COMMENTS

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I Do, I Did, I'm Done: Copyright and Termination of Transfer in Divorce

Introduction 184
I. An Overview of Community Property and Copyright Law .. 187
A. Federal Copyright Laws and the Copyrighting Process 187
1. Requirements, Rights, and Protections for Copyright Holders Generally 187
2. Federal Copyright Law Under the Copyright Act 188
B. The Relevance of State Community Property Law to Asset Division 189
II. Which Law Governs Copyrights when a Conflict Arises? ... 190
A. Preemption Principles 191
B. *In re Marriage of Worth* 192
C. *Rodrigue v. Rodrigue* 193
III. Termination of Transfer 194
A. How Does Termination of Transfer Typically Operate? 195
B. How Does Termination Apply in Transfers to Non-Creating Spouses? 195
1. May the Creating Spouse Exercise This Right Against the Non-Creating Spouse? 196

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2. When Does the Statutory Clock Run?..... 197
3. The *Worth* Interpretation..... 197
C. VARA and the French *Droit Moral* System..... 198
IV. Analyses of Various Spousal Transfer Approaches..... 201
A. Adopting the *Worth* Approach..... 201
B. Adopting the *Rodrigue* Approach..... 203
C. An Alternative Route: Looking to a Bifurcated Approach..... 204
Conclusion 206

INTRODUCTION

In a divorce, divided assets range from the mundane—homes, cars, joint bank accounts—to the downright unusual—Nobel Prizes,[1] stuffed animals,[2] and even human organs.[3] But even the strangest possessions can be equitably divided by courts. That is, perhaps, until we look to the unique area of copyrights. Copyright law raises several novel conflicts when we attempt to reconcile it with the accepted principles of marital community property and the division thereof upon divorce.

When Tom Clancy, author of well-known novels including the Jack Ryan franchise, separated from his wife Wanda King two decades ago, the pair hotly contested who should have rights to the Tom Clancy Op-Center spin-off series (as well as the profits the series generated).[4] Estimates of the value of Clancy's intellectual property vary, but they all fall above 100 million dollars; however, during his divorce he denied that King substantially contributed to creating any of the books.[5]

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1 Buckingham, LaGrandeur & Williams, *4 Divorce Cases with Bizarre Division of Assets*, THE L. OFFS. OF BUCKINGHAM, LAGRANDEUR & WILLIAMS (Sept. 21, 2017), https://www.boydbuckingham.com/20-17/09/4-divorce-cases-with-bizarre-items-included-in-the-division-of-assets/ [https://perma.cc/MXZ2-PYXG].

2 Gus Dahlberg, *You Won't Even Believe the Things People Fight for in a Divorce*, BABBITT & DAHLBERG (May 17, 2016), https://bdfamilylaw.com/blog/you-wont-even-believe-the-things-people-fight-for-in-a-divorce/ [https://perma.cc/WT92-3ZLX].

3 *Id.*

4 *Tom Clancy's Cold War\ The Author's Divorce Involves a Custody Dispute over a Fictional Character*, NEWS & REC. (Jan. 25, 2015), https://greensboro.com/tom-clancys-cold-war-the-authors-divorce-involves-a-custody-dispute-over-a-fictional-character/article_cc7414be-13f8-5017-be04-aff016d11532.html [https://perma.cc/UG82-94XZ].

5 Laura Lippman, *In Tom Clancy's Divorce Case, Wife Seeks Custody of Jack Ryan*, THE SEATTLE TIMES (Jun. 16, 1998), https://archive.seattletimes.com/archive/?date=19980616&slug=2756394 [https://perma.cc/JY9M-PVWT].

King, in turn, argued that Clancy financially harmed her by removing his name from the series of books, which was formerly drawing revenue for her.[6] Clancy chose not to keep his name, a valuable endorsement raising the worth of the series, affiliated with the Op-Center books.[7] Reversing a lower court decision, the Court of Appeals of Maryland found that Clancy reserved the right to control the project, including removing his name from the Op-Center books.[8] While the case touched on issues of intellectual property and marital assets, ultimately the Clancy holding fell to contract law and breach of fiduciary duty more than intellectual property law because Clancy and King had a preexisting profit-sharing agreement regarding the contested series of books.[9]

This story, unusual as it may be, gets at the heart of a fervent, ongoing legal debate that implicates intellectual property rights, art law, and family law, among other fields. Clancy and King divorced under Maryland law, which dictates that spouses divide assets equitably rather than equally.[10] As such, this case managed to circumvent the apparent legal purgatory that surrounds transfer of copyrights in divorce.

However, imagine a scenario in which King and Clancy lived in a community property state, such as California,[11] and King wanted more than simply the profits reaped from Clancy's copyrights. Had King petitioned for a fifty percent share of all the copyright interests, she would have come up against a possible preemption issue as well as a termination issue that has become ripe for courts over the last decade.[12] The rise of these issues is in part because of the timeline implicated by the Copyright Act, which was enacted forty-five years ago.[13] Hypothetically, if *Clancy v. King* was a community property case, state law would give each spouse a one-half interest in all marital property,

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6 *Id.*

7 *Id.*

8 Clancy v. King, 954 A.2d 1092, 1097 (Md. 2008).

9 *Id.* at 1097–98.

10 Michael Amon, *Tom Clancy's Ex-Wife Tries to Take Over Book Series*, THE WASH. POST (July 9, 2003), https://www.washingtonpost.com/archive/local/2003/07/09/tom-clancys-ex-wife-tries-to-take-over-book-series/fb15451e-f59e-48ef-b867-276e66e586b7/ [https://perma.cc/ZH88-P8A8].

11 *Property and Debt in a Divorce or Legal Separation*, CAL. CTS., https://www.courts.ca.gov/1039.htm?rdeLocaleAttr=en [https://perma.cc/4VET-J76D].

12 17 U.S.C. § 203(a)(3).

13 *Id.*

including the Op-Center books' copyrights.[14] But federal copyright law would assign an undivided interest in copyrights to Clancy as the creator.[15] This conflict is what courts have addressed—and disagreed on—in the relevant cases discussed in this Comment.

