


Collision Course: State Community Property Laws and Termination Rights Under the Federal Copyright Act--Who Should Have the Right of Way?

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COLLISION COURSE: STATE COMMUNITY PROPERTY LAWS AND TERMINATION RIGHTS UNDER THE FEDERAL COPYRIGHT ACT—WHO SHOULD HAVE THE RIGHT OF WAY?

LOREN E. MULRAINE*

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I. INTRODUCTION

William “Smokey” Robinson is one of the most significant figures in the history of twentieth century popular music.¹ As founder and leader of the Motown group Smokey Robinson & The Miracles, Robinson carved his mark in the annals of popular music as the lead singer, chief songwriter, and producer for his group, as well as numerous other Motown artists primarily in the 1960s and 70s. Robinson later embarked on a solo career and continued delivering hits well into the 1990s. His hit compositions include “Being With You,”² “Cruisin’,”³ “Get Ready,”⁴ “I Second That Emotion,”⁵ “I’ll Try Something New,”⁶ “More Love,”⁷ “My Girl,”⁸ “My Guy,”⁹ “Ooo Baby Baby,”¹⁰ “Quiet Storm,”¹¹ “Shop Around,”¹²

1. Rolling Stone Magazine, in its article *The 100 Greatest Songwriters of All Time*, listed the top five as Bob Dylan, Paul McCartney, John Lennon, Chuck Berry, and Smokey Robinson. ROLLING STONE, <http://www.rollingstone.com/music/lists/100-greatest-songwriters> [https://perma.cc/2XWM-GAY5] (last visited Jun. 12, 2017).

2. “Being With You” was released in March 1981 and rose to No. 2 on the Billboard Hot 100 chart, No. 4 on the Billboard Adult Contemporary chart, and No. 1. on the Billboard Hot Soul Singles chart. BILLBOARD, <http://www.billboard.com/artist/279629/smokey-robinson/chart> [https://perma.cc/9VZN-8E8X] (last visited Jun. 12, 2017).

3. “Cruisin’” was released in August 1979 and eventually rose to No. 1 on the Billboard Hot Adult Contemporary Tracks. BILLBOARD, <http://www.billboard.com/charts/adult-contemporary/2000-12-16> [https://perma.cc/4EDL-U375] (last visited Jun. 12, 2017).

4. Released in February 1966 by The Temptations, “Get Ready” was a top 30 hit on the Billboard charts. BILLBOARD, <http://www.billboard.com/artist/1490202/the-temptations/chart> [https://perma.cc/M83V-TF7K] (last visited Jun. 12, 2017).

5. Smokey Robinson & The Miracles released “I Second That Emotion” in October 1967 and peaked at No. 4 on the Billboard Pop singles chart. BILLBOARD, <http://www.billboard.com/artist/279630/smokey-robinson-miracles/chart> [https://perma.cc/3VRR-KCV7] (last visited Jun. 12, 2017).

6. Released in April 1962, “I’ll Try Something New” reached No. 11 on the Billboard R&B chart and No. 39 on the Billboard Pop chart. BILLBOARD, <http://www.billboard.com/artist/418636/miracles/chart> [https://perma.cc/GQ33-35ER] (last visited Jun. 12, 2017).

7. Released in May 1967, “More Love” reached No. 5 on the Billboard R&B chart and No. 23 on the Billboard Hot 100 chart. BILLBOARD, <http://www.billboard.com/charts/r-b-hip-hop-songs/1967-08-05> [https://perma.cc/5Q57-A3L5] (last visited Jun. 12, 2017).

8. Released by The Temptations in December 1964, “My Girl” was a No. 1 hit on both the Billboard Pop and R&B charts. BILLBOARD, <http://www.billboard.com/artist/1490202/the-temptations/chart> [https://perma.cc/27JS-9JWN] (last visited Jun. 12, 2017).

9. Released by Mary Wells in March 1964, “My Guy” peaked at No. 1 on the Billboard Pop chart. BILLBOARD, <http://www.billboard.com/artist/309865/mary-wells/chart> [https://perma.cc/HH2F-YZDL] (last visited Jun. 12, 2017).

10. Co-written with Pete Moore, “Ooo Baby Baby” was originally recorded by Smokey Robinson & The Miracles, reaching No. 4 on the Billboard R&B charts and No. 16 on the Billboard Pop charts. BILLBOARD, <http://www.billboard.com/charts/r-b-hip-hop-songs/1965-05-08> [https://perma.cc/GSY5-PR33]; <http://www.billboard.com/charts/hot-100/1965-05-08> [https://perma.cc/U5E3-KY7Y] (last visited Jun. 12, 2017). The song was famously remade

“Since I Lost My Baby,”¹³ “The Tears of A Clown,”¹⁴ “The Tracks of My Tears,”¹⁵ “The Way You Do The Things You Do,”¹⁶ “Who’s Lovin’ You,”¹⁷ “You’ve Really Got a Hold on Me,”¹⁸ and dozens of others.

by Linda Ronstadt, who released it in October 1978, and reached No. 2 on the Billboard Adult Contemporary chart and No. 7 on the Billboard Pop chart. BILLBOARD, <http://www.billboard.com/artist/307401/linda-ronstadt/chart> [<https://perma.cc/R5YH-76TY>] (last visited Jun. 12, 2017).

11. Released on the album of the same title in March 1975, “Quiet Storm” was a cultural phenomenon that spawned a popular music format on R&B radio and still enjoys heavy airplay today. It was only a modest hit on the singles charts, reaching No. 61 on the Billboard Pop chart and No. 25 on the Billboard R&B chart. BILLBOARD, *supra* note 6.

12. Smokey Robinson & The Miracles released “Shop Around” in September 1960 and it reached No. 1 on the Billboard R&B chart and No. 2 on the Billboard Hot 100 chart. BILLBOARD, <http://www.billboard.com/artist/279630/smokey-robinson-miracles/chart> [<https://perma.cc/3VRR-KCV7>] (last visited Jun. 12, 2017). Captain & Tennille remade the song in 1976 and it reached No. 4 on the Billboard Pop chart. BILLBOARD, <http://www.billboard.com/artist/298650/captain-tennille/chart> [<https://perma.cc/SK4J-QEFH>] (last visited Jun. 12, 2017).

13. Released in June 1965 by The Temptations, “Since I Lost My Baby” peaked at No. 4 on the Billboard R&B chart and No. 17 on the Billboard Pop chart. BILLBOARD, <http://www.billboard.com/artist/1490202/the-temptations/chart> [<https://perma.cc/27JS-9JWN>] (last visited Jun. 12, 2017). Several artists recorded successful cover versions, including the 1982 Luther Vandross release, which peaked at No. 17 on the Billboard R&B chart. BILLBOARD, <http://www.billboard.com/artist/308632/luther-vandross/chart> [<https://perma.cc/X75K-44XX>] (last visited Jun. 12, 2017).

14. Robinson co-wrote “The Tears of A Clown” with Stevie Wonder and Hank Cosby. It was initially released by Smokey Robinson & The Miracles in July 1970, reaching No. 1 on both the Billboard Pop and R&B charts. BILLBOARD, <http://www.billboard.com/artist/279630/smokey-robinson-miracles/chart> [<https://perma.cc/3VRR-KCV7>] (last visited Jun. 12, 2017).

15. Robinson co-wrote “The Tracks of My Tears” with Pete Moore and Marv Tarplin and the Miracles released the single in June 1965, reaching No. 2 on the Billboard R&B chart and No. 16 on the Billboard Hot 100. BILLBOARD, <http://www.billboard.com/charts/r-b-hip-hop-songs/1965-09-04> [<https://perma.cc/4YMA-7W3K>] (last visited Jun. 12, 2017). Linda Ronstadt was one of many artists who later remade the song, with Ronstadt’s 1975 version peaking at No. 25 on the Billboard Hot 100. BILLBOARD, <http://www.billboard.com/artist/307401/linda-ronstadt/chart> [<https://perma.cc/R5YH-76TY>] (last visited Jun. 12, 2017).

16. Co-written by Robinson and his bandmate Bobby Rogers, “The Way You Do The Things You Do” was the first charting single by The Temptations and reached No. 11 on the Billboard Hot 100 and No. 1 on the Cash Box R&B chart. BILLBOARD, <http://www.billboard.com/artist/1490202/the-temptations/chart> [<https://perma.cc/27JS-9JWN>] (last visited Jun. 12, 2017).

17. Originally a B-side of The Miracles’ hit “Shop Around,” “Who’s Lovin’ You” became a hit in its own right, reaching No. 19 on the Billboard Hot R&B chart and No. 66 on the Billboard Hot 100 chart for The Miracles before being remade by many artists, including The Jackson 5. BILLBOARD, <http://www.billboard.com/artist/416643/jackson-5/chart> [<https://perma.cc/4K2Z-9P8L>] (last visited Jun. 12, 2017).

18. Originally released as a B-side to the song “Happy Landing,” The Miracles’ November 1962 release of “You’ve Really Got a Hold on Me” rose to No. 1 on the Billboard Hot R&B chart

Robinson married Miracles singer Claudette Rodgers in 1959 and remained married until their union ended in divorce in 1986. In their divorce settlement, Claudette was awarded a 50% share in Smokey's copyrights, in accordance with the community property laws of the state of California.¹⁹ Pursuant to a stipulated judgment in 1989, Mr. Robinson agreed to the 50/50 beneficial split of royalty income with his ex-wife. Claudette Robinson would have only a beneficial interest,²⁰ i.e., no control over decisions made on licensing or exploiting the 483 works Mr. Robinson created during the course of their marriage. When the language of the Copyright Act provided for an opportunity for Robinson to retrieve his copyrights from his publishing and recording companies, a battle ensued over whether the renewal rights were also subject to California's community property laws or were new estates under the federal Copyright Act and thus not subject to the terms of the divorce proceedings twenty-eight years earlier.

An author's right to retrieve copyrights that have been transferred away is achieved differently under the 1909 and 1976 Acts. Under the 1909 Act, the right was a renewal right imbedded in the design of the Act's bifurcated copyright term. The 1976 Act, on the other hand, provides for a termination right that would be triggered thirty-five years after the date of the transfer.²¹

The purpose of this paper is to provide an overview of recapture rights²² under copyright law, as well as a primer on the difference between common law and community property law as it relates to property rights in a divorce proceeding. The paper will utilize as a case study the dispute between William "Smokey" Robinson and his former spouse, Claudette Robinson, and provide a statutory solution for future

and No. 8 on the Billboard Hot 100 chart. BILLBOARD, <http://www.billboard.com/charts/r-b-hip-hop-songs/1963-02-16> [<https://perma.cc/FKD6-DQCA>] (last visited Jun. 12, 2017).

