ian Ayers, *Making a Difference: The Contractual Contributions of Easterbrook and Fischell*, 59 U. Chi. L. Rev. 1391 (1992); Ayers & Gertner, *supra* note 206; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821 (1992); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 Harv. J.L. & Pub. Pol'y 639 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 Yale L.J. 615 (1990); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 (1998); see also Bix, *supra* note 183, at 175-76. See generally *Symposium on Default Rules and Contractual Consent*, 3 S. Cal. Interdisc. L.J. 1 (1993).

209. See Bix, *supra* note 183, at 175 (contract law "default rules usually reflect either the terms parties most likely would choose in any event—and therefore the ones that are most likely to reflect particular parties' actual intentions or the terms considered the fairest to the parties").

210. Moreover, even if Louisiana's default community property system were grounded in the hypothetical-bargain rationale, "[h]ypothetical consent is not consent; none of the reasons why actual consent creates obligations are available when consent is only hypothetical." See Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. Cal. Interdisc. L.J. 115, 120 (1993); David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815, 1833 (1991) (a default rule based on a hypothetical bargain is "hypothetical precisely because the transactor has made no explicit prior choice"); see also J.P. Kostritsky, "Why Infer?": *What the New Institutional Economics Has to Say About Law Supplied Default Rules*, 73 Tul. L. Rev. 497, 510-16 (1998) (discussing the problems associated with equating "hypothetical consent" to true consent in the context of default rules).

211. E.g., de Funiak & Vaughn, *supra* note 24, § 11.1, at 24.

212. More generally, the theory that default rules are "based on the parties' consent has long been thought to be pure fiction." See Barnett, *supra* note 208, at 822-23; see also Coleman et al., *supra* note 208, at 639 (arguing that consent to a contract does not mean consent to default rules).

subject to the regime;²¹³ he may have chosen not to opt for irrational reasons;²¹⁴ he may have yearned to opt out, but did not pursue the matter because the associated transaction costs were too high;²¹⁵ or he may have actually sought to opt out, but was rebuffed in his attempt to do so by other actors whose consent or approval was also required, namely his spouse or a judge (if judicial approval was necessary).²¹⁶ Given that Section 201(e) flatly prohibits nearly all involuntary transfers when the "individual author's ownership . . . has not previously been transferred voluntarily by that individual author,"²¹⁷ the peculiar circumstances surrounding each "individual author's" failure to opt out of the legal regime are critically important

213. See Barnett, *supra* note 208, at 866 (silence in the face of a default rule may not constitute "consent" to that rule if the parties did not know of the rule); *id.* at 898; Bix, *supra* note 183, at 195 ("it is far from clear that most people entering a marriage even knew [community property] rules from the beginning"); *id.* at 195-99 (to consent voluntarily one must have "full information about the consequences of the choice and the alternatives available").

214. See Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 Ind. L.J. 503, 508 (1998) (many do not enter into marriage contracts as a result of "the notorious assumption of newlyweds that their marriage will be among the fifty percent of marriages that work . . ."); Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993); Bix, *supra* note 183, at 193 ("there are particular situations and circumstances in which parties are particularly unlikely to act in a rational way, and the law . . . should respond to that reality"); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 216-17 (1995) (persons "often fail to make rational decisions even within the bounds of the information they have acquired"); *id.* at 254-58 (the "limits of cognition" and "[b]ounded rationality" call into question the degree to which marrying spouses freely and voluntarily consent to prenuptial agreements); Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 Wm. & Mary L. Rev. 989, 1016-22 (1995) (discussing the problems with applying rational-choice theory in context of family law); Eric Rasmusen & Jeffrey E. Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453, 461 (1998) ("most people think their marriages will not fail").

215. See Barnett, *supra* note 208, at 866 ("In the presence of rules that are costly to . . . contract around, silence is highly ambiguous. It may or may not signify consent to the imposition of the default rule."); Korobkin, *supra* note 208, at 675 (parties sometimes fail to contract around default rules "because of high transactions costs"); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation*, 97 Colum. L. Rev. 1710, 1755-59 (1997) ("the very existence of a default rule . . . imposes additional costs on parties wishing to lay down a contrary or different term in their contract"). The relational costs associated with contracting around default community property rules are, perhaps obviously, very high given that spouses or spouses-to-be do not want to risk transaction breakdown. See Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. Cal. Interdisc. L.J. 59, 73 n.45 (1993) ("Marriage is an example of a contracting context where the relational costs of varying default rules (such as community property or equitable distribution) through a prenuptial agreement may be particularly high."); *id.* at 69 ("[r]elational factors . . . have a strong influence on parties' perceptions of the benefits of contracting around legal default rules"); Rasmusen & Stake, *supra* note 214, at 461 (few people circumvent default rules of marriage "because initiating negotiations would send a pessimistic signal to a fiancé(e) or spouse"); Zamir, *supra*, at 1756-57 (the "mere suggestion by one party to contract around the ordinary rules may raise suspicion").