While an artist may disagree with such a characterization, works that an artist creates while married to their[16] spouse can be treated as marital assets, seemingly inclusive of the affiliated copyrights in those works.[17] Beyond who (if anyone) keeps the physical pieces of art, myriad other issues regarding the transfer of property in divorce must be addressed, including both ownership of copyrights and additional rights afforded to copyright holders.[18] What this means varies by state and is dependent on divorce law. But unless a valid prenuptial agreement exists that excludes the art, the art will at least be considered when property is ultimately divided.[19]

It is unsurprising, therefore, that dividing art collections and other copyrightable works is difficult when the copyright holder or holders are divorcing spouses. Further complications can arise when one of the parties is the creating artist.[20] This Comment will explore the rights and obligations a non-creating spouse[21] receives when awarded copyrights in a divorce with a particular focus on termination of transfer rights. Subsequently, it will argue for a bifurcated approach that would more clearly separate financial interests from managerial[22] ones and close the apparent termination of transfer loophole, retaining much of the current legislation while modifying portions of existing copyright law to follow a model that more closely parallels French moral rights.

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14 *In re* Marriage of Worth, 241 Cal. Rptr. 135, 772 (Ct. App. 1987).

15 17 U.S.C. § 301(e).

16 Though usages differ, the author will use "their" as a singular, gender-neutral pronoun.

17 Nicole Martinez, *What Happens to Art in a Divorce [Hint: Get an Art Appraiser]*, ART L.J. (Nov. 8, 2016), https://alj.artrepreneur.com/art-appraiser-divorce/ [https://perma.cc/ME6X-S475].

18 *Id.*

19 Sophie Chung, *Good Art, Ugly Divorce*, CTR. FOR ART L., (Jan. 28, 2020), https://itsartlaw.org/2020/01/28/good-art-ugly-divorce/#post-39590-footnote-3 [https://perma.cc/B5VX-S42Z].

20 Llewellyn Joseph Gibbons, *Then, You Had It, Now, It's Gone: Interspousal or Community Property Transfer and Termination of an Illusory Ephemeral State Law Right or Interest in Copyright*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 105 (2013).

21 The author uses the term "non-creating spouse" to refer to a spouse who does not directly contribute to creating the copyrighted work, differentiable from co-creating spouses who work together to make copyrightable works.

22 Managerial interests are those interests that include the right to license, copy, perform, display, and distribute the original material, among other non-fiscal rights.

I
AN OVERVIEW OF COMMUNITY PROPERTY AND COPYRIGHT LAW

The purpose of the following Part is to shed light on the unique interaction between federal copyright law, which governs certain elements of art ownership, and state divorce and community property law, which dictates how federal rights get divided in the case of a marriage dissolution. This peculiar issue extends to a variety of creators —artists certainly, but also authors and screenwriters.[23] Creators of copyrightable works who enter into marriage and subsequently divorce are likely to encounter issues of valuation, copyright division, allocation of future profits, and other matters of significant economic consequence upon dissolution of marriage.[24]

A. Federal Copyright Laws and the Copyrighting Process

1. Requirements, Rights, and Protections for Copyright Holders Generally

The American copyright process is relatively straightforward. Per the Copyright Act of 1976, ownership vests (meaning rights are assigned) in the author when the work is fixed in a tangible medium of expression.[25] There is an originality requirement, but courts interpret it quite liberally, meaning anything short of a mechanically exact copy will likely clear the necessary threshold.[26] Copyright owners have broad discretion when deciding what to do with their works.[27] They may distribute, copy, adapt, and display the work, as well as transfer the copyright itself.[28] Selling the physical work[29] does not necessarily convey every right the creator possesses to the buyer.[30] Transfer of copyrights must be conveyed in an instrument detailing the particular

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23 Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 128 (1999).

24 Martinez, *supra* note 17.

25 17 U.S.C. § 201(a) (1976).

26 Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT. L.J. 563, 577 (1996).

27 Ciolino, *supra* note 23.

28 *Id.*

29 The material object in which the work is fixed is not the legal equivalent of the copyright assigned to the work at its creation. 17 U.S.C. § 202.

30 Sullivan, *supra* note 26, at 578.

rights to be given and signed by the selling owner of those rights.[31] The copyright term (meaning the length the copyright is valid for) is the lifetime of the author and then an additional seventy years after their death.[32]

2. Federal Copyright Law Under the Copyright Act

Federal copyright protection is achieved by two mechanisms: federal law via the Copyright Act and state law by way of various enforcement principles.[33] In this Comment, the enforcement principles discussed address community property as well as when and why courts decide to divide copyrights as a marital asset.[34] Federal copyright law assigns a number of rights to creators, including the initial vesting and exclusive rights contained in § 106, the rights of voluntary transfer in § 201(e), and termination of transfer under § 203, all explained in greater detail below.[35]

Section 106 of the Copyright Act provides creators with six exclusive rights in their copyrighted works. The exclusive rights include (1) the right to reproduce the copyrighted work in certain forms; (2) the right to prepare derivative works based on the copyrighted work; (3) the right to distribute copies of records to the public by sale or transfer; and (4–6) several other rights specific to performance or display of nonvisual forms of copyrightable works (mentioned here briefly as they are less relevant to the present discussion).[36]

The aforementioned authorization to use copyrighted work is granted by the author in the form of contractual agreements known as licenses; licenses allow the licensees (those granted the license) to use the work in agreed-upon contexts.[37]

Section 201(e) provides that an author's ownership of both the copyright itself and the associated exclusive rights shall not be

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31 17 U.S.C. § 204(a).

32 Sullivan, *supra* note 26, at 580.

33 David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383, 387–88 (1988).

34 While states do have some ability to enact copyright specific laws of their own, such laws are outside the scope of this Comment. For further discussion of state copyright laws, see Marketa Trimble, *U.S. State Copyright Laws: Challenge and Potential*, 20 STAN. TECH. L. REV. 66 (2017); Nimmer, *supra* note 33.

35 17 U.S.C. §§ 106, 203, 201(e).

36 Loren E. Mulraine, *Collision Course: State Community Property Laws and Termination Rights Under the Federal Copyright Act—Who Should Have the Right of Way?*, 100 MARQ. L. REV. 1193, 1197–98 (2017).

