HOW COPYRIGHTS BECAME COMMUNITY PROPERTY (SORT OF): THROUGH THE *RODRIGUE V. RODRIGUE* LOOKING GLASS

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I. INTRODUCTION

In a recent issue of the *Louisiana Law Review*,[1] I argued, as others had before,[2] that copyrighted works of authorship are not community property under state law. Rather, I contended that such works are the separate property of the author-spouse under federal copyright law. This argument was grounded on well-

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

2. *See* 2 GARY N. SKOLOFF ET AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.07 (1998); 1 PAUL GOLDSTEIN, COPYRIGHT § 4.4.4.2 (2d ed. 1998); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 6A.01-6A.04 (1996); Lydia A. Nayo, *Revisiting* Worth*: The Copyright as Community Property Problem*, 30 U.S.F. L. REV. 153 (1995); Francis M. Nevins, Jr., *When an Author's Marriage Dies: The Copyright-Divorce Connection*, 37 J. COPYRIGHT SOC'Y 382 (1990); David Nimmer, *Copyright Ownership by the Marital Community: Evaluating* Worth, 36 UCLA L. REV. 383 (1988); William F. Patry, *Copyright and Community Property: The Question of Preemption*, 28 BULL. COPR. SOC'Y 237 (1981) (also published at 8 COMMUNITY PROP. J. 205 (1981)); Michael J. Perlstein, *Copyright as Community Property: Questions About* Worth *are More Than Merely Trivial*, 9 No. 11 ENT. L. REP. 3 (Apr. 1988); Debora Polacheck, *The "Un-*Worth*-Y" Decision: The Characterization of a Copyright as Community Property*, 17 HASTINGS COMM. & ENT. L.J. 601 (1995); Peter J. Wong, *Asserting the Spouse's Community Property Rights in Copyright*, 31 IDAHO L. REV. 1087 (1995); Carla M. Roberts, Note, *Worthy of Rejection: Copyright as Community Property*, 100 YALE L.J. 1053 (1991).

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settled principles of conflict preemption law: because state community property law purports to vest ownership of copyrights in the community, while federal law expressly and unequivocally vests full ownership solely in the author-spouse, federal copyright law—both statutory and constitutional—preempts conflicting state community property law on the issue of copyright ownership.[3]

On July 7, 2000, the United States Court of Appeals for the Fifth Circuit held otherwise. In *Rodrigue v. Rodrigue*,[4] the Fifth Circuit concluded that no conflict exists between federal copyright law and state community property law relating to the vesting of copyright ownership, and thus, copyrights do not vest solely in authors domiciled in community property jurisdictions.[5] To reach this conclusion, the court constructed a curious new regime for the vesting of ownership of federal copyrights. Under this regime—the principles of which had been neither briefed by the parties nor considered by the district court below[6]—ownership of copyrights in community-property jurisdictions will be dismembered[7] and divided, with the spouses jointly receiving the right to all "fruits" of copyrighted works and the author-spouse receiving the residual rights to "use" and to "alienate" his copyrights.[8] Perhaps most surprisingly, a non-author spouse now may be able to compel an author-spouse to, among other things, create and distribute new works based on community copyrights if a "prudent administrator" would do so.[9]

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3. *See* Ciolino, *supra* note 1, at 130-50.

4. 218 F.3d 432 (5th Cir. 2000) (Wiener, J.).

5. *See id.* at 435.

6. *See* Rodrigue v. Rodrigue, 55 F. Supp. 2d 534 (E.D. La. 1999).

7. In civilian parlance, when the right of ownership is broken apart into *usus*, *abusus*, and *fructus* (the rights to alienate, use and fruits) and distributed among different people, it is said to be "dismembered." *See, e.g.*, 1 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW pt. 2, No. 2745, at 623 (La. St. L. Inst. trans., 1959); A.N. YIANNOPOULOS, PERSONAL SERVITUDES § 1 (3d ed. 1989) ("The right of ownership, which according to traditional civilian analysis includes the elements of *usus*, *fructus*, and *abusus*, may lawfully be dismembered.").

8. *Rodrigue*, 218 F.3d at 437-40.

9. *Id.* at 442-43. Note that while the court stated that it left the issue of "prudent management," for "another day," in other parts of the opinion it suggested that this obligation nonetheless exists. *Id.*

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The Fifth Circuit's *Rodrigue* opinion is egregiously wrong. It ignores clear limitations imposed by the Copyright Clause of the Constitution. It distorts the plain language of the Copyright Act. And it concocts an unworkable regime of dismembered copyright ownership that is not only unprecedented in both American intellectual property law and Louisiana marital property law, but also that is ineffectual in furthering the objectives of longstanding principles of copyright and community property.