216. Under the Civil Code, a matrimonial agreement opting out of or terminating the legal regime cannot be effected unilaterally. On the contrary, prior to marriage the consent of both spouses is required for such an agreement. During marriage, not only is mutual consent required, but also court approval. See La. Civ. Code art. 2329.

217. 17 U.S.C. § 201(e) (1996) (emphasis added).

to the issue of whether that "individual author" has thereby consented to a subsequent involuntary transfer of his copyright.²¹⁸ For these reasons, it would be manifestly inappropriate to infer such consent generally from an author-spouse's simple failure to opt out of the legal regime.

IV. CONCLUSION: A CALL FOR THE STATUS QUO

For the reasons discussed above, copyrights vest during the legal regime solely in the author-spouse and are never transferred by operation of Louisiana law to the community patrimonial mass. Given that copyrights are not community property, should Congress reform federal copyright law to accommodate state family law? Such reform would appear to be justified by two postulated problems, namely, that the status quo leads both to allocative inefficiencies and to a fundamentally unfair distribution of property as between married persons.

This Part addresses these problems and ultimately concludes they are illusory. As discussed below, separate ownership of copyrights inflicts minimal harm to the interests protected by community property law and, on the contrary, furthers some of those interests. Moreover, any attempt to reconcile federal copyright law and state community property law would require Congress to overhaul several fundamental provisions of the Copyright Act in a manner that would exceed Congress' constitutional authority under the Copyright Clause of the Constitution.

One possible problem with granting the author-spouse all rights in copyrighted works is that doing so may discourage the author-spouse from investing his resources in alternative endeavors.²¹⁹ After all, a day spent creating a copyrighted work will yield something owned solely by him, while a day spent earning wages of equal (or even greater) value will yield something that he must share.²²⁰ Because this incentive structure could cause the author-spouse to channel his labor and capital to lower-valued uses, namely, the creation of copyrighted works, it conceivably could result in an inefficient allocation of resources.²²¹ Although this effect is conceivable, there is simply no evidence, empirical or anecdotal, suggesting that a significant number of married persons actually allocate their scarce resources with a view toward maximizing individual wealth in the uncertain contingency that their marriages will fail.²²²

218. See Bix, *supra* note 183, at 199 (the extent to which parties have established a matrimonial regime with "full rationality, consent or voluntariness is not entirely clear, and it is likely to vary from party to party in different fact situations").

219. Analogously, the United States Supreme Court in *McCarty v. McCarty*, 453 U.S. 210, 234, 101 S. Ct. 2728, 2742 (1981), noted that "[t]he value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce."

220. See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 Vand. L. Rev. 483, 582 (1996) ("an investor's decision to make one investment rather than another will depend upon the . . . return she expects to earn on the available investments").

221. On the role of allocative efficiency in copyright, see *id.*

222. Most spouses (somewhat irrationally) believe that *their* marriages will not fail. See, e.g.,

Another possible problem with granting the author-spouse all rights in copyrighted works is that doing so is simply unfair. The community property system exists largely to further spousal equality²²³ by financially acknowledging the contributions made by each spouse.²²⁴ Permitting an author-spouse to retain sole ownership of copyrighted works created during marriage is arguably unfair because it discounts the endeavors of his nonauthor partner.

Furthermore, this perceived problem is aggravated by the inability of the nonauthor spouse to obtain reimbursement for the value added to the author-spouse's separate patrimony through his authorship. Louisiana Civil Code article 2368 typically entitles a spouse to receive from the other²²⁵ one-half of the increase in value of the other spouse's separate property when the increase is attributable to the uncompensated or under-compensated labor or industry of the other spouse.²²⁶ This reimbursement exists largely to "discourag[e] a spouse from depriving the community of his salary to increase the value of his separate property."²²⁷ However, this reimbursement is unavailable when the under-compensated spousal labor takes the form of under-compensated authorship of copyrighted works. After all, to give a nonauthor spouse a monetary claim against the author for a share of the *value* of an author's copyrighted work would essentially end-run federal copyright law and give the nonauthor a share of the financial rewards of authorship. Because copyright law exists to generate such financial rewards to spur authorship,²²⁸ any state-law reimbursement claims for a portion of these federally-created incentives would be preempted by copyright law.²²⁹

Nayo, *supra* note 14, at 167; *supra* note 214 and accompanying text.