37 *Id.* at 1199.

transferred by a government body, official, or organization without the consent of the author.[38] This is a provision that raises questions in the context of marital property because a transfer ordered by the court as part of a divorce proceeding could be considered a transfer by a government body or official. To avoid running afoul of this authorial right, courts should find a way to either presume consent on the behalf of the creating spouse who owns the copyright or otherwise find a way to classify the transfer as nongovernmental.

Section 203 allows authors to revoke previous copyright licenses for a five-year window beginning thirty-five years after the original issuance by providing the licensee with written advance notice of the termination.[39] The provision was enacted to allow authors to terminate or renegotiate licenses that were granted while the author was in an unfavorable bargaining position relative to the licensee.[40] This provision becomes relevant only if copyrights can be divided as a marital asset and that division is equivalent to a typical license. If both conditions are satisfied, § 203 opens the door for the creating spouse to revoke the recipient non-creating spouse's rights, violating the court's division of property.

B. The Relevance of State Community Property Law to Asset Division

This Section will discuss the relevant differences between community property and equitable division of assets, the other system of property division in the United States.[41] In community property jurisdictions, the law provides for both marital property and separate property. But the default assumption in community property jurisdictions is that all property gained in the course of the marriage belongs one-half to both spouses, each having an equal share.[42] By contrast, equitable division jurisdictions treat each spouse as a separate, property-earning and property-holding entity.[43] In community property jurisdictions, separate

38 17 U.S.C. § 201(e).

39 17 U.S.C. § 203.

40 *Id.*

41 Mulraine, *supra* note 36, at 1212.

42 *See, e.g.*, Amy H. Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381, 392–93 (1984); Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. REV. 1, 6–7 (1976); Herbert I. Lazerow, *Copyright Co-Owners*, 67 J. COPYRIGHT SOC'Y U.S.A. 37, 45 (2020).

43 Mulraine, *supra* note 36, at 1212.

property encompasses property accumulated before the marriage; in a non-community property state, it may also include gifts or income from the sale of separate property.[44] Community property has roughly the same definition in all jurisdictions that adhere to the community property system[45]: it is property acquired after marriage and considered shared by both spouses.[46]

All property acquired during a marriage is assumed to be community property.[47] Generally, just because property is in the name of a single spouse does not exclude it from being considered a community asset.[48] The division of community property upon divorce varies state to state. For example, California has a rebuttable presumption that all marital property will be split fifty-fifty when spouses divorce.[49] It should be noted that, even in a community property state, a property split presumption can be overcome by a valid prenuptial agreement.[50]

All state courts that have addressed copyrights as marital property have either implicitly or explicitly held that copyrights and copyright royalties are marital (community) property to the extent that those copyrights were generated by spousal labor during the marriage.[51]

II
WHICH LAW GOVERNS COPYRIGHTS WHEN A CONFLICT ARISES?

Because both state and federal law purport to have some say in the distribution of copyrights where divorce is concerned, the lack of a consistent approach to handling such situations is disconcerting. Not only does the inconsistency create uncertainty for the spouses involved, but it also raises issues of provenance[52] and the validity of transferring

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44 Lazerow, *supra* note 42, at 45.

45 GERALD B. TREACY, COMMUNITY PROPERTY: GENERAL CONSIDERATIONS 802-3rd Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at II.C.

46 *Id.*

47 *Id.* While there are some aforementioned exceptions, such as gifts, they are outside the scope of this Comment.

48 *Id.*

49 Mulraine, *supra* note 36, at 1215.

50 *Id.* at 1216.

51 Ciolino, *supra* note 23, at 132–33. While all state courts that have addressed this issue have held copyrights to be divisible marital property, this Comment will focus on examples from those states that follow a community property framework rather than those that follow equitable distribution. However, the issue of copyright division is relevant in the latter as well as the former. MATTHEW BENDER & CO., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.07 (1998).

52 Provenance refers to the origins and authenticity of a piece. It is more relevant where works of visual art are concerned than reproducible works, such as a novel.

copyright title to third parties.[53] The existing cases that have handled copyright issues in divorces—several of which are detailed in this Part—employ different tactics in an attempt to harmonize state and federal principles. It should be noted that these cases all claim to have successfully divided the assets in question without running afoul of well-accepted notions of community property and federal copyright interests. The two main approaches analyzed below both allow the copyrights to be split. One approach is more drastic, splitting all the affiliated creator's rights, whereas the other approach splits only the financial spoils.

A. Preemption Principles

Under the Supremacy Clause, where state law conflicts with federal law, state law is preempted, and the applicable federal law governs.[54] The mere existence of a difference between federal and state law does not mean there is a conflict sufficient to invoke federal preemption.[55] On the contrary, preemption requires a specific showing that compliance with both the federal and state regulations is impossible or that adhering to state law will impair the achievement of the purposes and goals of the implicated federal statute.[56] There are three types of preemption: (1) express preemption where federal law expressly preempts state law; (2) field preemption where federal law occupies the entire legal field of the issue; and (3) conflict preemption where federal and state law conflict.[57] Field and conflict preemption are both types of implied preemption,[58] and using implied preemption would put the Copyright Act in conflict with state community property principles.

Arguably, preemption could be relevant both in the division of copyright assets upon divorce and decades later when that transfer becomes eligible for termination by the creator. The difficulty in reconciling the Copyright Revision Act of 1976 (the Act) and existing state laws regarding division of assets upon divorce is immediately apparent from the language of the Act. The Act incorporates the following provision regarding the transfer of copyright ownership:

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53 *See, e.g.*, 17 U.S.C. § 101.