This Article discusses these and related problems. After briefly discussing the history of the *Rodrigue* litigation, Part II critiques the Fifth Circuit's preemption analysis and concludes that it is hopelessly flawed, both as a matter of federal constitutional law and federal statutory law. Part III looks ahead to the post-*Rodrigue* partition proceeding—a proceeding in which state courts will face the unenviable task of identifying that portion of the dismembered copyright now deemed to belong to the community, namely the *fructus* of the copyright, and then valuing that *fructus* before distributing it and other community property between the ex-spouses. Finally, this Article concludes with a call for future courts to reject the *Rodrigue* court's analysis and, instead, to hold that the Copyright Clause of the Constitution and the Copyright Act of 1976 preempt state marital property law on the issue of copyright ownership.

II. A LOOK BACK: A CRITIQUE OF THE *RODRIGUE* COURT'S PREEMPTION ANALYSIS

George G. Rodrigue, Jr. ("George"), and Veronica H. Rodrigue ("Veronica") were married in 1967 and lived in Louisiana thereafter until their divorce in 1994.[10] During the marriage, George became a "widely acclaimed, highly successful, and very prolific painter" who created thousands of works, including many depicting a now-familiar image of a *Blue Dog*.[11] First painted in 1984, the ubiquitous *Blue Dog* image has become one of "the most recognized and marketed artistic icons ever conjured up."[12] George

10. *Rodrigue*, 55 F. Supp. 2d at 536.

11. *Rodrigue*, 218 F.3d at 433.

12. Andrew Marton, *Strokes of Genius Louisiana Painter George Rodrigue's Blue Dog Has Its Day and A Life of Its Own*, CHI. TRIB., Nov. 2, 2000, at Tempo 1; *see also* Alison Maxwell, *Xerox Coaxes Blue Dog Into Mainstream*, USA TODAY, Nov. 27, 2000, at B8

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has continued to create works of authorship, including many containing *Blue Dog* images, since his divorce from Veronica.

A. The *Rodrigue* Litigation

In 1995, George sued Veronica in the United States District Court for the Eastern District of Louisiana seeking a judgment declaring him to be the sole owner of all copyrighted works created during their marriage. In seeking this declaratory judgment, George argued that the United States Constitution and Copyright Act conflicted with, and therefore preempted, Louisiana community property law. Because no facts were in dispute, George filed a motion for summary judgment on the issue of copyright ownership, which the district court granted in 1999.[13] The district court reasoned that because federal law vests ownership of copyrights in the "author" alone while Louisiana law purports to vest ownership in "both spouses in indivision," these "provisions clash head-on."[14] As a result, the district court held that federal copyright law "as written preempts Louisiana community property law on the question of ownership of copyrights, and George is the sole owner of the copyrights."[15]

Veronica appealed to the United States Court of Appeals for the Fifth Circuit.[16] On July 7, 2000, that court reversed the district court and remanded the case with instructions.[17] Characterizing the conflict between Louisiana community property law and federal copyright law as merely "facial,"[18] the Fifth Circuit held that the Copyright Act does not preempt state laws that vest less than full copyright ownership in authors. Because the Act vests "only . . . the five exclusive attributes listed in § 106"[19]—namely, the rights to reproduce, adapt, publicly distribute, and publicly display the copyrighted work—it "does not preclude classification of other attributes of ownership of a copyright as community

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("Some say the *Blue Dog* is the hottest pop art fad since Walter Keane's wide-eyed tots in the 1960s or Roy Lichtenstein's comic strip images.").

13. *Rodrigue*, 55 F. Supp. 2d at 536.
14. *Id.* at 541.
15. *Id.* at 547.
16. *Rodrigue*, 218 F.3d at 432.
17. *Id.* at 442-43.
18. *Id.* at 435.
19. *Id.* at 435-36.

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property."[20] One such attribute, which the *Rodrigue* court observed is "[n]otably absent" from the Copyright Act, is "the right to enjoy the earnings and profits of the copyright."[21] Given this notable absence, the *Rodrigue* court held that the Act "does not mandate the monolithic preemption of Louisiana community property law *in toto*," but rather, permits the vesting of the economic "fruits" of copyrighted works in the community.[22] Vesting such "fruits" in the community, the court concluded, will neither impair the federal interest in "efficient exchange" of copyrights nor conflict "with the federal interest in encouraging authorship."[23] As to the federal interest in assuring "predictability and efficiency" in copyright exchanges, the court concluded that because copyrights are "registered movables" under Louisiana law, they can be transferred only by the author-spouse, thus assuring that a "potential purchaser or licensee will still be able to obtain good 'title' from the author-spouse."[24] As to the federal interest in encouraging authorship, the court concluded that because author-spouses have an "affirmative" post-divorce duty to exploit copyrights as a prudent manager would exploit them, "the duty imposed by Louisiana is consistent with—not contrary to—the interest in promoting artistic creation."[25]

For these reasons, the court instructed the district court "to enter judgment recognizing Veronica's entitlement to an undivided one-half interest in the net economic benefits generated by or resulting from copyrighted works created by George during the existence of the community and from any derivatives thereof." The court further held that:

> Such judgment also must recognize George's continued entitlement to the exclusive control and management of the five rights in such intellectual property specified in § 106, albeit subject to any duty that he might ultimately

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20. *Rodrigue*, 218 F.3d at 35-36.
21. *Id.* at 440.
22. *Id.* at 439.
23. *Id.* at 440-42.
24. *Id.* at 441.
25. *Rodrigue*, 218 F.3d at 442.