223. See Spaht & Hargrave, *supra* note 26, § 3.2, at 47 ("From the earliest times, the most important legislative policy underpinning the Louisiana community property regime has been that spouses share equally 'the produce of the reciprocal labor and industry of both husband and wife.'").

224. See, e.g., Roberts, *supra* note 14, at 1059 (goal of community property is to "recognize in economic terms the contribution of nonbreadwinner spouses").

225. The funds to satisfy a reimbursement claim may be drawn either from the other spouse's net share of the former community property or, with limited exceptions, from the other spouse's separate property. See, e.g., Roque v. Tate, 631 So. 2d 1385 (La. App. 5th Cir. 1994); Fastabend v. Fastabend, 606 So. 2d 794 (La. App. 3d Cir. 1992). See generally Spaht & Hargrave, *supra* note 26, § 7.13, at 379.

226. See La. Civ. Code art. 2368. See generally Spaht & Hargrave, *supra* note 26, § 7.18.

227. Spaht & Hargrave, *supra* note 26, § 7.18, at 415.

228. See *supra* notes 90-94 and accompanying text.

229. See *supra* Part II.C.; see also *PMC, Inc. v. Saban Entertainment, Inc.*, 52 Cal. Rptr. 2d 877 (Cal. 1996) (state law cannot regulate transfers of copyright ownership in a manner that conflicts with federal law). Indeed, in past cases in which federal law was held to preempt state marital property law as to property ownership, no spouse has been permitted to end-run federal preemption through a state-law reimbursement claim for a portion of the *value* of the property classified by federal law as separate. See, e.g., *Succession of Harrell*, 622 So. 2d 253, 255-56 (La. App. 1st Cir. 1993) (no reimbursement claim exists for "one-half the value of the bonds classified as separate by federal law"). See generally Spaht & Hargrave, *supra* note 26, § 3.42, at 150 (observing that in *Free v. Bland*, "[t]he surviving husband was recognized as owner of the bonds with no obligation to reimburse the wife's separate estate for her interest in the community funds that had now been transmuted into his separate property") (discussing *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089 (1962)).

Although this perceived unfairness is perhaps an understandable effect of Louisiana's deep-rooted community property tradition, classifying copyrights as separate property not only inflicts minimal harm to the interests protected by community property law, but also furthers those interests. The minimal nature of such harm becomes apparent upon considering that other valuable things derived from or associated with the author's separate copyrights are community property under Louisiana law and likely are unaffected by federal copyright law. For example, revenues derived from the licensing of a separately-owned copyrighted work during marriage are "civil fruits"²³⁰ of that work, and as such, are classified by Louisiana law as community property.²³¹ Similarly, the material objects embodying copyrighted works²³² are community property when comprised of significantly valuable community materials.²³³ And the proceeds derived from the

230. La. Civ. Code art. 551 ("Fruits are things that are . . . derived from another thing without diminution of its substance. . . . Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions."). See generally Spaht & Hargrave, *supra* note 26, § 3.7. Whether revenues derived from granting *exclusive* licenses in separately-owned copyrighted works should be classified as fruits (in which case such revenues may be community property, see *id.* art. 2339), or products (in which case such revenues would clearly be separate property, see *id.* art. 488 & art. 2341, cmt. c) is a more interesting issue. Because copyrighted works are inexhaustible "public goods," see, e.g., Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 Emory L.J. 1, 42-43 (1999); William W. Fischer, III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1700 (1988) ("Unlike most goods and services, [works of intellect] can be used and enjoyed by unlimited numbers of persons without being 'used up.'"), the exclusive licensing of a copyrighted work likely does not result in the "diminution of its substance," at least as that concept likely was contemplated by the drafters of Article 551. Nevertheless, the granting of an exclusive license is a "transfer" of copyright, see 17 U.S.C. § 101 (1996) ("transfer of ownership"), and, as such, deprives the grantor of the ability to exercise the transferred exclusive right(s) and to grant additional licenses (whether exclusive or nonexclusive). Therefore, it would appear that revenues obtained from the granting of exclusive licenses or from other copyright "transfers" should be treated as separately-owned "products" rather than as community-owned "fruits."