54 U.S. CONST. art. VI, cl. 2.

55 Mite Corp. v. Dixon, 633 F.2d 486, 493 (7th Cir. 1980).

56 BETH BATES HOLLIDAY ET AL., *Constitutional Law*, in OHIO JURISPRUDENCE § 140 (3d ed. 2021).

57 *Id.*

58 Gibbons, *supra* note 20, at 136.

> When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.[59]

The language of the Act inextricably links it to legal conceptions of marital property while opening the door to a preemption issue with state divorce laws.[60]

B. In re Marriage of Worth

In re Marriage of Worth, 241 Cal. Rptr. 135 (Ct. App. 1987), was the first time a court had the opportunity to determine how ownership of a copyright would be decided upon divorce in a community property state.[61] *Worth* was different from the cases that would follow; the spouses were already divorced, and the non-creating spouse was attempting to lay claim to proceeds from a copyright infringement action that arose from copyrights held in books written by the creating spouse.[62] California's community property principles—the relevant state law in this case—dictate that the fruits of labor during marriage are to be split equally among spouses in a divorce.[63] But the 1976 Copyright Act vests ownership in the author (the creating spouse for the purposes of this Comment) of the copyrighted work alone,[64] thus creating an apparent disparity.

The *Worth* court took an approach that would come to be seen as unusual for this type of case. This approach effectively bifurcated the vesting of copyrights by claiming that federal and state law do not raise a preemption issue but rather operate simultaneously to vest copyright in the creating spouse and transfer an interest in that copyright to the non-creating spouse.[65] The court circumvented the involuntary transfer provision of § 201(e) by calling upon the idea of an implied voluntary

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59 17 U.S.C. § 201(e).

60 Francis M. Nevins, Jr., *When an Author's Marriage Dies: The Copyright-Divorce Connection*, 37 J. COPYRIGHT SOC'Y U.S.A. 382, 382 (1990).

61 Gibbons, *supra* note 20, at 107–08.

62 *In re* Marriage of Worth, 241 Cal. Rptr. 135, 135 (Ct. App. 1987).

63 *Id.*

64 *Id.* at 137.

65 *Id.* at 136. The court's logic dictated that the only law that federal copyright law can preempt is state copyright law, not state family law, the law at issue in the case.

transfer.[66] The court said that the decision to marry is voluntary, and thus, the creating spouse of the copyrighted work gives implied consent to transfer some stake in their copyrights to their non-creating spouse.[67] The transfer works only if such implied consent is presumed—as in the present case.[68] Otherwise, under § 201(e), a government body or other organization would involuntarily transfer, and this would not be allowed.[69]

Additionally, the *Worth* court evaded § 201(e), the provision that invalidates transfers that violate the owner's exclusive rights in copyright.[70] While this provision seems to render voluntary transfers made by the copyright owner under § 201(d) meaningless, it can be reconciled by reading the provision as barring transfers by operation of law in cases where there has not previously been a *voluntary* transfer.[71]

Further deciding that copyrights are a divisible asset and possess some inherent worth because of the underlying value of the work, the *Worth* court inelegantly cleaved the copyrights involved in two without regard for the individual rights that exist in a copyright as espoused by § 106 and the *Rodrigue* court 20 years later.[72]

C. Rodrigue v. Rodrigue

The opinion in *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000), was a reversal of the earlier holding in *Worth*.[73] While the Louisiana district court initially found that federal law preempted state law on community property and copyrights, the U.S. Court of Appeals for the Sixth Circuit reversed, determining that there was a way to harmonize both. The court built on the precedent set by *Worth* and denied that preemption was an issue.[74] *Rodrigue* rejected the implied voluntary transfer necessitated by the *Worth* holding, and the court instead transferred those rights not guaranteed by the Copyright Act to the non-creating spouse in equal share, the profits chief among them.[75]

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66 Brett R. Turner, *Division of Intellectual Property Interests upon Divorce*, 12 No. 2 DIVORCE LITIG. 17 (2000).

67 *Id.*

68 17 U.S.C. § 201(e).

69 17 U.S.C. § 201(d).

70 *Id.*

71 *Id.*

72 Gibbons, *supra* note 20, at 110–12.

73 *Id.* at 122.

74 Rodrigue v. Rodrigue, 218 F.3d 432, 442 (5th Cir. 2000).

75 *Id.* at 443.

The *Rodrigue* court claimed to defer to both state law and federal law, walking a narrow line dependent on the very definition of the word copyright. The court asserted that the definition of copyright is pertinent only when considering the five rights espoused by 17 U.S.C. § 106: reproduction, adaptation, publication, public performance, and public display.[76] Other attributes of ownership could be split according to state community property law, according to the court.[77] Avoiding issues of title and co-authorship, the *Rodrigue* court recognized that the creating spouse is the sole author in whom title vests.[78]

The court also adopted a novel interpretation of state property law, choosing to divide copyright into three *functional rights* separate from the five rights laid out in the Copyright Act.[79] The functional rights are (1) usus—the right to use or possess; (2) abusus—the right to alienate or abuse; and (3) fructus—the right to the fruits.[80] Fructus—in essence, the profits interest—is the only right to which the non-creating spouse may lay any claim.[81] This approach is difficult to generalize more broadly than Louisiana—where it was pioneered—both because of the very particular application of narrowly bound property laws and because it does little to further explain the interplay between the Copyright Act and the relevant property laws.[82] While both leading cases in this area came to the same general conclusion—that copyrights were at least partially divisible—these cases are not wholly compatible with one another and still fail to answer questions that will doubtlessly arise in the future.

III
TERMINATION OF TRANSFER

Even if one assumes that the approaches to the division of copyrights adhered to by the above courts are meritorious and do not give rise to significant preemption issues—an assumption hotly contested by a significant body of legal commentary—there is still the issue of termination of transfer.[83] Termination of transfer is supposed to enable copyright holders who made disadvantageous transfers to later reclaim

76 17 U.S.C. § 106.
77 *Rodrigue*, 218 F.3d at 435.
78 *Id.* at 441.
79 *Id.* at 436–37.
80 *Id.* at 437.
81 *Id.*
82 *Id.*
83 Gibbons, *supra* note 20, at 111–12.

interests in those copyrights decades after making the original assignment.[84] It is critical to understand and address the possible application of the termination of transfer provision to non-creating spouse recipients of copyright interests because termination of transfer has the potential to belatedly nullify a court's grant of a copyright interest. This Part will give a broad overview of termination of transfer and explain how it could apply—rather problematically—to non-creating spouses who receive copyright interests.