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> be held to owe Veronica to 'manage prudently' all such copyrights and derivatives thereof under his control.[26]

After the Fifth Circuit's decision, George filed a petition for a writ of certiorari in the United States Supreme Court. On March 5, 2001, that petition was denied.[27]

B. The *Rodrigue* Court's Flawed Preemption Analysis

The federal preemption law applicable to the *Rodrigue* case was quite simple. "Even without an express provision for preemption," and "even if Congress has not occupied the field," state law is "preempted to the extent of any conflict with a federal statute."[28] Such a preemption-causing "conflict" exists either (i) when "it is impossible for a private party to comply with both state and federal law," or (ii) when the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[29]

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26. *Rodrigue*, 218 F.3d at 443.

27. *See* Rodrigue v. Rodrigue, 121 S. Ct. 1227 (2001). That the Court denied George's petition despite clear error in the Fifth Circuit's preemption analysis, see *infra* Part II.B, is perhaps not surprising. Given that the Fifth Circuit is the first federal appellate court to address the issue of copyright ownership vis-à-vis spouses domiciled in community property jurisdictions, there is presently no conflict among the circuit courts of appeals on the issue. *See* SUP. CT. R. 10 (setting forth considerations governing review on certiorari).

28. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2293 (2000).

29. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also* Boggs v. Boggs, 520 U.S. 833, 844 (1997) (same). In addition to erring in its application of well-settled preemption law, the *Rodrigue* court erred in its understanding of basic conflict-preemption doctrine.

First, the court found the case for preemption "particularly weak" because Congress was aware of state community property law and was silent on the issue in the Copyright Act. *See Rodrigue*, 218 F.3d at 440 & n.36; *id.* at n.36 (citing Brown v. Ames, 201 F.3d 654, 661 (5th Cir. 2000)). However, the Supreme Court has held that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict. . . . [Any contrary] inference of congressional intent is unwarranted . . . simply because the silence of Congress is ambiguous." *Crosby*, 120 S. Ct. at 2302; *see also* Greier v. Am. Honda Motor Co., 120 S. Ct. 1913, 1927 (2000).

Second, the court distinguished the *Rodrigue* case from *Boggs* by incorrectly characterizing *Boggs* as a case involving "total preemption of the field of retirement." *See Rodrigue*, 218 F.3d at 439 n.32. However, the *Boggs* Court expressly refused to "consider the applicability of field pre-emption," and instead, decided that case using "[c]onventional conflict preemption principles." *Boggs*, 520 U.S. at 841, 844.

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The conflict between the federal Constitution and Copyright Act on the one hand, and state community property law on the other, was starkly apparent. Under federal law, full, unqualified ownership of all copyrights vests in the *author* immediately upon creation of the work.[30] In contrast, under Louisiana community property law, full, unqualified co-ownership of all copyrights vests in the *spouses* immediately upon creation of the work.[31] Given this conflict, this case seemed to be one in which it was absolutely "impossible" to comply with both state and federal law.

However, instead of recognizing—as the district court did—that this case presented an "irreconcilable," "head-on" conflict,[32] the court of appeals set out to "reconcile the respective rights and obligations of authors under federal copyright law and their spouses under Louisiana community property law."[33] Although the district court believed that any such reconciliation would properly be the subject of "legislative deliberation and compromise,"[34] the Fifth Circuit instead chose to rewrite fundamentally both federal copyright law and Louisiana community property law, all the while unconstrained by the limitations imposed by the Copyright Clause of the Constitution. Irrespective of the impropriety of such judicial lawmaking, the end product of the court's reconciliation effort—a regime of dismembered copyrights and shared "fruits"—resolved none of the conflicts that were present at the start. Even worse, the end product of this effort is a curious copyright-ownership scheme that is fundamentally at odds with the United States Constitution, the Copyright Act of 1976 and, ironically, Louisiana community property law.

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30. *See* 17 U.S.C. § 201(a) (1994). For a full discussion of this conflict, see *infra* Part II.

31. *See, e.g.*, LA. CIV. CODE ANN. art. 2336 (West 1985) ("Each spouse *owns* a *present* undivided one-half interest in the community property.") (emphasis added); *see also* LA. CIV. CODE ANN. art. 2338 (West 1985) ("The community comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse.").

32. Rodrigue v. Rodrigue, 55 F. Supp. 2d at 534, 537 (E.D. La. 1999).

33. Rodrigue v. Rodrigue, 218 F.3d at 432, 433 (5th Cir. 2000).

34. *Rodrigue*, 55 F. Supp. 2d at 547.