231. See La. Civ. Code art. 2339. See generally Spaht & Hargrave, *supra* note 26, § 3.6 ("[f]ruits of a spouse's separate property, under Article 2339, are . . . community"). Note that under the Louisiana Civil Code a "spouse may reserve [civil fruits] as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged." La. Civ. Code art. 2339. Such a declaration is effective "when filed for registry in the conveyance records of the parish in which the declarant is domiciled." *Id.*

A good argument could be made, however, that Louisiana is foreclosed from classifying such proceeds as community property by the Copyright Act and the Supremacy Clause. Particularly, such classification may interfere with the financial incentives for authorship that Congress intended to facilitate through enacting the Copyright Act of 1976. See *supra* Part II.C.2.b.

232. Under the Copyright Act, "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied." 17 U.S.C. § 202 (1996).

233. In other words, a material object fixing an intangible copyrighted work is community property if the object is made up of community things that have a value that is consequential in relation to the value of the copyright that the object fixes. See La. Civ. Code art. 2342 ("The separate property of a spouse . . . comprises: . . . property acquired . . . with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used . . .").

sale of such tangible artifacts would likewise be community under real subrogation principles.²³⁴ Thus, many paintings, prints, phonorecords, manuscripts and other such corporeal objects produced by the author-spouse during the legal regime, as well as the proceeds obtained from the sale of such tangible objects, are likely community property under current state law. Considering that many artists derive a significant portion of their income from the sale of tangible artifacts, the monetary gains associated with a spouse's creation of works of authorship are often shared during marriage.²³⁵

In addition, separate copyright ownership furthers the interest of allowing spouses to go their own ways *after* marriage without nettlesome property-related entanglements. Indeed, Louisiana law distinctly recognizes this interest not only statutorily—through legislation expressly providing that post-termination wages are the separate property of the wage-earner²³⁶—but also jurisprudentially—through cases holding that professional goodwill²³⁷ is “an extrapatrimonial personal attribute not subject to sharing.”²³⁸ As Planiol observed, the value of a copyright, like the value of a professional practice, is inextricably intertwined with the reputation of a particular individual.²³⁹ For example, the copyright in a work by Degas depicting a ballet dancer is undoubtedly more valuable than the copyright in an identical work created independently by an unknown artist working in Jackson Square. If Degas had painted his first ballerina while married and while domiciled in New Orleans, and if he were still alive today, separate copyright

234. See, e.g., La. Civ. Code art. 488. See generally Spaht & Hargrave, *supra* note 26, § 3.7, at 63 (the proceeds obtained when a thing is sold “are a return of capital under a real subrogation theory”).

235. See Roberts, *supra* note 14, at 1072 (opining that “nonauthor spouses are protected adequately by granting a community property interest in the income derived from copyrights”). Although this is true under Louisiana community property law, which follows the Spanish system in classifying the fruits of separate property as community, it would not be so under the community property laws of California, Arizona, Nevada, New Mexico and Washington, which classify the fruits of separate property as separate property. See generally 1 Matthew Bender, *supra* note 14, § 20.03[3][b][1], at 20-63 to 20-64; de Funiak & Vaughn, *supra* note 24, § 71, at 160-62; see also Nimmer, *supra* note 14, at 390 (noting that under California law “royalties and profits received from property have the same character as the property”).

236. See La. Civ. Code arts. 2338, 2344. See generally Spaht & Hargrave, *supra* note 26, § 2.8. Likewise, under present Spanish community property law, income attributable to *copyright exploitation* falls into the marital community only when “earned during the marriage.” See Alberto Bercovitz, Germán Bercovitz & Milagros del Corral, *Spain*, in 1 *International Copyright Law & Practice* § 4[2][a], at 34 (Paul E. Geller ed. 1998).

237. Professional goodwill represents “primarily the future return to the professional practitioner for the exercise of skill and labor.” Spaht & Hargrave, *supra* note 26, § 2.8, at 39.

238. Spaht & Hargrave, *supra* note 26, § 2.8, at 40; see, e.g., *Chance v. Chance*, 694 So. 2d 613, 617 (La. App. 2d Cir. 1997); *Preis v. Preis*, 649 So. 2d 593 (La. App. 3d Cir. 1994); *McCarron v. McCarron*, 498 So. 2d 1139, 1142 (La. App. 3d Cir. 1986); *Pearce v. Pearce*, 482 So. 2d 108, 111 (La. App. 4th Cir. 1986); *Depner v. Depner*, 478 So. 2d 532, 533 (La. App. 1st Cir. 1985); *Taylor v. Taylor*, 473 So. 2d 867, 870 (La. App. 4th Cir. 1985).