A. How Does Termination of Transfer Typically Operate?

The provision enabling termination of transfer is found in two parts of the Copyright Act: § 203 and § 304(c).[85] The former applies to transfers completed on or after January 1, 1978, and the latter applies to transfers before that date.[86] Under § 203, a creator may terminate a transfer during a five-year period starting thirty-five years after the grant (transfer) is executed.[87] The creator must give notice to the grantee that they intend to terminate the copyright grant.[88] The right is inalienable, and the author may invoke the right of termination regardless of agreements to the contrary.[89] Such a termination reverts all rights to the terminating party. For the purposes of this Comment, we will not consider the alternative § 304 reversions in depth, though they may be used where transfer agreements have previously been renewed.[90]

B. How Does Termination Apply in Transfers to Non-Creating Spouses?

A question arises when a court decides that copyrights are marital property: is the transfer of copyright a transfer by operation of law? For lack of a writing by the author (such as a prenuptial agreement in which the creator makes the transfer) the transfer *must* be by operation of law if it occurs when the copyright protections vest in the creator—

84 17 U.S.C. §§ 203, 304(c).

85 *Id.*

86 *Id.*

87 17 U.S.C. § 203.

88 *Id.*

89 For example, an agreement that directs the creator not to breach the license prior to a specific date that is after the date that termination of transfer becomes available. 17 U.S.C. §§ 203(a)(5), 304(c)(5).

90 17 U.S.C. § 304(c).

typically fixation—regardless of whether the court says the transfer is by operation of law.[91] Further, it is worth considering whether the creating spouse may terminate a transfer to the non-creating spouse either by court order or by agreement reached in negotiations during the dissolution of marriage.

Hypothetically, if the termination provision functions the same way for transfers incident to marriage or divorce as for other copyright transfers, the creating spouse could revoke the non-creating spouse's right to any copyrights granted in divorce thirty-five years after the transfer. This issue has yet to be addressed by courts, but depending on when the spousal transfer is deemed to take place, it could be relevant to both creating and non-creating spouses in the near future or even immediately.

1. May the Creating Spouse Exercise This Right Against the Non-Creating Spouse?

Under § 203(a), authors may use the termination provision only to end a transfer the author granted themselves.[92] Whether the marital transfer is one by operation of law, leaving the author the right to terminate it, depends on the approach of the courts.

The *Worth* holding makes it difficult to imagine a scenario where a termination would be exercised because as functional co-authors, the creating spouse would need the assent of the non-creating spouse to terminate the transfer.[93] The *Rodrigue* court's approach leaves open the possibility of terminating the transfer and recapturing the economic rights granted to the non-creating spouse. One significant consideration from *Rodrigue* is whether the spousal assignment is like one given to any assignee, or if it is analogous to something more unique, like the grant of a pension or investment.[94]

The *Rodrigue* court puts the non-creator spouse's continued claim in the hands of state law[95] unless and until the claim is preempted by the Copyright Act or clear congressional intent. Though not entirely clear, it is possible that a creating spouse—in a jurisdiction that follows something analogous to the *Rodrigue* approach—could exercise the termination right against the non-creating spouse. The ambiguity regarding potential termination is troubling; it seems illogical that

91 Gibbons, *supra* note 20, at 111.

92 17 U.S.C. § 203(a).

93 Gibbons, *supra* note 20, at 124.

94 *Id.* at 125.

95 Rodrigue v. Rodrigue, 218 F.3d 432, 435 (5th Cir. 2000).

copyright holders should get to defy the agreed-upon distribution of assets in a divorce due to what is, essentially, an oversight in legislation.

2. When Does the Statutory Clock Run?

If termination of transfer is operable against one's spouse, when the initial transfer took place becomes relevant. This consideration allows one to assess when the revocation period begins.[96] Depending on states' interpretations of community property principles, there are a minimum of three points in a couple's marriage and subsequent divorce that a transfer could have occurred.[97] First, transfer could occur by operation of law upon creation of the work.[98] If this is the case, the statutory clock runs at creation, and the termination can be made as soon as thirty-five years have passed since the creation of the work.[99] Second, transfer could take place upon the court's judgment that the non-creating spouse is entitled to a copyright interest.[100] Third, transfer could occur upon voluntary agreement by the creator-spouse in the form of a prenuptial agreement, postnuptial agreement, or voluntary settlement.[101]

3. The Worth *Interpretation*

The *Worth* court held that the transfer was automatic and took place upon the fixation of the work, indicating that California at least adheres to the first approach, where the non-creating spouse's rights vest at the same time as the creating spouse's rights.[102] This approach could create some idiosyncratic results where a non-creating spouse gets divorced after a lengthy marriage and immediately thereupon or shortly after the creating spouse terminates whatever copyright interest the non-creating spouse receives in the divorce. That said, this result is likely protected by the termination provisions for co-authors. The *Worth* court seems to treat the non-creating spouse as a de facto co-author, in which case, as

96 The running of the statutory clock is an issue that—if relevant—would be more easily resolved in states that use an equitable distribution system. In such states, because spouses can hold assets separately in the course of the marriage and then divide them upon divorce. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5 / 504 (West 2012); CONN. GEN. STAT. ANN. §§ 46b-81, 46b-82 (West 2012).

97 Gibbons, *supra* note 20, at 113.

98 On a related note, in an equitable distribution jurisdiction, a transfer by operation of law would take place at the time of divorce because property can be held separately for the duration of the marriage. *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *In re* Marriage of Worth, 241 Cal. Rptr. 135, 136 (Ct. App. 1987).

mentioned above, the creating spouse would need the consent of the non-creating spouse to terminate the transfer.[103]

A further problem with the *Worth* court's approach is that it purports to make the non-creating spouse a constructive co-author of the work.[104] If this approach is correct, the Copyright Act solves the problem by laying out provisions for termination of transfer among co-authors.[105] Unfortunately, § 201(d)(1) of the Copyright Act does not seem to allow the court to create new forms of authorship.[106] Further, co-authorship requires that all parties make an independent contribution to the work of some amount, something the non-creating spouse does not do.[107] If the Copyright Act prevents a non-creating spouse from being treated as a co-author, even in a jurisdiction that follows the *Worth* approach, the creating spouse may still be able to exercise termination of transfer.