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1. The Irreconcilable Conflicts Between State Law and the Copyright Clause of the Constitution

Both Louisiana community property law and the new regime of dismembered copyrights constructed by the *Rodrigue* court squarely conflict with the Copyright Clause. First, the Copyright Clause expressly provides that only "*Authors*" can "secur[e]" copyrights.[35] The *Rodrigue* opinion, however, effectively permits states to grant property rights in copyrighted works to non-authors. Particularly, it permits states to vest the *fructus* of copyrighted works in non-author spouses.[36]

Second, the Copyright Clause expressly provides that authors may obtain rights only in "*their* respective Writings."[37] The *Rodrigue* opinion, however, permits states to grant rights to a spouse in works created by another.

Third, the Copyright Clause specifically gives only "Congress" the power to grant federal copyright entitlements.[38] The *Rodrigue* opinion, however, permits *states* to grant such entitlements to non-authors.[39]

Fourth, the Copyright Clause permits Congress to grant copyright entitlements only "[t]o Promote the Progress of Science."[40] The *Rodrigue* opinion, however, permits states to grant

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35. U.S. CONST. art. I, § 8, cl. 8 (emphasis added). Because this clause empowers Congress to "secur[e]" copyrights for "Authors," it does not prohibit Congress from permitting authors to transfer these copyrights subsequent to "securing" them.

36. *See Rodrigue*, 218 F.3d at 439. No provision of Louisiana community property law has this effect. On the contrary, Louisiana community property law would vest full co-ownership of copyrights created during the community in the spouses jointly. *See* LA. CIV. CODE ANN. arts. 2336, 2338 (West 1985). It is uncertain whether the *Rodrigue* court was confused about the effect of Louisiana property law in this regard, or simply decided to ignore the law as written and write its own Louisiana marital-property law.

37. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

38. *See id.*; *see also* U.S. CONST. art. I, § 1; New York v. United States, 505 U.S. 144, 156-57 (1992) (noting that states cannot exercise powers delegated to Congress).

39. *Rodrigue*, 218 F.3d at 432.

40. Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) ("Congress' power under [the Patent and Copyright] Clause is limited to action that promotes [science or] the useful arts.").

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copyright entitlements to spouses purely to promote the goal of marital equality.[41]

Astonishingly, the Fifth Circuit seemingly overlooked these fundamental constitutional problems.[42] Worse still, the court created a new one. Particularly, the court's new regime of dismembered copyrights offends fundamental principles of federalism. By granting an author's spouse only the *fructus* of a copyright, the court has introduced into Louisiana family law the novel concept that a spouse will receive something less than full co-ownership of community property.[43] For a federal court rather than a state legislature to introduce this fundamentally new notion into a centuries-old community property system is manifestly inappropriate.

2. The Irreconcilable Conflicts Between State Law and the Copyright Act of 1976

Both Louisiana community property law and the *Rodrigue* court's new regime of dismembered copyrights conflict with the Copyright Act. Section 201(a) of the Copyright Act, entitled "Initial Ownership," provides that ownership of copyright "vests initially in the author or authors" of a work of authorship.[44] In contrast, Louisiana community property law would vest co-ownership of copyright in the spouses jointly.[45] Given that it is "impossible" to comply with both federal and state law with regard to copyright vesting, this straightforward conflict should have led to a simple

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41. *See Rodrigue*, 218 F.3d at 432.

42. There is little case law interpreting the Copyright Clause of the Constitution. Indeed, the United States Supreme Court has only interpreted that clause five times in its history. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340 (1991); Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903); Higgins v. Keuffel, 140 U.S. 428 (1891); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). *See generally* Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference* (2000), *reprinted in* 7 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW 1, 5-6 (2000) (also published at 47 J. COPYRIGHT SOC'Y 317 (2000)).

43. *Cf.* LA. CIV. CODE ANN. art. 2336 (West 1986) ("Each spouse owns a present undivided one-half interest in the community property.").

44. 17 U.S.C. § 201(a) (1994).

45. *See* LA. CIV. CODE ANN. art. 2338 (West 1985).

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conclusion, namely, that § 201(a) preempts state community property law—as the district court properly held.[46]

The *Rodrigue* court could not and did not deny the existence of this conflict. Discounting the conflict as merely "facial," the court proceeded to construct a new, purportedly "compatible," regime of dismembered copyrights.[47] Unfortunately, just as Louisiana's traditional community property regime is flatly incompatible with § 201(a), so too is the *Rodrigue* court's curious new ownership regime.[48]

a. Vesting Less Than Full Copyright Ownership in the Author-Spouse

Because the *Rodrigue* opinion vests the *fructus* of all copyrights created during marriage in the community, it vests less than full copyright ownership in the author-spouse. In so doing, the opinion squarely conflicts with the Copyright Act. To justify its contrary conclusion—namely, that the Copyright Act is "compatible" with denying full copyright ownership to the author-spouse—the court first turned to the language of § 201(a): "[c]opyright in a work . . . vests initially in the author."[49] Noting that § 201(a) addresses only "vesting" of "copyright" and "never uses the words 'own' or 'ownership,'" the court concluded that it relates only "to immediate vesting of the copyright, and not to vesting of ownership."[50] Although the title to § 201(a) is "Initial *Ownership*," the court explained that "[t]he title of an act cannot control its words."[51] Finally, citing only *Black's Law Dictionary*, the court declared that the term "vest" in § 201(a) merely has a "temporal connotation" and no "substantive denotation of the nature and scope of the *ownership* of the property."[52] Therefore, con-

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46. *See* Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 541 (E.D. La. 1999) ("Article 2338 . . . literally conflicts with the [Copyright] Act."); *accord* Nevins, *supra* note 2, at 399; Patry, *supra* note 2, at 272; Polacheck, *supra* note 2, at 604, 607.