239. See Planiol, *supra* note 24, no. 917, at 97 (“The rights of author are simply a monopoly of exploitation. As such they are merely part of the exercise of his profession. Hence, they should remain in separate ownership.”) (emphasis added).

ownership would assure that he could create derivative works and exploit the reputation-dependent value of such works for himself alone.

If, however, copyrights in works created during marriage were considered to be community property, then a myriad of intractable problems would arise regarding works created by an author after termination of his marriage. First, it would be difficult to determine as a threshold matter whether an ex-spouse's post-termination work is derivative or wholly-original. This difficulty arises because a *nonderivative* work created in an author's peculiar style may appear to be an adaptation purely as a result of stylistic similarities.²⁴⁰ For example, because Degas' later ballerina works were created by the same artist, painting the same subject matter, in the same style as many of his earlier works, it is difficult to discern whether Degas' later paintings are wholly original or merely adaptations of his earlier works. Although this issue usually is irrelevant, when an author co-owns the *original* copyright with another person, the creation of a derivative work triggers an obligation to account to his co-owner for a share of the profits attributable to the subsequent use of the co-owned work.²⁴¹ Therefore, if Degas co-owned the copyrights in his early ballerina paintings with his ex-wife, it would be extremely difficult to determine whether his subsequent works were wholly-original or merely derivative, and thus, whether he had a duty to account to her for a share of the profits earned through his adaptation of the earlier works.

Second, as to post-termination works that were clearly derivative, it would be difficult to distinguish (for purposes of interspousal accounting) between the profits generated by the community copyright from those generated by other factors.²⁴² Such "other" factors might include: (1) the reputation of the author, (2) the post-termination contributions of expression, labor and capital by the author and others to create and to market the derivative work, (3) the value of the tangible artifact qua artifact embodying the derivative work, and (4) market factors, among innumerable other things.²⁴³ For example, if Degas created a ballerina painting *after* divorce that

240. See *supra* notes 122-126 and accompanying text.

241. See, e.g., *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir. 1955); *Nimmer & Nimmer*, *supra* note 14, § 6.12[A], at 6-34.1 ("a joint owner is under a duty to account to the other joint owners of the work for a ratable share of the profits realized from his use of the work"); see also *Cary*, *supra* note 118, at 96.

242. See *Walker v. Forbes, Inc.*, 28 F.3d 409 (4th Cir. 1994) (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 60 S. Ct. 681 (1940); *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992)).

243. For a discussion of the difficulties associated with deriving and apportioning net profits in the analogous context of copyright infringement, see *Ciolino*, *supra* note 230, at 17-25.

Note that similar problems would arise in quantifying Article 2368 reimbursement claims if such claims were not preempted by federal copyright law. This is so because any increases in the value of a copyright that are attributable to factors *other than* the author-spouse's under-compensated labor are not subject to a claim for reimbursement. See La. Civ.Code art. 2368; *Beals v. Fontenot*, 111 F.2d 956, 959 (5th Cir. 1940) (no reimbursement due if increase in value is due to "the ordinary course of things" or "the rise in the value of the property and chances of trade"); see also *Abraham v. Abraham*, 230 La. 78, 87 So. 2d 735, 738 (1956). See generally *Spaht & Hargrave*, *supra* note 26, § 7.18, at 419 ("The most difficult proof required of the claimant spouse under Article 2368 is that the increase in value of

was an adaptation of an earlier one created *during* marriage, and then he sold that derivative work for a profit, a court would be faced with the difficult task of segregating the profits attributable to the earlier community copyright from those attributable to other factors such as Degas' artistic reputation, the subsequent expression he added, the labor invested by him and others to create and market the adaptation, the raw materials fixing the work, the capital and overhead necessary to create and to market the work, the value of the signed-by-the-artist painting qua tangible artifact,²⁴⁴ and factors peculiar to the relevant art market. These are the sorts of problems that community property law seeks to avoid by, among other things, classifying reputation-dependent professional good will as separate property.²⁴⁵

For all of these reasons, there are no compelling reasons why Congress should reform federal copyright law to accommodate Louisiana and the few other American community property jurisdictions. On the contrary, there are persuasive reasons why it should not attempt to make this accommodation. As discussed previously,²⁴⁶ permitting state community property law to govern the ownership and management of copyrights would frustrate many of the goals underlying Congress' 1976 overhaul of American copyright law. Moreover, reconciling copyright law and community property law would require a comprehensive structural reexamination of the Copyright Act. In addition to rethinking fundamental principles of authorship, initial vesting, and transfer of ownership,²⁴⁷ Congress would have to reconsider provisions relating to visual artists' rights under the Visual Artists Rights Act of 1990,²⁴⁸ and to the termination of copyright transfers,²⁴⁹ among others.

separate property is *attributable to a spouse's labor.*") (emphasis in original).