19. It should be noted that even in common law jurisdictions, courts routinely arrive at the same practical result in divorce cases, i.e., awarding the non-author spouse a 50% share in the beneficial income from the copyrights of the author spouse.

20. There is a critical distinction to be made between beneficial interest and actual co-ownership. Co-ownership would typically carry with it the exclusive rights of authorship found in 17 U.S.C. § 106 (2012), specifically, the right to reproduce, authorize derivative works, distribute, perform publicly, display publicly, and perform by way of a digital transmission. Conversely, beneficial ownership carries none of those exclusive rights. Instead, the beneficial owner would only have the right to share in the income generated from the work for a specified period of time.

21. 17 U.S.C. § 203 (2012).

22. Recapture by way of renewal for the second twenty-eight-year term under the 1909 Act or termination of transfer under the 1976 Act. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

disputes where federal copyright law and state community property laws collide at the intersection of copyright terminations. Specifically, should these newly recaptured rights be treated as a new estate and thus not governed by the initial divorce decree, or should they be viewed as a continuation of the rights that were properly dispersed under the initial divorce?

Finally, I will argue that Congress should include specific language in the next copyright act that codifies the law with regard to beneficial ownership of copyright granted to ex-spouses under the terms of a marital dissolution.

II. COPYRIGHT

In order to clearly enunciate the issues that flow from termination of copyright transfers, it is first important to lay the groundwork with a primer on copyright law itself. This section of the paper will give an overview of copyright law and the rights that are governed by the federal statute. Following this foundation, I will define copyright termination in general before ending the section with a comprehensive discussion on the legislative deference that has traditionally been given to the rights of heirs under copyright law in general, and copyright terminations specifically.

A. *Exclusive Rights Under Copyright Law*

The foundation of copyright law is built upon the principle that an author, by virtue of having created an original work, should have the exclusive rights to exploit and to benefit from the exploitation of his or her creation.²³ This exclusive right to exploit would also include the right to refrain from publication altogether.²⁴ The author's exclusive rights are enumerated in section 106 of the Copyright Act of 1976 and include the exclusive right to any and each of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;

23. JULIE E. COHEN, LYDIA P. LOREN, RUTH L. OKEDIJI & MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (4th ed., Wolters Kluwer 2015). "By granting the bundle of rights . . . , copyright law provides a legal entitlement to the copyright owner to exclude others from enjoying certain benefits of the work. This enables an author to recoup her investment in the creation of the work." *Id.*

24. Copyright in unpublished works extends for the same term as published works under the 1976 Act: life of the author plus seventy years. If the work was created under the 1909 Act and was unpublished, the copyright term is life plus seventy, with expiration no earlier than December 31, 2002, and if the work is subsequently published before December 31, 2002, then the term is life plus seventy with expiration no earlier than December 31, 2047.

- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.²⁵

The copyright owner has the exclusive rights enumerated above and also has the exclusive right to authorize others to engage in these acts.²⁶ These rights extend for the life of the copyright.²⁷

Under the 1909 Act, the life of the copyright was an initial term of twenty-eight years followed by a potential renewal term of twenty-eight additional years, for a total of fifty-six years. This term was eventually expanded to seventy-five (twenty-eight years for the initial term plus forty-seven years for the renewal),²⁸ and later to ninety-five years (twenty-eight initial plus sixty-seven renewal),²⁹ where it currently stands for 1909 Act works which were duly renewed at the appropriate time. The Copyright Act of 1976, which went into effect on January 1, 1978, changed the term of copyright protection from the bifurcated term under 1909 to a term that lasts for the life of the author plus seventy years.³⁰

25. 17 U.S.C. § 106 (2012).

26. U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS, Circular 1 (2012).

27. See 17 U.S.C. § 106.

28. In 1962, as Congress was working on what would become the 1976 Act, the second term of works protected under the 1909 Act was extended by nineteen years, from twenty-eight to forty-seven years, in order to bring the term of 1909 Act works more in line with the term that would be present in the new Act.

29. The additional twenty years, extending the second term of 1909 Act works from forty-seven to sixty-seven years, became effective with the passage of the Sonny Bono Copyright Term Extension Act of 1998, which added twenty years to all works—whether under the 1909 Act or 1976 Act—that were still under copyright protection.

30. 17 U.S.C. § 302(a) (2012). The 1976 Act originally provided for a term of life of the

Understanding the exclusive rights of an author and the term of copyright are essential prerequisites to the discussion of termination of transfers. As noted above, under section 106 of the Copyright Act, the author has the exclusive rights to authorize others to use his work.³¹ This authorization is granted through various contractual agreements generally referred to as licenses. For example, in order for a recording company to release a recording by an artist, the company would have to include language in the recording contract that grants certain rights to the recording company, such as the right to publicly distribute, the right to make copies, and the right to publicly perform or authorize public performance.³² In the case of a publishing deal, the songwriter would grant rights including the rights to make copies, distribute, and public performance or public display.³³ These rights are statutorily held by the author, absent contractual language to the contrary.³⁴

An interesting conundrum applies to intellectual property that distinguishes it from other types of property such as real property. It is relatively easy to determine the value of real property. For example, if one wishes to estimate the value of a home, that can easily be done even before the home is built. The location, square footage, materials, school district, comparable homes, etc., will all be determinative of the value of the home. One need not wait for the response to the home to determine the selling price point. Intellectual property is a completely different animal. How does one really know the value of a song, a book, a play, a logo, or an invention at its inception? The answer is, one doesn't. While it is true that there is greater certainty with a very popular artist, the actual value of the work is not actually measurable until after the commercial release of the project. Subsequently, the nature of the intersection between creation and commerce places the creator in a position where he or she typically must enter into a business transaction licensing his or her works before there is a concrete measure of its value. Songs often will "take off" due to circumstances above and beyond the intentions of the band or the record label. For example, The Rembrandts were a successful rock band that was asked to work with the producers of

author plus fifty years; however, that was extended to life plus seventy with the 1998 Sonny Bono Copyright Term Extension Act. *Id.*

31. 17 U.S.C. § 106.

32. *See generally* JOHN P. KELLOGG, TAKE CARE OF YOUR MUSIC BUSINESS 48–50 (2d ed. 2014) (discussing and analyzing the Grant of Rights).

33. *Id.* at 119–24 (discussing the Grant of Rights).

34. 17 U.S.C. § 204(a) (2012).

a new TV show to develop a theme song.³⁵ The song, “I’ll Be There For You,” became the theme song for the show “Friends.”³⁶ When the show debuted, the thirty-second theme became so popular that the record company had to stop the presses on the band’s new album so that it could go into the studio and record a full song—at that point it only had that thirty-second version.³⁷ The song, of course, took the band to its greatest commercial success, and it was originally not even a full pop song! That’s a classic example of how the response of the public can have a major effect on the value of a copyrighted work.

B. *Copyrights of Musical Works*

With musical works, there are two copyrights that are in play: (1) the copyright in the underlying song, which is typically transferred by the songwriter to an outside publisher; and (2) the copyright in the sound recording, which is typically transferred by the recording artist to a record company. Both of these copyrights can be reclaimed by the original author.³⁸

The 1976 Act clarifies a point that had been controversial under the 1909 Act, specifically that a “musical work[] encompasses both the words of a song and its instrumental component.”³⁹ Musical arrangements, which are a form of derivative work, were held to be copyrightable, so long as the arranger adds the requisite amount of original authorship.⁴⁰ A musical work can be fixed in any number of tangible mediums of expression, including musical notation written on paper and recordings such as phonorecords, CDs, or mp3 files.⁴¹

35. *The Amazing Story Behind ‘I’ll Be There For You,’ According To The Rembrandts*, BUZZFEED NEWS (Sept. 21, 2014), https://www.buzzfeed.com/jaimieetkin/the-amazing-story-behind-the-friends-theme-song?utm_term=.gjK5PDlpKq#.nqz651zODK [<https://perma.cc/NM4Z-HBJM>].

36. *Id.*

37. *Id.*

38. 17 U.S.C. § 203 (2012).

39. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 3.18 (5th ed., LexisNexis 2010).

40. *Plymouth Music Co. v. Magnus Organ Corp.*, 456 F. Supp. 676 (S.D.N.Y. 1978).

41. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR MUSICAL WORKS, Circular 50 (2012). It should be noted that fixation is the only requirement for copyrighting a work under the 1976 Act. Whereas the 1909 Act required the formalities of copyright registration, notice and general publication, the 1976 Act provides for copyright protection the instant a new work is fixed in a tangible medium that is perceivable by the human eye with or without the use of a machine or device. Nonetheless, there are still legitimate benefits to formally registering a new work with the copyright office, not the least of which is access to the civil remedies of statutory damages and court costs and attorneys’ fees in the event of successful copyright litigation.

“Sound recordings” are defined as “works that result from the fixation of a series of musical, spoken, or other sounds, but [do not include] the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”⁴²

C. Copyright Termination

Traditionally Congress has been concerned with the scenario of the struggling musician, writer, artist, or other impecunious author who assigns his or her copyright in a one-sided, take-it-or-leave-it bargain. Copyright law has mechanisms for protecting authors from the results of their bargains, at least in the long run. Under traditional, pre-1976 Act law, the renewal term for copyright offered something akin to a second chance for authors, or more precisely for their heirs.⁴³

In order to terminate under the 1976 Act, the author must file a copyright termination notice with the copyright office and notify the transferee (i.e., the record company or publishing company) or his or her assignee if the transferor later transferred it to another entity.⁴⁴ This copyright termination notice must be filed no less than two years before the date the author wishes the termination to go into effect, and no more than ten years before the date the author wishes the termination to go into effect.⁴⁵ The termination notice must include reference to the contract under which the transfer took place.⁴⁶

In the case of Smokey Robinson, his copyrights straddle the 1909 and 1976 Acts. Termination provisions are thus governed by two distinct sections of the Copyright Act: section 304(c) and (d) or section 203. Sections 304(c) and (d) apply to works in their second renewal term as of January 1, 1978, while section 203 applies to transfers made on or after January 1, 1978.⁴⁷ The copyright transfer for a work created in 1975, such as “A Quiet Storm,” could be terminated twenty-eight years after its original copyright date, which would be 2003, presuming the work was in

42. 17 U.S.C. § 101 (2012). The sound recording is distinguished from the material object in which it is embodied. Sound recordings are embodied in phonorecords that, under the Copyright Act, include anything capturing sound, such as tapes, disks, or computer chips.

43. GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW 75 (2008).

44. 17 U.S.C. § 203 (2012).

45. *Id.* §§ 203, 304 (2012).

46. *Id.* § 304.

47. *Id.* §§ 203, 304(c)-(d).

fact created in 1975.⁴⁸ On the other hand a work created just a few years later, such as 1981's "Being With You," by virtue of falling under the 1976 Act, could be terminated thirty-five years after the transfer date, which would be 2016.⁴⁹

With sound recordings, if the grant covers the right of publication, the effective termination date must occur the earlier of:

- The thirty-fifth anniversary through the fortieth year measured from the date of publication; or
- Between the fortieth anniversary date through the forty-fifth year measured from the date of the execution of the grant.⁵⁰

For example, if an artist signed a recording contract in 1980 and released an album in 1982, the proper measuring stick would not be the original contract date, but instead would be the album release date.⁵¹ The release date would be appropriate because as defined by the 1976 Copyright Act,

publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication.⁵²

Any work transferred by the author may be terminated—even if the contract says the grant is in perpetuity.⁵³ However, works made for hire⁵⁴ cannot be terminated because under the definition of works for

48. *Id.* § 304(c).

49. *Id.* § 203.

50. Kenneth J. Abdo & Timothy C. Matson, *Statutory Terminations of Copyright Transfers Under the U.S. Copyright Act as Applicable to Sound Recordings* (2012), http://www.americanbar.org/content/dam/aba/events/entertainment_sports/2012/10/forum_on_the_entertainmentsportsindustries2012annualmeeting/tv_cable_radiomusic_publishing/statutory_terminations_of_copyright_transfers.authcheckdam.pdf [https://perma.cc/CU2P-VCHS].

51. 1982 plus thirty-five years = 2017, while 1980 plus forty years = 2020, thus the date triggered by the album's release, would control.

52. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS, Circular 56 (2014).

53. 17 U.S.C. § 203(a)(5) (2012). Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant. *Id.*

54. 17 U.S.C. § 101 (2012) provides that works for hire are created as either (1) a work prepared by an employee within the scope of his or her employment; or (2) a work that is specially commissioned and falls within one of the following categories: a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a

hire, the artist never actually owned the copyright, and thus cannot recapture something he or she never actually owned.⁵⁵ The 1976 Act provides:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁵⁶

This is often the case in deals for songs commissioned for use in films.⁵⁷

D. Termination Rights and Legislative Respect for Heirs

With the uncertainty that exists as to the value of a newly created copyrighted work, there is a strong likelihood that creators may find themselves in a position where their bargaining power pales in comparison to the power of the corporations with which they are negotiating. Both scholars and rights owners have recognized that copyright is “incapable of...monetary evaluation prior to its exploitation.”⁵⁸ With this in mind, both the Copyright Act of 1909 and the Copyright Act of 1976 provide mechanisms whereby authors may terminate copyright transfers. The 1909 Act allows for termination by way of recapturing the second copyright term, i.e., twenty-eight years after creation.⁵⁹ As noted above, Congress recognized the inherent unequal bargaining power of an author in relation to a corporate entity such as a publisher and case law has responded accordingly:

“It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively

supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. *Id.*

55. *Cf.* 17 U.S.C. § 201(b) (2012).

56. *Id.*

57. See generally JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS 235–89 (7th ed. 2011). The song will normally be specified as a “work for hire” with practically all rights and publishing owned by the producer. Most major studios and production “companies” own their own publishing companies and assigns the film songs to these entities. Some major writers are able to negotiate retention of all music publishing or a co-publishing deal with the studio or production company but this is the exception rather than the norm. Also, some writers are able to get the song back (a reversion) from the studio if the song is not used in the picture, but again, this is a matter of negotiation. *Id.*

58. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02 (LexisNexis 2016).

59. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075, § 23 (1909).

small sum.” The renewal term permits the author, [who was originally at a disadvantage with regard to bargaining power,] to renegotiate the terms of the [license] once the value of the work has been [established] . . . ”If the work proves to be a great success and lives beyond the term of twenty-eight years, . . . it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that [the author] could not be deprived of that right.”⁶⁰

Under the 1976 Act, both sections 203 and 304(c) “grant the author or the author’s statutory successors an inalienable and unwaivable right to terminate transfers or licenses of copyright after a set period of years.”⁶¹ “These provisions are similar, but not identical, and are distinguished by the date of the transfer or license.”⁶² “Section 304(c) governs transfers and licenses executed before January 1, 1978, and by its own terms covers only works in either their first or renewal term on January 1, 1978.”⁶³ “Section 203 covers transfers and licenses executed on or after January 1, 1978”⁶⁴ “The possibility of termination under section 304(c) began on January 1, 1978.”⁶⁵ “Terminations under section 203 are not effective until January 1, 2013, although notices were filed as early as 2003.”⁶⁶

With regard to copyright transfer and termination of transfers, it is apparent from the choices made by Congress that its legislative intent has always been driven by a strong preference for heirs’ interests.

[T]he [Supreme] Court interpreted the “derivative works exception” to the “termination of transfer and licenses” provision in section 304(c). Section 304 extended the duration of subsisting copyrights from 56 to 75 years, but also gave authors or certain of their heirs the right to terminate any of the author’s grants of rights and to reclaim full copyright ownership during the 19-year

60. *Stewart v. Abend*, 495 U.S. 207, 218–19 (1990) (fourth alteration in original) (citation omitted).

61. 3 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 7:42 (2014).

62. *Id.*

63. *Id.* “The section thus also does not cover works that were unpublished on January 1, 1978.” *Id.*

64. *Id.* Thus, this section “covers three categories of works: (1) works that were subject to common law copyright on January 1, 1978; (2) works protected under the 1909 Act that were in the first or renewal term on January 1, 1978, but where the transfer or license was executed on or after that date; and (3) works created on or after January 1, 1978.” *Id.*

65. *Id.*

66. *Id.*

extension of the term. In so doing, Congress determined that authors who struck unremunerative bargains with publishers when their works were in their infancy should have the opportunity to renegotiate their old contracts.⁶⁷

Most recently in *Petrella v. MGM*,⁶⁸ the brief for the petitioner noted the following: “Congress chose to create the *Stewart v. Abend*⁶⁹ renewal right for authors’ heirs, even though by its nature it sometimes requires courts to weigh decades-old evidence after the author’s death. In doing so, Congress deliberately subordinated evidentiary concerns to vindicating heirs’ rights.”⁷⁰

In the seminal copyright case *Eldred v. Ashcroft*,⁷¹ where the key issue was the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, the amicus briefs included numerous references to the importance of heirs’ rights as they relate to the term of copyright protection, including the following:

The experience of centuries of musical history testifies to one of the most unhappy realities of symphonic and concert music: a delay of acceptance and recognition, not to say remuneration, typically for decades... most composers of symphonic and concert music today live in relative obscurity and economic need while creating their life’s work, and only close to death or after death do they or their heirs start to reap acknowledgment and compensation for their works.⁷²

This reality is not reserved for symphonic music. While artists in popular music genres such as rock, R&B, pop, country, hip-hop, and the like may reap financial benefits while they are alive, their catalogs routinely gain value after their deaths. One needs only to look at the catalogs of Tupac Shakur,⁷³ The Notorious B.I.G.,⁷⁴ Kurt Cobain,⁷⁵ Michael

67. 131 Cong. Rec. E3783-03, 1985 WL 725092.

68. 134 S. Ct. 1962 (2014).

69. 495 U.S. 207 (1990).

70. Brief for Petitioner at 16, *Petrella v. MGM*, 134 S. Ct. 1962 (2014) (No. 12-1315), 2013 WL 6992139 (Appellate Brief).

71. 537 U.S. 186 (2003).

72. Brief for Symphonic and Concert Composers Jack Beeson et al., as Amici Curiae Supporting Respondents, *Eldred v. Ashcroft*, 532 U.S. 186 (2003) (No. 01-618), 2002 WL 1836707.

73. Zack O’Malley Greenburg, *Tupac Shakur Earning Like He’s Still Alive*, FORBES (May 31, 2011), <https://www.forbes.com/sites/zackomalleygreenburg/2011/05/31/tupac-shakur-earning-like-hes-still-alive/#10afa6f641ee>.

74. AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 7–8 (Steve Jones & Joli Jensen eds., 2005).

Jackson,⁷⁶ Amy Winehouse,⁷⁷ Whitney Houston,⁷⁸ and Prince⁷⁹ to see the post-mortem effect on their album sales. In an article comparing the post-mortem sales increases for Michael Jackson and Prince, Chris Molanphy of *Pitchfork Magazine* shared the following:

Broadly speaking, any famous musician who dies—particularly when the death is sudden or unexpected—will see a bump on the charts, as sales are boosted by the heartfelt mourner and the morbidly curious alike.

This dates back decades: John Lennon's December 1980 murder sent his virtually brand-new album with Yoko Ono, *Double Fantasy*, hurtling to the top of the charts, where it stayed for two months. Kurt Cobain's April 1994 death lifted *In Utero*, Nirvana's roughly six-month-old album, back into the Top 20, and all of the group's albums to higher positions; for a brief time *Bleach* was the nation's top catalog seller. Selena's murder in March 1995 brought several of her Spanish-language albums onto the U.S. charts for the first time and, four months later, spurred her English-language debut *Dreaming of You* to debut at No. 1—a bittersweet crossover breakthrough. The shootings of Tupac Shakur in September 1996 and Christopher "Notorious B.I.G." Wallace in March 1997 spurred their just-recorded studio projects—the former's *Makaveli* album and the latter's *Life After Death*—to career-best debuts when each was released just weeks after their respective deaths. Johnny Cash's passing in September 2003 sent his 10-month-old *American IV* album, containing his aching cover of Nine Inch Nails' "Hurt," hurtling back into the Top 40, and his *16 Biggest Hits* collection became the best-selling catalog title for most of 2003's remaining months. Just this year, David Bowie scored the first U.S. No. 1 album of his career—yes, ever—when his swan song *Blackstar* debuted on top the week after his death in January.⁸⁰

75. Lacey Rose, *Top-Earning Dead Celebrities*, FORBES (Oct. 24, 2006), https://www.forbes.com/2006/10/23/celebrities-earnings-fame-tech-media-06deadcelebs-cx_lr_topearnintro.html.