47. *Rodrigue*, 218 F.3d at 435, 439.

48. This regime also conflicts with Louisiana community property law in granting non-author spouses a property interest less than full co-ownership—a first for Louisiana family law.

49. *Rodrigue*, 218 F.3d at 435 (citing 17 U.S.C. § 201(a)).

50. *Id.* at 436.

51. *Id.* at 435 n.12 (emphasis added).

52. *Id.* at 436 n.13 (emphasis added).

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cluded the court, the Copyright Act does not mandate the vesting of full ownership in the author.[53]

This holding—that section 201(a) vests something less than full, unqualified "ownership" of copyright in the author—is flatly inconsistent with the plain language of § 201(a). Granted, the body of the statute does not employ the word "ownership." But if "ownership" is not what "vests" in authors under § 201(a), what does? And to the extent that there is any ambiguity at all on this point, the unambiguous title of the section—"Initial Ownership"—should have definitively resolved it.[54]

Moreover, the *Rodrigue* court's construction of § 201(a) is inconsistent with a prior decision of the United States Supreme Court interpreting the effect of that section. In *Community for Creative Non-Violence v. Reid*,[55] the Court squarely held that "copyright *ownership* 'vests initially in the author or authors of the work.'"[56] Other opinions of the Fifth Circuit,[57] and numerous opinions of other federal courts of appeals,[58] are in accord with *Reid*: all contradict the *Rodrigue* court's conclusion that § 201(a)

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53. *Rodrigue*, 218 F.3d at 436.

54. *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("The 'title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting Trainmen v. Baltimore & Ohio Ry. Co., 331 U.S. 519, 528-29 (1947)); Immigration & Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *see also* Denn v. Reid, 35 U.S. (10 Pet.) 524, 527 (1836) ("Where the language of the act is not clear, and is of doubtful construction; a court may well look at every part of the statute: at its title . . . .").

55. 490 U.S. 730 (1989).

56. *Id.* at 737 (emphasis added) (quoting 17 U.S.C. § 201(a) (1994)).

57. *See, e.g.*, Quintanilla v. Texas Television, Inc., 139 F.3d 494, 496 (5th Cir. 1998) ("copyright *ownership* 'vests initially in the author or authors of the work'") (emphasis added); Lulirama, Inc. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 876 (5th Cir. 1997) ("copyright *ownership* 'vests initially in the author or authors of the work'") (emphasis added).

58. *See, e.g.*, Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1034 (9th Cir. 2000) ("Ownership of a copyright vests initially in the author of the work . . . ."); Walthal v. Rusk, 172 F.3d 481, 484 (7th Cir. 1999) ("The ownership of copyright vests in the author . . . ."); *accord* Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529, 1530 (11th Cir. 1994); Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1488 n.12 (10th Cir. 1993); Aymes v. Bonelli, 980 F.2d 857, 860 (2d Cir. 1992); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 776 (3d Cir. 1991); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990).

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vests something other than full, unqualified copyright ownership in authors.

b. Vesting "Fruits" of Copyrighted Works in the Community

Because *Rodrigue* vests ownership of the "fruits" of an author's works in the community, it conflicts with the Copyright Act. To support its contrary conclusion—namely, that states are free to strip the economic "fruits" of copyrighted works from author-spouses—the *Rodrigue* court focused on the nature of the rights that vest in authors under the Copyright Act. In so doing, the court discounted § 201(a) as pertaining "*only* to 'copyright,'" which "is a finite bundle of *but* five fundamental rights, being the exclusive rights of reproduction, adaptation, publication, performance, and display."[59] According to the court, "[n]otably absent" from the "five rights is the right to enjoy the earnings and profits of the copyright."[60] Because Congress did not expressly say that the author has the exclusive right to *the revenues* generated by his copyrighted work, the *Rodrigue* court held that states are free to give those revenues to non-authors: "the preemptive effect of federal copyright law extends only to this explicitly-enumerated, lesser-included quintet."[61] In so holding, the court apparently presumed that the economic incentives created by copyright's exclusive rights can be separated readily from the rights themselves, and further, that this separation can be effected without harm to the interests which underlie federal copyright law.

This holding reflects a profound misunderstanding of copyright. Under federal copyright law, the copyright owner is entitled to the economic benefits produced by his work—regardless that Congress did not explicitly state this obvious proposition in the Copyright Act itself. Since antiquity, it has been a well-

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59. *See Rodrigue*, 218 F.3d at 435 (emphasis added); *see also id.* at 435-36, 440 (discussing the same).