C. VARA and the French Droit Moral *System*

In the United States, in addition to the protections afforded by the Copyright Act, certain types of artists have additional protections under the 1990 Visual Artists Rights Act (VARA), which provides artists with protections for the moral rights of attribution and integrity.[108] VARA is limited in its scope, applying only to works of visual art, including paintings, sculptures, drawings, prints, and photographs.[109] Courts may, however, have some discretion to broaden the legislation in individual cases to include other types of visual art.[110] VARA, as the United States' counterpart to *droit moral*, a broader French system of moral rights, has the potential to be expanded to protect copyright creators' interests while still allowing non-creating spouses a fair interest in the marital estate.

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103 17 U.S.C. § 203(a)(1).

104 *Worth*, 195 241 Cal. Rptr. at 136.

105 17 U.S.C. § 203(a)(1).

106 17 U.S.C. § 201(d)(1).

107 *See, e.g.*, Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362 (7th Cir. 2009), *cert. denied*, 559 U.S. 992 (2010); Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000).

108 17 U.S.C. § 106A.

109 Rachel A. Camber, *A Visual Art Law You Had Better Not Overlook*, 73 FLA. B.J. 69, 69 (1999).

110 *Id.*

Just two categories of rights are protected under VARA: attribution and integrity.[111] The attribution right ensures that the artist is entitled to attribution for their own work and that no other artist's works can be wrongfully attributed to the protected artist.[112] The integrity right prevents distortion, mutilation, or modification of the art in such a way as to be prejudicial to the artist's reputation or honor, even after a transfer of title.[113] VARA also enables artists to enforce these rights by affording them all available remedies—except criminal—under the Copyright Act.[114] But there are significant exceptions to VARA protections, even for visual artists.[115]

Unlike VARA, *droit moral* takes a more delineated approach to laying out the bundle of rights associated with copyright—establishing two separate bundles of rights.[116] *Droits patrimoniaux* predominately protect a work's economic rights, while *droits moraux* protect moral values.[117] The four rights encompassed by *droit moral* (or the *droits moraux* collectively) are publication, paternity, integrity, and withdrawal.[118] Publication enables authors to choose whether to present their work to the public. Paternity, or authorship, is the right to claim authorship of one's work, prevent others from wrongfully claiming authorship, and prevent one's name from being incorrectly associated with the authorship of another's work.[119] Integrity protects against unauthorized modification by anyone other than the author, prevents mutilation, and guards against derogatory action.[120] Finally, withdrawal —most relevant to the American termination of transfer ability—

111 Cynthia Esworthy, *From Monty Python to Leona Hemsley: A Guide to the Visual Artists Rights Act*, NAT'L ENDOWMENT FOR THE ARTS, http://web.archive.org/web/20030827213232/http:/arts.endow.gov/artforms/manage/VARA.html [https://perma.cc/KH9W-7DNK].

112 Camber, *supra* note 109.

113 *Id.*

114 *Id.*

115 Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 43 (1998). VARA does not apply to—among other works excluded—posters, maps, charts, works made for hire, art of which more than 200 copies are made, diagrams, models, books, motion pictures, and advertising. Esworthy, *supra* note 111.

116 *Id.* at 69.

117 *Id.*

118 Jeffrey M. Dine, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545, 550 (1995).

119 *Id.* at 551.

120 *Id.*

allows an author to take a work out of circulation entirely; withdrawal is the least commonly exercised moral right of the four.[121] The duration of these moral rights is limited in some regions of France, but in many others, they exist in perpetuity.[122]

The French law creates a tighter nexus between the author and the work and better honors the author's creative decisions.[123] One of the main differences between American property rights and French moral rights is that, even where all the economic rights have been transferred, the French artist retains moral rights in creative works, not just specific works of visual art, as with VARA.[124] When the United States joined the Berne Convention two years prior to adopting VARA, it expressly declined to adopt the included moral rights convention for visual artists.[125] The United States insisted that its own common law and variants on moral rights were sufficient to protect the interests of creators.[126] The moral rights established under the Berne Convention are largely analogous to the paternity and integrity rights established under *droit moral*.[127]

The French Supreme Court initially recognized that a creator's rights in copyrighted work could be a marital asset in the 1902 *Lecocq* case.[128] The *Lecocq* case coined the term *droit moral*[129] and held that such an inclusion would not affect the creator's ability to modify or suppress works.[130] Effectively, the case severed financial rights from the other rights afforded by *droit moral* by awarding the non-creating spouse a financial interest in work that was otherwise under the dominion of the creating spouse. That said, the 1959 case of *Bowers v. Bonnard-Terrasse* held that, under the principles of *droit moral*, unfinished works must

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121 *Id.*

122 *Id.* at 552.

123 Susan P. Liemer, *On the Origins of Le Droit Moral: How Non-Economic Rights Came to Be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65, 71 (2011).

124 McCartney, *supra* note 115, at 37–38.

125 *Id.* at 40.

126 Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 363 (1998).

127 *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [https://perma.cc/45GD-RE6Y].

128 Sofie G. Syed, *The Right to Destroy Under Droit d'Auteur: A Theoretical Moral Right or a Tool of Art Speech?*, 15 CHI.-KENT J. INTELL. PROP. 504, 513 (2016).

129 *See* Cour. de cassation [Cass.] [Supreme Court for Judicial Matters] Judgment de 25 Juin 1902 (Cinquin C. Lecocq), Civ., 1903 Recueil Periodique Siery [D.P.] 1.5 (Fr.).

130 Syed, *supra* note 128.

necessarily be excluded from community property, even in cases where the creating spouse has died.[131]

Additionally, *droit moral* foresees the difficulty in allowing authors to destroy or revoke previously licensed work from publication.[132] *Droit moral* provides for that specific situation by requiring that the author indemnify licensees against the loss of such a contract.[133] If the author ever chooses to bring that particular revoked work back into publication, they must afford the right of first refusal to the previous contract holder.[134] A similar approach, at least in regard to indemnification, could prove useful where non-creating spouses are concerned; this approach would allow the creating spouse to retain managerial control while protecting the ongoing financial interests of the non-creating spouse. Hypothetically, if a spouse, such as Clancy in the introductory example, chose to remove a work from market, they would be obligated to compensate their non-creating spouse for the lost revenue.