76. MICHAEL JACKSON: GRASPING THE SPECTACLE 218 (Christopher R. Smit ed., 2012).

77. JEAN-PIERRE HOMBACH, AMY WINEHOUSE 30 (2010).

78. Ed Christman, *Run to You*, BILLBOARD MAGAZINE, Feb. 25, 2012, at 16.

79. Mahita Gajanan, *Some Princely Numbers*, in TIME PRINCE: AN ARTIST'S LIFE 1958–2016 (2016).

80. Chris Molanphy, *Prince and Michael Jackson: Still Competing, Posthumously, on the*

After Michael Jackson and Prince unexpectedly passed away in 2009 and 2016, respectively, their catalog albums dominated the Billboard charts, with Jackson's hit albums occupying all ten of the top ten spots on the Billboard catalog album charts⁸¹ and Prince dominating the Hot 200 album charts—a chart that catalog albums were ineligible for at the time of Jackson's death.⁸²

Who should benefit from these sales? Certainly, an author's heirs deserve to reap the rewards when they lose a family member who has in all likelihood been the provider for the family.

"Professionals in the creative arts consistently struggle with the very real possibility that their life's work may never be recognized during their lifetimes. Artistic creators run this risk nonetheless, often sacrificing economic enrichment for themselves in hopes that their creations may someday provide for their heirs."⁸³

"George David Weiss, composer of 'What a Wonderful World' and 'The Lion Sleeps Tonight,' testified before Congress regarding fair compensation to the artistic creators who enrich our culture. He noted that many composers—and not merely those who write 'serious' music—do not achieve public recognition or financial reward until after their death:"

There are innumerable composers whose works never reach the pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant-garde*—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish

Charts, PITCHFORK (May 12, 2016), <http://pitchfork.com/thepitch/1146-prince-and-michael-jackson-still-competing-posthumously-on-the-charts/> [<https://perma.cc/BP2G-3K3P>].

81. Jackson's sales the week after his death nearly doubled from the week before: the album *Number Ones* sold 339,000 copies; *Thriller* was at No. 2 with 187,000 copies sold, *The Essential Michael Jackson* sold 125,000 copies; *Off the Wall* sold 51,000; *Dangerous* sold 26,000; *Bad* sold 23,000, a Jackson 5 compilation sold 10,000; a solo *Ultimate Collection* sold just under 10,000; *Invincible* (his last solo album) sold 8,000; and *Greatest Hits HISTORY, Vol. 1* reached No. 10 with almost 8,000 sales

82. Prince occupied five of the ten spots on the Billboard Hot 200 album charts within a few days of his death with his albums *The Very Best of Prince* (No. 2), *Purple Rain* (No. 3), *The Hits/The B-Sides* (No. 4), *Ultimate* (No. 6), and *1999* (No. 7).

83. Brief for Symphonic and Concert Composers Jack Beeson et al., as Amici Curiae Supporting Respondents, *Eldred v. Ashcroft*, 532 U.S. 186 (2003) (No. 01-618), 2002 WL 1836707.

their heirs—if the duration of protection is sufficient. What was lost to the creator should not be also lost to his or her heirs. . . . If we are to encourage creativity, at a minimum we must offer to the thousands of my colleagues who struggle to earn a living in this difficult and competitive business the reasonable prospect that they can leave a legacy to their children and grandchildren—even if their compositions do not become commercially viable for many years.⁸⁴

The life-plus term is also designed to protect the next two generations of the author's heirs. Extended copyright term is necessary to achieve adequate protection for the author's heirs, during the additional years they, too, are expected to live. In the *1995 Senate Hearing* 134, Congress specifically recognized this fact when it enacted the Copyright Term Extension Act (CTEA).⁸⁵

"The Register of Copyrights informed the Committee that even for . . . works [that] are afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs."⁸⁶

Thus, the CTEA merely updated the copyright term to account for current life expectancy and child bearing patterns, ensuring that fair compensation for both existing and new works, especially to the heirs of composers of symphonic and concert music, would not fall short for two generations.⁸⁷

More so than in any other artistic endeavor, the creation of symphonic and concert music requires "sacrificial days." . . . Congress recognized that copyright term extension for new and existing works was necessary to compensate the composer and two generations of heirs, and to provide for investment in, and preservation, promotion and dissemination of, existing works. For these rational reasons, and a host of others, Congress enacted the CTEA, and so provided the necessary protection and incentives for the promotion of progress of

84. *Id.*

85. S. REP. NO. 104-315, at 11 (1996).

86. *Id.*

87. See *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Comm. On the Judiciary U.S. Senate*, 104th Cong. 1 (1995) (Opening statement of Senator Hatch: "When, however, we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short.").

serious American works of art⁸⁸

The unwaivable right of termination under the 1976 Act essentially serves the same purpose as the renewal term under the 1909 Act. Specifically, it protects authors from unremunerative transfers that may be given because of an author's inferior bargaining power.⁸⁹ These termination provisions provide the author with a second chance to benefit from the author's works while avoiding some of the challenges of the 1909 Act.⁹⁰

According to *Mills Music, Inc. v. Snyder*,⁹¹ the legislative intent of the termination provision for pre-1978 grants was to "relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."⁹²

Congress initially created the bifurcated copyright term beginning with the Copyright Act of 1790, which protected works for an initial period of fourteen years with a possible renewal of an additional fourteen years.⁹³ "The Act, which required registration formalities, gave a 14-year copyright, renewable once, in books, maps, and charts, against unauthorized printing reprinting, publishing, or vending."⁹⁴ The bifurcated term continued with subsequent amendments and through the 1909 Act where the original author had an opportunity to reclaim his copyright at the end of the first term.⁹⁵ Upon statutory renewal for the second term, the author could either keep the work and exploit it, or he could relicense it to the previous publisher or another entity, presumably for a more equitable fee or royalty split.

Unfortunately, authors did not gain the full advantage anticipated by Congress with the bifurcated term under the 1909 Act because the renewal term was alienable by contract—even before it vested.⁹⁶ As one

88. Brief for Symphonic and Concert Composers Jack Beeson et al., as Amici Curiae Supporting Respondents, *Eldred v. Ashcroft*, 532 U.S. 186 (2003) (No. 01-618), 2002 WL 1836707.

89. See *Copyright Law Revision: Hearings on H.R. 2512 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 57 (1967) (statement of Irwin Karp, Counsel, Authors League of America).

90. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

91. 469 U.S. 153 (1985).

92. *Id.* at 172–73.

93. Copyright Act of 1790, 1 Stat. 124.

94. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 17 (2d ed. 2010).

95. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075, § 23 (1909)

96. *Cf.* *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

might imagine, this led to publishers strong-arming authors into transferring both the initial term and renewal term, which deprived the authors of the power to renegotiate after their works had achieved some success in the marketplace. In *Fred Fisher Music Co. v. M. Witmark & Sons*,⁹⁷ the Court answered in the affirmative the question of whether a copyright owner under the 1909 Act could assign his interest in the renewal copyright before he has secured the renewal term.⁹⁸

The Copyright Act of 1976 was designed without the two distinct terms that existed under the 1909 statute, instead establishing a unitary term of life plus fifty years.⁹⁹ Congress, instead of relying on a renewal term, provided an opportunity for authors to recapture their copyrights after a specified period of time, specifically, thirty-five years¹⁰⁰ after the date of the transfer.¹⁰¹ Citing the same unequal bargaining position of authors and the “impossibility of determining a work’s value before it has been exploited,” Congress provided for these termination rights of post-1978 grants.¹⁰² Under the 1976 Copyright Act, authors may reclaim the copyrights to their original creations after a period of thirty-five years from the date of the initial transfer; this differs from the previous Act where termination rights were triggered by the date of creation.¹⁰³ In other words, a 1909 Act work that was created in 1940 and transferred in 1950 could still be terminated in 1968, even though the transferee would only have eighteen years under the license. With the 1976 Act, a work created in 1980 and transferred in 1990 would be eligible for termination thirty-five years from 1990, i.e., 2025. The 1976 Act provides the author with a five-year window within which to terminate the transfer.¹⁰⁴ That five-year window runs from the thirty-fifth year after the transfer (or execution of the grant) until the fortieth year.¹⁰⁵

Congress also expressly provided that “[t]ermination of the grant may

97. *Id.*

98. *Id.* If the author died before the renewal term vested, his heirs had the option to void the renewal transfer.

99. 17 U.S.C. § 302(a) (2012). The term was initially life plus fifty years but was expanded to life plus seventy under the 1998 Sonny Bono Copyright Term Extension Act. *Id.*

100. With a five-year window from year thirty-five to year forty. 17 U.S.C. § 203(a)(3) (2012).

101. *Id.*

102. H.R. REP. NO. 94-1476, at 124 (1976); S. REP. NO. 94-473 (1975).

103. 17 U.S.C. § 203(a)(3).

104. *Id.*

105. *Id.* The author is also required to give notice of at least two years and no more than ten years before the effective date of the termination.

be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”¹⁰⁶ This prevents an author from being strong-armed into transferring his termination rights before they are vested. Thus, Congress exhibited its clear intent to protect the author’s termination rights by limiting the assignability of those rights. Moreover, the statute expressly states that only the parties with the right to terminate are entitled to the recaptured rights in the copyright.¹⁰⁷

A recent Sixth Circuit decision has further amplified the deference given to heirs’ rights in copyright terminations. In *Jackson Brumley et al. v. Albert Brumley & Sons, Inc. et al.*,¹⁰⁸ a family dispute arose over the termination rights to the gospel classic “I’ll Fly Away.” Albert Brumley wrote “I’ll Fly Away” in the 1920s and sold it to a music publishing company, which secured a copyright in 1932.¹⁰⁹ Brumley later regained the copyright by purchasing the publishing company, later starting his own publishing company, Albert E. Brumley & Sons.¹¹⁰ Brumley and his wife eventually sold the publishing company to two of their six children, William and Robert, the latter of whom later bought out his brother’s interest to become the sole owner of the publishing company.¹¹¹ Through the sale, the rights to “I’ll Fly Away” were transferred as well.¹¹² After Albert Brumley died in 1977, his widow executed a new contract transferring all rights to obtain renewals or copyrights in the future works written or composed by Albert E. Brumley to the Brumley & Sons publishing company.¹¹³ In 2008, the four other Brumley children attempted to exercise their termination rights to the song so that all of the children could share equally in the copyright, which was by this time generating hundreds of thousands of dollars a year in royalties.¹¹⁴ The children successfully filed a lawsuit resulting in a declarative judgment that the termination notice was effective.¹¹⁵ Robert appealed, leading to the present ruling by the Sixth Circuit Court of Appeals.¹¹⁶ The court

106. 17 U.S.C. §§ 203(a)(5), 304(c)(5) (2012).