60. *See id.* at 440.

61. *Id.* at 439. Despite the court's reference to a "quintet" of "five" exclusive rights, Congress some time ago amended the Copyright Act to add a sixth exclusive right. *See* 17 U.S.C. § 106(G) (Supp. V 1999) (providing that "the owner of copyright under this title has the exclusive rights to authorize . . . (G) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission").

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settled principle of general property law that property owners own that which their property produces.[62] More recently, this fundamental entitlement to the fruits of owned property was confirmed by the United States Supreme Court in decisions holding that states cannot take income produced by a person's money, or the right to derive income from land, without just compensation.[63]

As to copyright law in particular, since at least the sixth century A.D., it has been well-settled that copyright owners have the right to the fruits and revenues of their works. King Diarmed, in approximately 560 A.D., proclaimed, "[t]o every cow its calf," as his justification for awarding the author of a book the right to its fruits.[64] Since then, copyright owners have enjoyed the revenues of their works in civil law jurisdictions[65] and in this country alike. In fact, providing economic benefits to authors is not merely a right implicit in the Copyright Act, it is the avowed instrumental goal of American copyright law, as the Supreme Court has held: "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."[66] That copyright law exists

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62. *See, e.g.*, CARL SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW § 85, at 406-07 (E.E. Whitfield trans., 1886).

63. *See, e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156, 168 (1998) ("any interest that . . . accrue[s in IOLTA accounts] attaches as a property right incident to the ownership of the underlying principal"); Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984) ("curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking"); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property"); *see also* Williamson v. Williamson, 844 F.2d 1166, 1171 (5th Cir. 1988) ("the right to collect rents and profits is an incident of land ownership").

64. *See* A. BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 42 (1899).

65. AUBRY & RAU, DROIT CIVIL FRANÇAIS § 190, at 170 (7th ed. 1961) (La. St. Law Instit. Transl., 1966) "The exclusive rights of writers, artists or inventors to the monetary value of their works . . . is considered to be their ownership of this intellectual property." *Id.* at 170-71. "[T]he purpose [of the term ownership] is to express the existence of an exclusive right to enjoy and dispose of a value and draw from it the benefits it can yield." *Id.*

66. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Note that these economic incentives to authors exist to further the larger goal of making more works available to the public at large. *Id.* That copyright exists merely to provide economic incentives for authorship rather than to implement some natural-law notion that authors are inherently endowed with rights in their works has been evident since the early days of the Republic. *See* Letter, Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *in* THE COMPLETE JEFFERSON 1015 (Saul K. Padover ed., 1943).

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to assure "personal gain"[67] to authors recently was summarized as follows by Judge Pierre Leval, perhaps the most respected copyright-law jurist on the bench today: "The purpose for which the Copyright Acts were adopted was to expand human knowledge for the general good by giving creative persons—authors—exclusive control of the copying of their creations as a *financial incentive* to create."[68]

In short, the *Rodrigue* court's holding that states are free to take from an author half of the revenues generated by his copyrighted works so long as nominal copyright ownership remains with him, guts the very essence of copyright. "Owning" a cup of lemonade without the right to drink it is a hollow right: just as the essence of lemonade ownership lies in the drinking, the essence of copyright ownership lies in the enjoyment of revenues produced by the exclusive rights. When a state law denies the owner of a federal copyright the full benefits of his copyright, that state law should be preempted. Indeed, as the Supreme Court has held, "[w]hen state law touches upon the area of [the patent and copyright] statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, *or its benefits denied*' by the state law."[69] Here, both Louisiana community property law and the *Rodrigue* court's new regime of dismembered copyrights strip the economic benefits of federal copyrights from authors and vest

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67. Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create."); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) ("economic incentive . . . underlies the patent and copyright laws long enforced by this Court"); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972) ("constitutional and statutory protection accorded copyrights" exists to encourage "individual effort by personal gain").

68. Attia v. Soc'y of the N.Y. Hosp., 201 F.3d 50, 54 (2d Cir. 1999) (emphasis added) (Leval, J.); *see also* CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 65 (2d Cir. 1994) (Leval, J.) ("the objectives of copyright law, which are, as dictated by the Constitution, to promote the advancement of knowledge and learning by giving authors economic incentives (in the form of exclusive rights to their creations) to labor on creative, knowledge-enriching works").

69. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) (emphasis added). The Court further noted that federal intellectual-property law will preempt state law under these circumstances "even if the state law is enacted in the exercise of otherwise undoubted state power." *Id.* For a Fifth Circuit case with the same holding, see *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269 (5th Cir. 1988) ("When state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law.") (quoting *Stiffel*, 376 U.S. at 229).

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agement principles of state and federal law were a "compatible combination."[76]

The court's conclusion that the copyrights in issue are "registered movables" is simply wrong. First, as noted elsewhere in the opinion, "George obtained certificates of registration for some *but not all* of his paintings."[77] In fact, the vast majority of the copyrights at issue in the *Rodrigue* litigation were never registered and, therefore, could not have been "registered movables."