244. This value cannot be understated. "An original drawing . . . is more valuable than the finest reproduction, even one all but indistinguishable from it." Leonard B. Meyer, *Forgery and the Anthropology of Art, in The Forger's Art: Forgery and the Philosophy of Art* 77, 86-87 (Denis Dutton ed., 1983). This is so because of the deontological importance of the pedigree of a physical artifact. See Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 Wash. & Lee L. Rev. 33, 76-77 (1997). A recent example of this phenomenon is the value placed on the original film of the John F. Kennedy assassination made by Abraham Zapruder in 1963. Arbitrators valued the physical artifact alone—the 26-second celluloid film—at \$16 million dollars, despite that copies of the film would be virtually indistinguishable from the original stored in the National Archives. See Deb Riechmann, *Zapruder Heirs to Get \$16 Million for Film*, N.O. Times-Picayune, Aug. 4, 1999, at A3.

245. See Spaht & Hargrave, *supra* note 26, § 2.8.

246. See *supra* Part II.C.

247. See 17 U.S.C. §§ 201 & 204 (1996).

248. Section 106(A) of the Copyright Act grants only the "author" of a work of visual art the rights of attribution and integrity. Thus, if Congress were to permit community property states to vest a copyright in, or transfer a copyright to, a nonauthor spouse, the author-spouse would nonetheless retain the VARA right to "prevent the use of his or her name as the author of any work of visual art which he or she did not create." See 17 U.S.C. § 106A(A)(1)(A) (1996). As a result, the author-spouse could prevent the co-owning nonauthor from using the author's name in connection with any derivative works. Given the importance of artistic reputation to the economic value of a copyright, this would seem to undermine substantially the value of the adaptation right in the hands of the nonauthor-spouse. Presumably, Congress would have to address this issue if it sought to facilitate equal sharing of copyrights between spouses.

249. Section 203 of the Copyright Act grants only the "author" of a copyrighted work (or, if he is

Worse still, the legislative end-product of any congressional effort to promote the spousal sharing of the spoils of authorship would likely be unconstitutional. The Copyright Clause empowers Congress, "To Promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."²⁵⁰ If Congress attempted to vest copyright ownership in nonauthor-spouses, it arguably would be exceeding the limited power conferred upon it by the Clause: to grant exclusive rights only to "[a]uthors."²⁵¹ Moreover, in enacting legislation to facilitate spousal copyright sharing, Congress essentially would be curtailing the rights of authors in furtherance of family-law interests. Such legislation would be unusual indeed, particularly considering that traditional limitations on authors' rights exist to increase the volume of authorship to which the public has access.²⁵² Therefore, while the goal of public-access typically tethers limitations on authors' rights to the Copyright Clause's utilitarian principles, no similar anchor exists in the Clause for federal marital-property legislation.

In conclusion, federal copyright law vests ownership of all copyrights exclusively in the author-spouse. In so doing, federal law preempts contrary Louisiana law that purports to vest copyright ownership in both spouses in the community. So it is. And so it should—and must—remain.

dead, certain survivors of the author) the right to terminate a copyright transfer thirty-five years after execution of the grant. See 17 U.S.C. § 203 (Supp. 1999). In order truly to equalize the value of copyrights to both spouses, Congress would have to address this provision.

250. U.S. Const. art. I, § 8, cl. 8.

251. *Id.* For a discussion of the constitutional problems associated with expanding the notion of authorship, see Nimmer & Nimmer, *supra* note 14, § 1.06[C], at 1-66.21 to 1-66.22; Nimmer, *supra* note 14, at 407 (arguing that there would be no constitutional problem if Congress vested copyright in the author-spouse, and then permitted states to thereafter transfer the copyright to the nonauthor-spouse).

252. For example, the fair-use limitation exists to increase the number of works of authorship available to the public, thus furthering the utilitarian goals undergirding the Copyright Clause. See Ciolino, *supra* note 244, at 72-74.