107. 17 U.S.C. § 304(c).

108. 822 F.3d 926 (6th Cir. 2016).

109. *Id.* at 929.

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.*

115. *Id.* at 930.

116. *Id.*

ruled that the Brumley siblings' termination notice was effective, and that the copyright interests to "I'll Fly Away" should revert to all of the Brumley siblings in equal shares (Goldie Brumley, the author's widow, had passed away in 1988).¹¹⁷

The court agreed with the district court's ruling that the 1979 agreement did not transfer Goldie Brumley's termination rights to the publishing company.¹¹⁸ First, the 1979 assignment could not have been an implicit exercise of Goldie's termination right because she held only half (i.e., less than a majority) of the termination interest at the time and because the assignment did not follow the statutorily required provisions of notice and registration with the copyright office.¹¹⁹ The Court further found that the 1979 assignment, which mentioned only renewal rights, could not have bargained away termination rights without explicit terms to that effect.¹²⁰

III. COMMUNITY PROPERTY LAW

This section of the paper will provide an overview of the most important distinctions between common law and community property law as they relate to marital property. I will then analyze the challenges that are faced when community property laws collide with the federal copyright laws, and specifically address the question of whether copyrights should be classified as community property.

A. *Distinguishing Common Law and Community Property Law*

There are two distinct marital property systems in the United States: common law property and community property.¹²¹ "Common law is the dominant property system in the U.S. and has been adopted by 41 [of the 50 states.]" "The [fundamental theory of] common law is that each spouse is a separate individual with separate legal and property rights. . . . [Under this theory, generally] each spouse owns and is taxed upon the income that he or she earns."

The community property system has been adopted by nine states: Arizona,¹²² California,¹²³ Idaho,¹²⁴ Louisiana,¹²⁵ Nevada,¹²⁶ New Mexico,¹²⁷

117. *Id.* at 934.

118. *Id.* at 931.

119. *Id.*

120. *Id.* at 926.

121. IRS Basic Principles of Community Property Law, § 25.18.1.

122. ARIZ. REV. STAT. § 25-2 (2016).

123. CAL. FAM. CODE, § 4, Part 2, 760-61 (2016).

Texas,¹²⁸ Washington,¹²⁹ and Wisconsin.¹³⁰ In addition to these states, Alaska is an opt-in community property state that gives both parties the option to make their property community property.¹³¹ The United States territory of Puerto Rico is also a community property jurisdiction.¹³²

B. *An Overview of Community Property Law*

The general concept of community property is “that labor or effort of either spouse during marriage is community property.”¹³³ In community property states, community property is the default characterization of all marital assets. Community property typically includes salary, wages, and other compensation for work performed during marriage, the fruits resulting from the labor and skills of each spouse, income derived from community property assets, and separate property that has been changed, or “transmuted”¹³⁴ into community property.¹³⁵

The theory underlying community property is analogous to that of a partnership. Each spouse contributes labor and capital (in some states), for the benefit of the community, and shares equally in the profits and income earned by the community.¹³⁶ Subsequently, each spouse owns an automatic fifty percent interest in all community property, regardless of which spouse acquired the community property.¹³⁷ Spouses may also hold separate property, which they solely own and control; however, the law in the community property states does not favor this type of arrangement.¹³⁸ Community property is simply property that both spouses share equally, just as partnership income is income that all

124. IDAHO CODE § 9-32 (2016).

125. LA. R.S. 9:2801 (2016).

126. NEV. REV. STAT. § 123.225 (2015).

127. N.M. STAT. ANN. § 40-3 (West 2016).

128. TEX. FAM. CODE § 1(B)(3)(A).

129. WASH. REV. CODE § 26.16.030.

130. WIS. STAT. § 766 (2015–2106).

131. ALASKA STAT. § 34.77.030 (2016).

132. Thomas M. Featherston Jr., *His, Her or Their Property: A Primer on Marital Property Law in The Community Property States*, 1, 1 (2014), <http://www.baylor.edu/law/facultystaff/doc.php/205011.pdf> [<https://perma.cc/MP82-JJ8V>].

133. CHARLOTTE K. GOLDBERG, CALIFORNIA COMMUNITY PROPERTY 6 (4th ed. 2013).

134. Transmutation is a term which refers to changing the character of property, usually from separate property to community property.

135. See GOLDBERG, *supra* note 133, at 6.

136. See *id.*

137. *Id.* at 4.

138. *Id.* at 5.

partners share equally, regardless of which partner was responsible for acquiring the income on behalf of the partnership.¹³⁹ Spouses are also equally liable for debts.¹⁴⁰ In most states, creditors of spouses may be able to reach all or part of the community property, regardless of how it is titled, to satisfy debts incurred by either spouse.¹⁴¹ State laws vary on what property can be reached. Seven of the nine community property states (all except Washington and California) hold that the community property estate is terminated by a final decree of divorce or legal separation.¹⁴² California and Washington hold that the community property estate is terminated when spouses physically separate and both spouses intend to permanently end the marriage.¹⁴³ This mutual intent must be established through the actions and conduct of the spouses. The burden of proof is on the party asserting that the community property estate was terminated.¹⁴⁴ In many community property states, unless otherwise proven, property in the possession of spouses during the marriage is presumed acquired during marriage, thus triggering application of the community property presumption.¹⁴⁵

California, like most community property states, provides for a rebuttable presumption that property owned by spouses is community property.¹⁴⁶

The “general” community property presumption is that property acquired during marriage is presumed to be community property. Unless that presumption is rebutted by the spouse who claims that the property is separate property, the presumption becomes conclusive.¹⁴⁷

Community property in California is defined as “[a]ll property, real or personal, wherever situated, acquired by a married person during marriage while domiciled in this state.”¹⁴⁸ The code further defines

139. *Id.*

140. WILLIAM W. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 10:52 (2016 ed.); CAL. FAM. CODE, §§ 2621–24.

141. *Id.*

142. *See* ARIZ. REV. STAT. § 25-2; IDAHO CODE § 7-32; LSA-C.C. Art. 2356; NEV. REV. STAT. § 123.225; N.M. STAT. § 40-3; TEX. FAM. CODE § 7.001; WIS. STAT. § 766.75 (2015–2016).

143. *See* CAL. FAM. CODE, § 4, Part 2, §§ 760–61; WASH. REV. CODE § 26.16.140.

144. *Seizer v. Sessions*, 940 P.2d 261 (Wash. 1997); WASH. REV. CODE § 26.16.140; *In re Marriage of Hardin*, 45 Cal. Rptr. 2d 308 (Cal. App. 4 Dist. 1995) (citing CAL. FAM. CODE § 771).

145. *See, e.g., Mortenson v. Trammell*, 604 S.W.2d 269 (Tex. Civ. App. 1980).

146. GOLDBERG, *supra* note 133, at 51.

147. *Id.*

148. CAL. FAM. CODE § 760.

separate property as “[a]ll property owned before marriage” and “all property acquired...after marriage by gift, bequest, devise, or descent.”¹⁴⁹ “In addition, the ‘rents, issues, and profits’ of separate property are separate property.”¹⁵⁰

Under California community property law, there are two types of marital property: community property and separate property. At divorce, community property is divided equally between the spouses. “That 50/50 split is mandatory, and there are almost no deviations from equal division.”¹⁵¹ Separate property belongs to each spouse and is not divided by the court. The foundational element of treating marital property as community property is that all members of the community—in this case the husband and wife—have their contributions treated equally and attributed equally to the community.

To establish the presumption affirmatively, it must be shown that the property was, in fact, acquired during marriage There is no presumption regarding the time of acquisition; that is a question of fact. When a marriage is of long duration and there is no evidence that the asset in question is traceable to a gift, bequest, devise or the inheritance of one or other spouse, the mere fact of ownership at the time of the termination of the marital relationship by dissolution or death will support a finding of acquisition during marriage.¹⁵²

This is true whether or not the individual works outside of the home or conversely is a homemaker. Likewise, community property law is not respecter of the actual amounts the individual community members may earn. For example, if one spouse earns \$1 million and the other spouse earns \$200,000, they jointly own \$1.2 million as community property. Likewise, if one spouse earns \$100,000 and the other spouse is a homemaker who does not earn any outside income, both parties will jointly own \$100,000 as community property. This only applies to earnings during the lifetime of the marriage.¹⁵³ It does not apply to earnings prior to marriage or after separation, or interest earned from

149. CAL. FAM. CODE § 770.

150. GOLDBERG, *supra* note 133, at 5.

151. *Id.* at 4.

152. WILLIAM W. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 6:3 (2017 ed.) (citing *In re Bollinger's Estate*, 149 P. 995 (Cal. 1915); *In re Bryant's Estate*, 43 P.2d 529 (Cal. 1935); *Gaines v. California Tr. Co.*, 121 P.2d 28 (Cal. Dist. Ct. App. 2d 1941); *Lynam v. Vorwerk*, 110 P. 355 (Cal. Dist. Ct. App. 1st 1910)).