Second, as to the copyrights at issue that *were* registered with the Copyright Office, those copyrights do not fit the definition of a "registered movable." Under Louisiana law, a "registered movable" is one "for which the registration scheme provided by law is one that purports to protect those who rely on the ownership inferences that come from registration or issuance in one's name."[78] Under federal copyright law, however, registration is merely permissive and gives no protection whatsoever to those who rely on a registration certificate as conclusive proof of ownership.[79] Given that copyrights are not "registered movables" under Louisiana law, it would seem that a non-author spouse has the state law right to manage the author-spouse's copyrights—in spite of the attendant harm to federal copyright-law interests. That is not a "compatible combination."

d. Compelling the Author-Spouse to "Manage Prudently" Copyrights

The new "duty . . . to 'manage prudently' all [community] copyrights and derivatives thereof,"[80] that the *Rodrigue* court ap-

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76. *Rodrigue*, 218 F.3d at 439.

77. *Id.* at 433 (emphasis added); *see also* Rodrigue v. Rodrigue, 55 F. Supp. 2d at 534, 536 (E.D. La. 1999) ("George is an artist who created numerous paintings during and after the existence of the community, some of which George obtained certificates of copyright.").

78. KATHERINE S. SPAHT & LEE HARGRAVE, MATRIMONIAL REGIMES § 5.7, at 241 (2d ed. 1997).

79. *See, e.g.*, 17 U.S.C. § 408(a) (1994) ("The owner of copyright . . . *may* obtain registration of the copyright . . . . Such registration is not a condition of copyright protection.") (emphasis added).

80. *Rodrigue*, 218 F.3d at 443.

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them in the community.[70] A clearer conflict could hardly be imagined.

c. Permitting the Nonauthor-Spouse to Transfer the Other's Copyrights

The *Rodrigue* court incorrectly concluded that Louisiana law prohibits a nonauthor-spouse from transferring copyrights created by the author-spouse.[71] On the contrary, Louisiana community property law, if given effect, would permit one spouse to alienate or encumber copyrights created by the other.[72]

Federal law preempts state law not only when "it is impossible for a private party to comply with both state and federal law," but also when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[73] The *Rodrigue* court appeared to recognize the harm to federal interests that could result from permitting a nonauthor-spouse to transfer copyrights vested in the author-spouse. The specter of such transfers could harm the market for copyrighted works by creating unpredictability and inefficiency in copyright exchanges and licensing.[74] However, the court concluded that because copyrights fall into the category of "registered movables" under Louisiana law, the author-spouse has the exclusive authority to manage his copyrights.[75] Therefore, it found that the man-

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70. In past community property preemption cases, the Supreme Court has flatly rejected attempts to end-run federal law by giving an economic benefit (in lieu of co-ownership) to spouses whose state law right to share federally-created entitlements was preempted by federal law. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 588 (1979) (rejecting monetary award to spouse to compensate her for loss of right to husband's federal railroad retirement benefits). Numerous state courts have followed suit. *See, e.g.*, Johnson v. Johnson, 726 So. 2d 393, 395-96 (Fla. Dist. Ct. App. 1999) (prohibiting "the indirect division of benefits by awarding nonparticipating spouse other marital property to compensate for his or her theoretical share of the participating spouse's benefits"); *In re* Boyer, 538 N.W.2d 293, 294-95 (Iowa 1995) ("state courts are without power to directly or (by way of setoff) indirectly divide [federally preempted] benefits").

71. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 440-41 (5th Cir. 2000).

72. *See* LA. CIV. CODE ANN. art. 2346 (West 2000).

73. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2293 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also* Boggs v. Boggs, 520 U.S. 833, 844 (1997).

74. *See Rodrigue*, 218 F.3d at 440-41.

75. *Id.* at 438-41.

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parently[81] has imposed on author-spouses conflicts with federal copyright law. Declaring that this duty "is consistent with—not contrary to—the federal interest in encouraging authorship and exploitation of copyrights," the court predicted that this novel management obligation will act as a proverbial "stick" to encourage artistic creation.[82]

True, copyright law is all about giving authors an incentive to produce works of authorship. But for the first time in the history of American copyright law, this incentive is to come not solely from economic rewards,[83] but rather from "sticks." Given that the Copyright Act vests the owner with the "exclusive" right to decide when, how, and under what circumstances to "reproduce the copyrighted work," to "prepare derivative works based on the copyrighted work," and to "distribute copies" of the work, giving an author's ex-spouse a *state law right* to compel him to exercise one or more rights which, under *federal law*, are "exclusively" his to exercise, conflicts with sections 106 and 201(a) of the Copyright Act.[84]

III. A LOOK AHEAD: THE POST-*RODRIGUE* PARTITION PROCEEDING

The *Rodrigue* court's problematic preemption analysis has left us with a new regime of dismembered copyrights under which the *fructus* of works created during an author's marriage are community property, while the *usus* and *abusus* of such copyrights remain his separate property.[85] Perhaps not surprisingly,

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81. The opinion sends conflicting messages regarding whether the court actually imposed such a duty to "manage prudently," or rather, reserved that issue for resolution "another day."