IV
ANALYSES OF VARIOUS SPOUSAL TRANSFER APPROACHES

In assessing the various possible approaches to handling the issue of copyright division incident to divorce, it is important to consider several factors. Not only is it important to consider whether state and federal laws conflict with one another but also whether the approach accounts for practical matters concerning future licenses, termination of transfer, initial vesting, and the preservation of the integrity of both the specific works and the creator's artistic reputation. This Part will analyze the approaches the American courts in *Worth* and *Rodrigue* used and will consider a novel approach that incorporates portions of the French *droit moral* and expands artist's rights under VARA.[135]

A. Adopting the Worth *Approach*

The *Worth* court claimed to harmonize state and federal law by interpreting the "transfer by operation of law" provided for under federal

131 Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 11 (1988).

132 Syed, *supra* note 128, at 517.

133 *Id.*

134 *Id.*

135 Such an expansion has been proposed but not explored in-depth as it relates to marital asset division. *See* Swack, *supra* note 126.

law as allowing a transfer (in this case financial rights *and* co-authorship) by California state marital law.[136] After doing so, the court further concluded that the copyrights in question were equally divisible between the creating spouse and the non-creating spouse, with no regard to the rights afforded by the Copyright Act.[137] Joint ownership cannot occur without consent, which, in this case, can only be presumed to exist via legal construction.[138] Not only can consent merely be presumed to exist but, in fact, it must be presumed, lest the transfer violate federal law prohibiting forced transfers.[139] The conclusion drawn by the *Worth* court about the existence of some inherent value to the copyrights in the work—separate entirely from any efforts by the creating spouse to generate revenue from the work, is unsupported by precedent and common sense alike.[140]

The inelegant split of the copyrights among spouses without regard to any delineation between financial rights and management rights foreshadows a number of challenges in managing the copyrights, including but not limited to difficulties with transfer of title.[141] The creating spouse's rights to distribute their work are significantly curtailed; the creating spouse will only be able to grant a nonexclusive license to the work without the consent of the non-creating spouse as a functional co-author. Even where the non-creating spouse consents to grant an exclusive license, it takes little imagination to create a scenario where a prospective licensee would hesitate to get involved in a situation where a (potentially hostile) third party has rights that limit the property the licensee hopes to license.

As far as legal principles and general applicability are concerned, perhaps the only clear advantage of the *Worth* approach—as opposed to other proposed solutions—is that the *Worth* approach assigns what could be considered a true fifty-fifty interest in an asset deemed marital property. To the extent that the management rights of copyrights might be an asset themselves, this approach does not award management rights wholly to the creating spouse, instead splitting them equally.

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136 *In re* Marriage of Worth, 241 Cal. Rptr. 135, 136 (Cal. Ct. App. 1987).

137 *Id.*

138 Nimmer, *supra* note 33, at 439.

139 *Id.* at 409.

140 Gibbons, *supra* note 20, at 109.

141 Nimmer, *supra* note 33, at 393.

B. Adopting the Rodrigue *Approach*

The *Rodrigue* court held that, while copyrights were a marital asset, they were further divisible into their respective functional property under Louisiana state law.[142] The creating spouse received exclusive rights under § 106 of the Copyright Act (the court noted that § 106 does not refer to the economic aspects of copyright ownership); however, the non-creating spouse was able to take an interest in the economic rights.[143] The court did not treat the non-creating spouse as a co-author but rather similar to a co-owner.[144]

One positive aspect of the *Rodrigue* court's approach compared to the *Worth* court is the superior functionality of separating monetary interests from the rights assigned exclusively to a copyright author. Failing to do so is sure to create difficulty, as detailed above in the analysis of *Worth*.

One glaring issue with broadly adopting *Rodrigue* is that this approach would look different in each state. This holding fails to provide a roadmap for future courts to follow because of the novel way Louisiana state law apportions different property rights in relation to the case.[145] Relying on state property law to handle a nuanced issue that traverses a significant body of federal law would undoubtedly result in disparate outcomes for creating and non-creating spouses alike. The peculiarities of state property law are best applied to property governed by the state.

Additionally, the *Rodrigue* court did not consider the possibility of termination of transfer, leaving the non-creating spouse open to having their interest revoked without compensation.[146] Nor does the court specify when in the marriage the transfer of copyright interest to the non-creating spouse takes place. Any comprehensive approach to handling transfers of copyright between spouses should necessarily address the issue of termination of transfer as well as when that transfer occurs.

Attempting to apply this approach nationwide would be, at best, impractical. While the court managed to evade addressing difficult preemption issues, it also evaded giving the issue of copyright transfers

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142 Rodrigue v. Rodrigue, 218 F.3d 432, 435 (5th Cir. 2000).

143 *Id.*

144 *Id.* The non-creating spouse is a co-owner rather than a co-author because they receive a purely monetary interest and no further proprietary control over the copyrighted work.

145 *Id.* at 436–37.

146 *Id.* at 432.

between spouses the consideration it rightly deserves. As such, the *Rodrigue* method of dividing copyrights, while perhaps more aligned with legal principles than *Worth*, is still insufficient to manage copyright division in future cases.

C. An Alternative Route: Looking to a Bifurcated Approach

While the *Rodrigue* approach looks like what might take place under a broader, moral rights-based system, the opinion leaves significant questions unanswered about what protections a creating spouse can expect to retain when the court treats copyrights as community property assets in a divorce. While the courts within the United States that have issued opinions on copyrights as community property have unilaterally stated that their approaches reconcile federal and state law by *avoiding* preemption, it is far from clear whether state and federal laws can be applied simultaneously without issue, especially in the *Worth* approach.[147] Requiring presumed consent to copyright transfers as incident to consenting to marriage is the only construction that avoids preemption. If this construction is inaccurate, the Copyright Act preempts community property law, and the *Worth* holding is patently incorrect.