153. CAL. FAM. CODE § 760 (2015).

property that was acquired prior to the marriage, or gifts or inheritances given to either spouse during the marriage.¹⁵⁴ Thus, if one spouse owned stock prior to the marriage, at the time of dissolution, that spouse would own that stock and any dividends derived therefrom as separate property. If one spouse were to inherit property during the course of the marriage, upon dissolution the inheriting spouse would retain that inheritance as separate property. It is very difficult for spouses to change the character of property from community property to separate property. This change, known as *transmutation*, must be “in writing by an express declaration . . . by the spouse whose interest in the property is adversely affected.”¹⁵⁵

It should be noted that even in community property jurisdictions, properly executed premarital (i.e., prenuptial) agreements can override the community property laws with regard to distribution of property after a divorce. As such, a prenuptial agreement can state that income earned during the marriage will belong to the spouse who earned it.¹⁵⁶

All forms of intellectual property, including copyrights, are divisible in marriage dissolution.¹⁵⁷ The pertinent question would be how the copyrights are characterized, i.e., as community property or separate property. If a songwriter has created and copyrighted songs before entering into marriage, then these songs would be considered separate property upon divorce. However, if songs were created and copyrighted during the term of the marriage, these copyrights would typically be considered community property upon dissolution of the marriage. Simple enough? Not quite. California law favors community property and also protects separate property vigorously.¹⁵⁸ As such, “doctrines have developed to try to balance the interests of both the ‘community’ and ‘separate property spouse.’”¹⁵⁹

C. *The Collision of Copyright and Community Property*

So what happens when termination rights collide with property rights granted in a divorce under community property laws? If the author has agreed that his copyrights shall be shared 50/50 with his ex-spouse under divorce proceedings, does he have the right to shed this 50/50 split

154. CAL. FAM. CODE § 770 (2015).

155. CAL. FAM. CODE § 852(a) (2015).

156. *See In re Marriage of Bonds*, 5 P.3d 815, 821 (Cal. 2000).

157. *See* discussion *infra* Part III.D.

158. *In re Bonds*, 5 P.3d at 821.

159. *See id.*; GOLDBERG, *supra* note 133, at 5.

when he later terminates the copyright transfer and regains the work from the transferee? In other words, if Author “A” writes songs while married to Spouse “B” and subsequently agrees to share copyrights owned by A 50/50 with B upon a divorce, does that agreement extend through the life of the copyright even after A terminates copyright transfers made to third party corporations and regains the full copyright? Or alternatively, does that agreement expire once the original copyright transfer has ended? These questions lead us back to the case study at the center of this article.

As Smokey Robinson was devoting himself to his career as a songwriter and artist, “the woman he was married to between 1957 and 1986, [Claudette,] says she put a hold on her own singing career to take care of the kids,”¹⁶⁰ and “asserted that she deserved a 50 percent share” of what he earned in future royalties for his copyrighted works—this would normally be the community property default.¹⁶¹ Smokey subsequently filed a lawsuit for declaratory relief with Claudette filing counterclaims.¹⁶² “In 1989, three years after the divorce, the parties entered into a stipulated judgment.”¹⁶³ At the time, the Robinsons apparently failed to address what would happen if the R&B singer regained rights to his compositions and made new licensing deals.¹⁶⁴

Of course, this is exactly what occurred a “quarter century later,” and the parties found themselves at odds over the classification of the terminated copyright interests as community property under California family law or separate property under the federal law—the Copyright Act.

Claudette Robinson’s attorney argued that the termination provision was not intended to “result in a windfall taking of copyright . . . from their former spouses,” and that during the divorce, “Mr. Robinson gained an unfair advantage over Ms. Robinson by his concealment of the full scope of his termination right.”¹⁶⁵ Smokey Robinson’s lawyer argued that “recaptured copyrights belong to the author alone,” that 1976 Copyright Act precludes any transfer of those copyrights before the terminations

160. Eriq Gardner, *Smokey Robinson Settling With Ex-Wife Over Terminated Song Rights*, THE HOLLYWOOD REPORTER (Dec. 12, 2014), <http://www.hollywoodreporter.com/thresq/smokey-robinson-settling-wife-terminated-757370> [<https://perma.cc/C3XM-R85D>].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

themselves are effective, and that his ex-wife's actions could "jeopardize" his ability to secure new agreements exploiting his newly recovered rights.¹⁶⁶ The dispute, with elements of federal copyright law and state family law and the Supremacy Clause of the U.S. Constitution, gathered widespread attention in the music community—especially among artist representatives.¹⁶⁷

Ultimately, the Robinsons reached an out of court settlement on the matter—but what would've, could've or should've happened if the case had proceeded through the court system? Should the result be different if the termination occurred during the marriage? Does each spouse have a right to manage the copyright during the marriage? Are community spouses being treated fairly if they only receive economic benefit? Perhaps the most important question of all is whether copyrights are community property at all.

D. Are Copyrights Community Property?

A California Court of Appeals held in the 1987 case *In re Marriage of Worth*¹⁶⁸ that ownership of a copyright was a community property asset. The husband's assertion that the copyright belongs only to the author was based on the fact that under the Act, a copyright in a protected work "vests initially in the author or authors of the work."¹⁶⁹ The court disagreed, citing California community property statutes which state "that all property acquired during marriage is community property."¹⁷⁰ Under the court's ruling, a nonauthor spouse now has rights as a joint owner of the copyright, in addition to rights to income derived from a work produced during a marriage. I would suggest this is a specious holding for a number of reasons. First of all, treatment of a copyright as community property "provides a disincentive for authors to create works, and thereby conflicts with the purposes of federal copyright law."¹⁷¹ Secondly, "[a]lthough 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

166. *Id.*

167. *Id.*

168. 195 Cal. App. 3d 768, 768 (1987).

169. *Id.* at 773 (citing 17 U.S.C. § 201(a) (2012)).

170. *Id.* (citing CAL. CIV. CODE § 5110).

171. Carla M. Roberts, *Worthy of Rejection: Copyright as Community Property*, 100 YALE L.J. 1053, 1053. (1991).

property law on the issue of initial vesting of copyright ownership.”¹⁷² Third, there is a distinction that should be made between owning as community property the thing that was created via intellectual property, e.g., a statue or photograph, as opposed to the actual intellectual property itself. The court held in *Rodrigue v. Rodrigue*¹⁷³ that while the physical object embodying the work may be community property, the copyright in the work is a separate property of the author spouse.¹⁷⁴ As such, the copyrights in works created before and during marriage are the separate property of the creating spouse.¹⁷⁵ This legal application would not apply to past and present royalties, which would fall under community property.¹⁷⁶ The “basic rule in Texas [is] that the income from separate property is community property. . . . As such, the non-creating spouse has an undivided one-half interest in the past and present royalties of works created by the other spouse.”¹⁷⁷

IV. PREEMPTION

This section of the paper outlines the nature of preemption law and how it applies in the case of state community property law and federal copyright statutes. The discussion will include the historical formation of the law, how and when preemption is applied under the 1976 Copyright Act, and a brief overview of the development of case law over the years.

A. *What is Preemption?*

Article VI, clause 2 of the Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁷⁸

The Supremacy Clause, as this provision is known, sets forth the

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

173. 218 F.3d 432, 439–40 (5th Cir. 2000).

174. *Id.*

175. *See infra* notes 247–56.

176. J. Wesley Cochran, *It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas*, 58 BAYLOR L. REV. 407, 459 (2006).

177. *Id.*

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

general principle that governs conflicts between state and federal law: Federal law, even a regulation of a federal agency, trumps inconsistent state law.¹⁷⁹ Subsequently, the Supreme Court has developed rules to guide courts when the principle is implicated generally and specifically with regard to intellectual property.

B. *How is Preemption Applied?*

Preemption can be either express or implied. When Congress chooses to expressly preempt state law, the courts are left with one question: whether the challenged state law is one that the federal law is intended to preempt.¹⁸⁰ The Copyright Act has an express statutory preemption provision in section 301:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.¹⁸¹

“As a result, courts typically begin and end preemption analysis with that section.”¹⁸²

Implied preemption, on the other hand, is a bit more complex, particularly when the state law in question does not directly conflict with federal law.¹⁸³ There are two types of implied preemption: “occupation of the field” and “conflict preemption.”¹⁸⁴ In a case of implied preemption, the Court must look beyond the express language of federal statutes to determine whether Congress has “occupied the field” in which the state is attempting to regulate, or whether a state law directly conflicts with federal law, or whether enforcement of the state law might frustrate

179. *Id.*

180. See JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 264–65 (2012).

181. 17 U.S.C. § 301(a) (2012).

182. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 18:2 (2014); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

183. See COHEN ET AL., *supra* note 23, at 912.

184. See *id.*

federal purposes, i.e., “conflict preemption.”¹⁸⁵ In *Pennsylvania v. Nelson*,¹⁸⁶ the Court held that “occupation of the field” occurs when there is “no room” left for state regulation.¹⁸⁷ In making the decision on whether a challenged state law will be upheld or preempted, courts are to look to the pervasiveness of the federal scheme of regulation, the federal interest at stake, and the danger of frustration of federal goals.

The two lanes which must be merged in this dispute are state law and federal copyright law, which of course invites U.S. Constitutional law and the preemption doctrine into the equation.¹⁸⁸ The parties in this case are California residents, but it should be noted that the same question would be present if the parties were from any of the nine community property states.

If, *arguendo*, California state law grants Claudette Robinson an economic share of the recaptured copyrights at issue, is there a direct and irreconcilable conflict between state and federal law? An important distinction here is the difference between a share of the copyright and an economic interest in the copyright. Community property law would grant the spouse an equal economic interest in the copyright. It would not grant the spouse a share of the copyright, i.e., in a joint ownership manner. Ownership of the copyright belongs only to the author or authors, or the employer in a work for hire relationship.¹⁸⁹

Relying on the community property laws of the state of California, Claudette Robinson states a cause of action only under state law.¹⁹⁰ Smokey, relying on the language of the Copyright Act as it pertains to terminations,¹⁹¹ exclusively invokes federal law. The preemption doctrine provides that where state and federal law are irreconcilably in conflict, federal law preempts state law pursuant to the Supremacy Clause of the United States Constitution.¹⁹² This doctrine only applies to “state laws that interfere with, or are contrary to federal law.”¹⁹³ The U.S.

185. *Id.*

186. 350 U.S. 497 (1956).

187. *Id.* at 502.

188. *Id.*

189. 17 U.S.C. § 201 (2012).

190. See Eriq Gardner, *Smokey Robinson's Ex-Wife Demands Share of Reclaimed Hit Songs*, BILLBOARD MAGAZINE (May 5, 2014), <http://www.billboard.com/biz/articles/news/legal-and-management/6077527/smokey-robinson-ex-wife-share-of-reclaimed-songs> [<https://perma.cc/5HUN-TT8N>].

191. 17 U.S.C. § 203 (2012).

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

193. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

Supreme Court has held that where the federal law does not expressly preempt state law, but the state law and federal law are in “irreconcilable conflict” in practice, then the federal law implicitly preempts the state law.¹⁹⁴ Also known as conflict preemption, this preemption principle renders a state law inapplicable where it is “‘impossible for a private party to comply with both state and federal requirements’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁹⁵

The opposing view asserts that the Supremacy Clause of the United States Constitution does not come into effect at all because, *inter alia*, there is a difference between ownership of the copyright renewal term and the beneficial right or economic interest in the proceeds generated from the copyrighted works.

C. Preemption Under the 1976 Copyright Act

Under the 1909 Act, preemption was a common law doctrine that was interpreted by courts and was in significant disarray.¹⁹⁶ This led to a level of instability in how the law was applied and was the impetus for Congress codifying the standard in the 1976 Act.¹⁹⁷

State law will be preempted whenever it is incompatible with federal copyright law.¹⁹⁸ Section 301(a) sets forth three conditions, all of which must be met for state law to be preempted:

- (1) the right protected by state law must be equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106;
- (2) the right must be in a work of authorship fixed in a tangible medium of expression; and
- (3) the work of authorship must come within the subject matter of copyright specified in §§ 102 and 103.¹⁹⁹

The language in section 301 was a valiant attempt to clarify the challenging preemption issue; however, it has not clearly achieved its goal. This is due in large part to the statute’s failure to answer questions about the meaning of rights equivalent and when such rights come within

194. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25 (1996).

195. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citation omitted).

196. LEAFFER, *supra* note 39, § 11.05.

197. *Id.*

198. *See GINSBURG, supra* note 180, at 264.

199. LEAFFER, *supra* note 39, § 11.05.

the subject matter of copyright.²⁰⁰ Ironically, this has led to the courts returning to traditional preemption doctrine as interpreted by the Supreme Court in pre-1976 cases.²⁰¹

In a recent appellate decision, the Eighth Circuit court clarified when the Copyright Act preempts a state-created right of publicity. *Dryer v. National Football League*²⁰² involved three former NFL players who appeared in game footage that the NFL included in a number of films created by NFL Films.²⁰³ The players brought suit for violation of state law right of publicity for use of their images in the films.²⁰⁴ The district court granted summary judgment in favor of the NFL on the players' right of publicity on a number of grounds including preemption under the Copyright Act.²⁰⁵ On appeal, the Eighth Circuit affirmed, holding that the NFL's rights in the copyrighted film footage preempted the players' attempt to control dissemination of the films, which would impede the NFL's ability to exercise one of its exclusive rights granted by the Copyright Act.²⁰⁶

D. Is There a Conflict Between the State and Federal Law?

The Copyright Act of 1976 expressly preempts any state copyright law in virtually all instances. Subsequently, modern copyright issues fall exclusively under the purview of federal courts and federal law.²⁰⁷ Claudette Robinson's claim was that she owned part of the recaptured copyrights.²⁰⁸ Smokey Robinson, however, asserts that the 1976 Act expressly provides that these recaptured rights belong to the author alone.²⁰⁹ Subsequently, the legal argument made by Mr. Robinson is that if Ms. Robinson is correct in asserting that under state law she owns part of the recaptured copyrights, there is a direct and irreconcilable conflict between state and federal law with respect to the ownership of the recaptured rights. If Mr. Robinson's claims are accurate, the Supremacy Clause of the United States Constitution would preempt Ms. Robinson's claims. Under the concept of conflict preemption, where the federal law

200. *Id.* at 550.

201. *Id.*

202. 814 F.3d 938 (8th Cir. 2016).

203. *Id.* at 940.

204. *Id.*

205. *Id.* at 941.

206. *Id.* at 944.

207. 17 U.S.C. § 301 (2012).

208. Gardner, *supra* note 160.

209. *Id.*

does not expressly preempt state law, but the state law and federal law are in irreconcilable conflict in practice, then the federal law implicitly preempts the state law.²¹⁰ Conflict preemption renders a state law inapplicable if the circumstances render it “impossible for a private party to comply with both state and federal requirements or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”²¹¹

As it stands, Congress has yet to enact a broad federal law that would govern the treatment of marital property upon divorce.²¹² As a result, California state laws generally dictate the disposition of community property, including the copyrights in question here. Federal law will only preempt California state law if the state law results in “‘major damage’ to ‘clear and substantial’ federal interests.”²¹³

V. ECONOMIC BENEFITS VS. OWNERSHIP RIGHTS

This section will explore the difference between economic benefit generated from beneficial ownership and the actual ownership rights that a copyright owner enjoys, such as the rights to administer the copyright as well as to benefit from its exploitation. I will then look at whether these benefits should be protected separately and whether there is an economic justice argument to be made for the non-creator spouse.

A. *Ownership Rights and Economic Benefit Defined*

Copyright vests initially in the author or authors of a work.²¹⁴

The idea that copyright is primarily for the benefit of the author was central to the state statutes; that copyright is necessary for learning was central to the constitutional provision; that copyright is a government grant (or statutory privilege) was central to the first federal copyright act; and that copyright was to prevent monopoly was central to the [landmark case of American copyright law, *Wheaton v. Peters*,²¹⁵ decided in 1834].²¹⁶

210. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

211. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citation omitted).

212. *In re Marriage of Worth*, 195 Cal. App. 3d 768, 777-78 (1987).

213. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1978).

214. 17 U.S.C. § 201(a) (2012).

215. 33 U.S. 591 (1834).

216. LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 181 (Vanderbilt University Press 1968).

While the word “author” is not actually defined in the Copyright Act, case law has defined an author as one “to whom [the work] owes its origin.”²¹⁷ This is a common discussion in cases dealing with the issues of joint authorship²¹⁸ and works for hire.²¹⁹ Inherent in authorship rights are the rights of the author to receive economic benefit from the work in question. It is also common to have an economic benefit without being the actual owner of a work. This can happen in a number of ways, including copyright transfers, licenses, bequests, and beneficial ownership established by way of community property laws.

B. Is Economic Benefit Protected Separately from the Ownership Rights?

The direction of the law in this dispute will be largely based on whether economic benefit is protected separately from the ownership rights when a copyright is at issue. The argument made in favor of the former spouse continuing to receive economic benefit from the terminated transfers is based on the premise that the right to share in the economic proceeds is freely assignable and is governed by state law only, with no preemption issue as to federal copyright law.²²⁰

This argument relies in part on the holding in *Montz v. Pilgrim Films & Television, Inc.*, that the Copyright Act only preempts state law that “grants ‘legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright’” as specified by section 106.²²¹ This legal position also relies on the premise enunciated in *Yount v. Acuff Rose-Opryland*, which stated that “a royalty interest does not bespeak an interest in the underlying copyright itself—a royalty is simply an interest in receiving money when the owner of the copyright exploits it.”²²² Moreover, the beneficial owner has no control or

217. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884).

218. 17 U.S.C. § 101 (2012) defines “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”

219. 17 U.S.C. § 101 defines a “work made for hire” in two parts: “(1) a work prepared by an employee within the scope of his or her employment” or “(2) a work specially ordered or commissioned for use” 1. As a contribution to a collective work; 2. As a part of a motion picture or other audiovisual work; 3. As a translation; 4. As a supplementary work; 5. As a compilation; 6. As an instructional text; 7. As a test; 8. As answer material for a test; or 9. As an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

220. Gardner, *supra* note 160.

221. 649 F.3d 975, 979 (9th Cir. 2011) (citing 17 U.S.C. § 301(a)).

222. 103 F.3d 830, 834 (9th Cir. 1996).

management duties with regard to the copyright.²²³ *Yount* further held that assignments of interests in royalties have no relationship to the existence, scope, duration, or identification of a copyright, nor to rights under a copyright.²²⁴ Ms. Robinson's legal argument is based on this premise—that the right to fifty percent of the economic benefit, i.e., royalties, arises from the divorce settlement, i.e., state contract law, does not conflict with the section 106 rights in the Copyright Act, and thus withstands the challenge of preemption and, most importantly, continues unabated into any additional post termination transfers.

Courts have held that where an author-spouse has the right to exercise his or her exclusive rights under the Copyright Act, but is obligated to share the economic benefits of that exploitation, there is no harm to any federal interests under the Copyright Act.²²⁵

Mr. Robinson is not questioning whether the economic interest from the copyrighted songs should be part of the community property. His position is that when the original term expired with the termination of the transfers, he took a new interest that was essentially birthed on the date of the termination. As such, this new estate would not be part of the community property since it was created after, indeed many years after, the end of the marriage. Mr. Robinson is thus asserting that *Rodrigue* is not applicable to this situation. Mr. Robinson did ensure this economic benefit during the term. He is now arguing that with the termination, an entirely new estate begins and he is no longer required to provide economic benefit from the new estate. After all, if we were to take the marital relationship out of the picture and replace it with an agreement the author had to share economic interests with a publisher, the publisher would not be entitled to continue receiving income after the termination has been executed.

In a holding similar to *Rodrigue*, the Supreme Court of Hawaii held in *Berry v. Berry* that “the non-authoring spouse is entitled to an economic interest in the copyrights” that were created during marriage.²²⁶ The *Berry* court found no preemption issue as it reasoned that an economic interest in copyrights is not equivalent to the section 106 rights under the

223. *Id.*

224. *Id.* at 835; see also *Rodrigue v. Rodrigue*, 218 F.3d 432, 435 (5th Cir. 2000); *Berry v. Berry*, 277 P.3d 968, 987 (Haw. 2012); *Westmorland v. Westmorland*, C07-1435 MJP, 2007 WL 4358309; *In re Marriage of Worth*, 241 Cal. App. 3d 768, 773, 776–78 (1987).

225. See *Rodrigue*, 218 F.3d at 435.

226. 277 P.3d 968, 987 (Haw. 2012).

Copyright Act.²²⁷ Again, the essence of this case is the contrasting of actual ownership versus equitable or beneficial ownership. Should these two concepts be applied interchangeably to beneficial copyright interest in the initial term and in the renewal term or post-termination period? It is true that if spouses dividing economic benefits to a copyright do not affect the exclusive rights under section 106, thus not triggering preemption. This logically can only apply to the initial interest if the post-termination term or renewal term is a new estate.