Further, even if we assume that no preemption issue exists, no court has issued an opinion determining whether the creator spouse can use the termination of transfer right to revoke a transfer incident to divorce.[148] Plainly, it would seem illogical that a court would grant a non-creating spouse an interest in an asset deemed marital property only to allow—by virtue of a decision made by the very party to whose detriment the asset was distributed—such a distribution to be canceled by the creating spouse. But without clear guidance in the field, there is nothing to stop a creating spouse from canceling the distribution of an asset to the non-creating spouse. In fact, the creating spouse could possibly do so immediately after divorce if a court determines that the transfer took place prior to the divorce, upon either marriage or the fixation of a prenuptial agreement or other settlement.[149]

Making the financial interests in a copyright divisible from managerial interests is the best way to reconcile community property principles with federal copyright law. Doing so enables the non-creating

147 *Id.* at 435; *In re* Marriage of Worth, 241 Cal. Rptr. 135, 136 (Cal. Ct. App. 1987); Berry v. Berry, 277 P.3d 968, 987 (Haw. 2012).

148 Gibbons, *supra* note 20, at 128–29.

149 *Id.* at 113–22.

spouse to claim a monetary interest in the copyrights while protecting the creating spouse's right to ensure that their work is treated properly and their reputation is adequately maintained.

Droit moral is an extensive system of copyright protections, and the United States has only adopted a very limited version of moral rights for authors through VARA.[150] First, broadening VARA protections to apply to more types of authors, and perhaps even all authors of copyrightable works, would work to ensure that the court respects the dignity of works and the rights of creators in divorce proceedings. This would prevent non-creating spouses from making decisions regarding the copyrighted works that their former spouse (who is the creator of the work) finds unacceptable. At a minimum, this will prevent any more instances of unclear division restricting the rights on the part of both spouses, as in *Worth*.

Second, amending VARA to include protections for rights analogous to those included in the *droit moral* system will not only ensure that the author's interests are represented in the divorce but also in general dealings. Approaches like the one approach in *Worth* show that there is little inherent value assigned to creative and copyrightable works in the United States beyond what those works may be financially exploited for. Expanding VARA to more closely track French law may begin to change this perception.

Third, integrating an approach that considers more of the moral rights afforded by French law may even have some benefit where foreign copyright transactions are concerned. This would reduce the schism between American copyright law and other countries' moral rights-based approaches.[151]

The more comprehensive French moral rights system would give the creating spouse the option of terminating licenses or even pulling the copyrighted work from public presentation entirely. But, as the French scheme requires licensees to be compensated for their loss when the licensed material is pulled from circulation,[152] so, too, should non-creating spouses with a financial interest be compensated for the loss of income from lucrative licenses denied by the creating spouse. Such compensation could take the form of equivalent payments from the creating spouse to the non-creating spouse for the duration that the

150 17 U.S.C. § 106A.

151 Dine, *supra* note 118, at 582.

152 Damich, *supra* note 131, at 24.

license would have endured had the licensing agreement not been terminated. In cases where such a period is not readily discernible, testimony from the would-be licensee should prove sufficient to establish it.

In some ways, this proposed approach would likely benefit even the non-creating spouse more than the current approach does. As mentioned above, the non-creating spouse will still be entitled to a percentage of the profits derived from copyrighted works deemed community property. The loss of lucrative licenses that will likely occur if non-creating spouses are allowed an equal measure of control over the functional elements of the copyright is abhorrent to both the fiscal values of the American system and the cultural values encapsulated within French law. There is little advantage to affording the non-creating spouse such an interest beyond satisfying lay notions of fairness. In fact, doing so may even raise concerns for potential licensees over the intervening rights of a third party who may not share the author's interest in licensing the copyrighted materials.

Further, as the right of termination of transfer comes not from VARA but from the Copyright Act, § 203(a) must be amended to clarify that transfers of financial interests to a non-creating spouse incident to divorce are not revocable by the creating spouse. Leaving the termination of transfer provision ambiguous in its application to transfers to non-creating spouses leaves those spouses open to retributive action or unjust allocation of assets. Amending § 203(a) would remedy the issue of preemption between state and federal law, establishing that financial interests in copyrights is a divisible, marital asset. Alternatively, such an interest could be said to automatically terminate thirty-five years after the divorce is finalized, setting a clear endpoint for the non-creating spouse's interest in the copyright.

CONCLUSION

At present, the court holdings that address copyright division in divorce are simultaneously under-protective of the non-creating spouse's rights under community property principles and overly intrusive to the artist's right to preserve his or her work and legacy. *Rodrigue* is the method that comes closest to reconciling the issue of navigating artists' rights and spousal rights simultaneously, but it falls short on several accounts. The problems with adopting the *Rodrigue* court's approach on a broader scale without first amending existing federal law are evident. Adopting the *Rodrigue* approach may fail to protect the non-creating spouse's ongoing interest in the copyrighted

works if the creating spouse can terminate the transfer of copyright interests, and the approach relies heavily on non-fungible principles of state law. Therefore, a bifurcated approach wherein VARA, the American law, is modified based on French *droit moral* to better supplement the gaps left by the Copyright Act is a more satisfactory solution to the issues posed by dividing copyrights as a marital asset.

Of course, as with any proposal, this approach has limitations. There is a possibility that expanding creator's rights over their work, especially where alteration is concerned, will conflict with freedom of expression principles.[153] Additionally, the culture of the United States is somewhat at odds with French culture in a way that makes the foundational elements of *droit moral* more difficult to envision as an element of American law. French laws relating to the protection of art and intellectual property are based on the deep respect and importance afforded to art, not necessarily the affiliated proprietary and monetary interests, as with American law.[154] However, there may be some mitigating potential to be found in a similar structure (for example, a less extreme modification of VARA) that provides fewer protections but also proves less disruptive to the current system.[155]

Courts have differed substantially where apportioning copyrights as a marital asset is concerned. The disagreement among courts alone signifies a lack of harmony between legal systems given that federal law, which applies in all states, governs copyrights. An incautious approach is especially ill-advised given the significant criticism the court's approaches detailed in this Comment have faced and continue to face. Presently, there seems to be no accepted and wholly satisfactory method for addressing the problems of preemption, delineation between managerial and financial rights, and the conditions of transfer and termination thereof where spouses are concerned.

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153 Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 814 (2001).

154 *Id.* at 814–15.

155 *Id.* at 815.