Whether or not the post-termination interest is a new estate, it is a reasonable presumption that in either case the original purpose of copyright would lean toward a default to benefit the author, at least absent some agreement to the contrary.

The biggest roadblock to fully adopting the legal approach favored by Mr. Robinson is the language in the Copyright Act under both sections 203 and 304(c): "Termination of a grant... affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws."²²⁸

This language would appear to thwart any author's attempt to disenfranchise the equitable interest of an ex-spouse in copyrighted works. As noted earlier in this article, Congress has consistently acted in favor of protecting the rights of heirs when it comes to copyright transfers and terminations. This is evident from the legislative histories,²²⁹ testimony from the Register of Copyrights,²³⁰ and legal scholars and practitioners. Smokey Robinson would certainly be able to terminate the grants, since this right is conferred only upon the living author by the Copyright Act.²³¹ However, the community property disposition of the equitable rights to Ms. Robinson are conferred by state law, i.e., her rights arise under other federal, state, or foreign laws.

Notwithstanding these challenges, section 201(e) of the Copyright Act of 1976, Involuntary Transfer, states

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not

227. *Id.*

228. 17 U.S.C. §§ 203(b)(5), 304(c)(6)(E) (2012).

229. *See, e.g., The Copyright Term Extension Act of 1995: Hearing on S. 485 Before the Committee on the Judiciary United States Senate*, 104th Cong. 1-2 (1995) (Opening Statement of Sen. Hatch).

230. *Id.* at 6-8 (testimony of Marybeth Peters, Reg. of Copyrights and Associate Librarian of Congress for Copyright Services).

231. 17 U.S.C. § 203.

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,²³²

except as provided under Title 11 (Title 11 addresses the specific rules for Sound Recordings and Music Videos). The argument to be made in support of Mr. Robinson's initial legal assertion would be that the rights conferred by the termination are a new estate, and would thus be "a right that has not previously been transferred voluntarily by that individual author."

C. *Is there an Economic Justice Argument to be Made?*

In his book, *Economic Justice*, Stephen Nathan explores the theories undergirding the foundations of economic justice by asking three questions: (1) How well off does it make people?; (2) Does it reward people in accordance with what they deserve?; and (3) What is its impact on people's liberty?²³³

If we applied this measured analysis to the Smokey and Claudette Robinson scenario, where would it lead us?

(1) *How well off does it make Smokey and Claudette Robinson?* When applying the first factor to Smokey and Claudette Robinson, quite frankly, we're speaking about royalties in the millions of dollars over the life of these copyrights. Clearly, this is not the typical situation. A far more impactful question would be how well off either result, i.e., whether or not copyright renewal periods should continue to accrue beneficial ownership to the non-creator spouse, would make parties who are not of the substantial means of Smokey and Claudette Robinson. Claudette Robinson contends that she put her entertainment career on hold in order to have children and raise a family. Ultimately, she chose not to return to her entertainment career. Even in the cases where one spouse does return to the workforce, he or she has often lost ground in their career trajectory and fallen behind their contemporaries with whom they were professionally comparable. Family law recognizes this reality when it considers the contribution the non-working spouse makes in raising the children as equal to the breadwinner's contribution of financially

232. 17 U.S.C. § 201(e) (2012).

233. See generally STEPHEN NATHANSON, *ECONOMIC JUSTICE* (1998).

providing for the family. As noted earlier in this article, community property laws specifically make a point of considering all the money earned during a marriage “community property” owned equally by both spouses. If the beneficial ownership in a copyright were to be extinguished during the renewal term of the copyright, we would in essence be holding the author’s contribution to the community more valuable than the non-author’s contribution through other duties and responsibilities. This would be bad law and faulty policy. The non-working spouse’s contributions as the primary caretaker of children and homemaker cannot be given less value than the breadwinner’s (i.e., the author’s) creative contributions to the “community.” To do so would undoubtedly leave the spouse less well off than the law and economic justice principles would desire.

(2) *Does it reward Smokey and/or Claudette Robinson in accordance with what they deserve?* The opposing camps in this legal dispute would undoubtedly have contrasting views with regard to the inquiry of rewarding people in accordance with what they deserve. Again, we can look at the body of community property statutes to see the policy considerations at hand with regard to what the individuals deserve. From a policy perspective, lawmakers do not wish to create a scenario in which the value of taking care of a family or the day-to-day needs of raising children would be considered an afterthought. What the parties deserve is to share equally in the contributions that each makes to the community. The right to share in the community does not come with an expiration date, i.e., only in the initial term of the copyright; on the contrary, it should extend to the total life of the copyright.

(3) *What is the effect on the liberty of Smokey and/or Claudette Robinson?* Would a ruling that Claudette is due the continued royalty stream from the renewal term have a negative impact on Smokey’s liberty? What exactly is “liberty”? We typically think of the word “freedom” when we consider questions of liberty. The Declaration of Independence states “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²³⁴

Liberty is defined by Merriam-Webster “the quality or state of being free: a: the power to do as one pleases. b: freedom from physical restraint. c: freedom from arbitrary or despotic control. d: the positive

234. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

enjoyment of various social, political, or economic rights and privileges. e: the power of choice.”²³⁵

Liberty in the sense of a songwriter’s control over his songs would include being able to make contracts, grant synchronization licenses, mechanical licenses, the right to make derivative works, and the like. These rights are not affected by a non-author’s beneficial ownership. The beneficial owner, in this case, the non-creator spouse, has no rights to control the administration of the copyright; these rights are totally in the purview of the songwriter. It is commonplace for copyright owners who have gone through a divorce to be required to split their copyright interests with their ex-spouses. However, this division does not transfer to the non-author spouse any administrative control over the copyrights.

VI. CONCLUSION

Ideally, there would be clear statutory guidance to serve as a traffic signal at the intersection of state community property laws and copyright termination rights. “Without affirmative action by Congress, the federal goals of encouraging authors and the state goals of stability and harmony in family life, while not necessarily inconsistent, may in fact be irreconcilable.”²³⁶ In the absence of a definitive signal, what would be the most reasonable and just solution? Here are the key inquiries and suggested answers:

1. Should copyrighted works of authorship be considered jointly owned by non-creator spouses by virtue of the parties living in a community property state?

No, copyrighted works are not joint works unless both (or all) parties make “independently copyrightable contribution[s]” to the works²³⁷ and intend that their contributions be merged into an interdependent whole.²³⁸ Without these elements, the work in question is not a joint

235. *Liberty*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2009).

236. Llewellyn Joseph Gibbons, *Then, You Had It, Now It’s Gone: Interspousal or Community Property Transfer and the Termination of an Illusory Ephemeral State Law Right or Interest in a Copyright*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 108 (2013).

237. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000). The Court of Appeals in *Aalmuhammed* held that authorship is required under the statutory definition of a joint work, and that authorship is not the same thing as making a valuable and copyrightable contribution. *Id.*

238. The Second and Seventh Circuits require the party claiming to be an author of a joint work to prove, not just that both parties intended their contributions to be merged into a single work, but that both parties intended each other to be joint authors.

work. “If a work is deemed to be a ‘joint work,’ then all co-authors own equal shares in the work unless they have agreed to the contrary, even if it is clear that their contributions are not equal.”²³⁹ It would be an untenable result for a work that was not created as a joint work, and never intended to be a joint work, to be transmuted into a joint work simply because an author and his or her spouse divorce in a community property jurisdiction.

2. Should the retrieved post-termination work be considered a separate estate or a continuation of the initial estate?

It depends. Works created under the 1909 Act that are still under copyright, i.e., works created between 1923 and December 31, 1977, were created under a statute with a bifurcated copyright term.²⁴⁰ Because of this fact, the two terms have typically been considered separate estates. On the other hand, works created on or after January 1, 1978, i.e., under the Copyright Act of 1976 (as amended), have a single copyright term of life of the author plus seventy years. There is no persuasive support for considering this anything other than one single estate—even if the author transferred the right and later terminated it.

3. Considering the rights of the creator-spouse and the non-creator spouse, what is the fair and reasonable solution to this situation?

Prevailing law seems to indicate that there is not a preemption issue between federal copyright and state community property law. Economic justice would strongly suggest that the sharing of beneficial ownership in copyrighted works should be granted to non-creator spouses. Equity would suggest that the creator-spouse would not have his or her work transmuted into a joint work solely because they were divorced in a community property state. As scholars and legal

239. ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 549 (2012); see 17 U.S.C. § 201(a) (2012); *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730 (1989).

240. The 1909 Act originally bestowed a twenty-eight-year copyright term with the possibility of an additional twenty-eight years if the author was alive and registered the renewal term. The twenty-eight-year renewal term eventually was extended to forty-seven years, then became automatically renewed in 1992, and finally became sixty-seven years with the 1998 Sonny Bono Copyright Term Extension Act.

experts prepare the next great Copyright Act, we have an opportunity to craft a statutory solution. To this end, my proposal would be to treat any divorce agreement that grants beneficial copyright ownership as a simple copyright transfer, and add language to the new Act to that effect, essentially creating a thirty-five-year post-divorce right. Since copyright exists upon the creation of the work, and since the community property statutes consider transfer by operation of law to occur immediately upon the created interest,²⁴¹ this thirty-five-year period would be triggered not from the date of the divorce decree, but from the date of the creation of the copyrighted work. My proposed language would be the following:

A copyright transfer, triggered by a post-marital proceeding, which transfers a share of beneficial ownership to a former spouse under state law, shall be treated in the same manner as a transfer of copyright to a third party (e.g., publisher, record company, etc.). Such transfer shall trigger the same termination rights that exist with regard to other copyright transfers under this title. Under this title the non-creator spouse would share in the beneficial ownership of the copyright for the life of the copyright, subject to properly executed termination between the thirty-fifth and fortieth year after the date of the creation of the copyright work, and subject to all statutory termination requirements under the Copyright Act.

Under copyright law, the author is one to whom the work owes its origin²⁴² and the author alone has the exclusive rights under section 106 of the Act. With this in mind, any state law that purports to transmute an author's original work into a joint work or one owned jointly by a non-author would be untenable and is unsupportable from a policy perspective. Granting the non-creator spouse a minimum of thirty-five years beneficial ownership, with the author enjoying the right to terminate as he or she would any other transfer, would provide a reasonable compromise from which to navigate the collision of state community property laws and federal copyright laws.

241. See Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 398–99 (2010).

242. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884).