82. *Rodrigue*, 218 F.3d at 442.

83. To be fair, the court acknowledged that the author still has an economic incentive to produce derivative works based on copyrights created during the community. To quote the court, the author, after sharing with his spouse, will get a "half-a-loaf" as a "carrot." *Id.*

84. In addition, if the non-author spouse indeed has the right to compel the other to create works of authorship, this right would appear contrary to the civilian maxim *nemo praecise cogi potest ad factum* under which "no one can be physically coerced to do a thing." *See* 2 SAUL LITVINOFF, OBLIGATIONS § 154 (1975); *see also* Levine v. Michel, 35 La. Ann. 1121, 1128 (La. 1883); William Jaynes, Note, *Obligations—Specific Performance of Obligations to Do or Not to Do In Louisiana*, 57 TUL. L. REV. 1577 (1983) (discussing specific performance). Thanks to Raul Esquivel for this point.

85. *Rodrigue*, 218 F.3d at 437.

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this odd new allocation of copyright interests is plagued with practical and conceptual problems that threaten to undermine the goals of both federal copyright law and state community property law. This Part considers these problems.

In most cases, the legal regime of community property is terminated either by the death of a spouse, or by a judgment of divorce.[86] Upon termination by divorce, each spouse "owns an undivided one-half interest in former community property and its fruits and products."[87] From then until the former community property is partitioned, the ex-spouses share equally the fruits and products of that property, after deduction of the costs of production.[88] Former spouses can partition former community property either extrajudicially by agreement, or judicially through a partition proceeding.[89] In a judicial proceeding, the partitioning court must: (1) identify all community assets and liabilities, (2) value those assets and liabilities as of the time of trial, and (3) allocate them "so that each spouse receives property of an equal net value."[90]

> The author-spouse alone holds the elements of *usus* and *abusus*—a combination that comprises the exclusive rights to possess, use, transfer, alienate, and encumber the copyright as he sees fit—free of any management, consent, or participation of the non-author spouse. . . . But the community during its existence (and the former spouses or other successors after its termination) holds the element of *fructus*.

Rodrigue, 218 F.3d at 437.

86. *See* LA. CIV. CODE ANN. art. 2356 (West 1985). In addition, the legal regime terminates by judgment of declaration of death of a spouse, by declaration of the nullity of a relatively null marriage, by judgment of separation of property, and by a matrimonial agreement that terminates the community. *Id.* A judgment of divorce terminates the legal regime "retroactively to the date of filing of the petition in the action in which the judgment of divorce is rendered." LA. CIV. CODE ANN. art. 159 (West 1999).

87. *See* LA. CIV. CODE ANN. art. 2369.2 (West Supp. 2001); *see also* LA. CIV. CODE ANN. art. 2369.1 (West Supp. 2001) ("After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law or by juridical act.").

88. *See* LA. CIV. CODE ANN. art. 2369.2 cmt. d (West Supp. 2001); *see also* LA. CIV. CODE ANN. art. 798 (West Supp. 2001) (setting forth the rights of co-owners to the fruits and products of a thing held in indivision).

89. *See* LA. CIV. CODE ANN. art. 809 (West Supp. 2001) ("The mode of partition may be determined by agreement of all the co-owners. In the absence of such an agreement, a co-owner may demand judicial partition."); *see also id.* art. 2369.1 (West Supp. 2001) ("After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law or by juridical act").

90. *See* LA. REV. STAT. ANN. § 9:2801(1) (West 1997) (identifying community assets and liabilities); *id.* § 9:2801(2) & (4)(a) (valuing community assets and liabilities); *id.* §

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Although this three-step judicial partition framework is reasonably straightforward, how it will accommodate a post-*Rodrigue* partition of the copyright *fructus* is uncertain. What is certain, however, is that a court partitioning copyright fruits will face difficulties at each step along the way.

A. Step One: Identifying the Fruits of Copyrights Created During the Legal Regime

The first step a court will face in partitioning the copyright *fructus* will be distinguishing the community *fructus* from non-fruit revenues, which are owned separately by the author.[91] To do so, the partitioning court first will have to identify revenues generated by works created during the legal regime. Then, the court will have to distill from post-community revenues only those revenues constituting "fruits."

1. Excluding Revenues Generated by Wholly Original Post-Community Works

In partitioning the *fructus* of copyrighted works created during the legal regime, the partitioning court will have to assure that it does not partition revenues generated by wholly-original post-community works. In the *Rodrigue* case, for example, the partitioning court must *not* partition the fruits of any wholly-original works created by George after his divorce. Because such creations are his separate property,[92] they are not subject to partition.[93] In contrast, the fruits of copies and adaptations of pre-

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9:2801(4)(b) (dividing community assets and liabilities); LA. REV. STAT. ANN. § 9:2801(4)(c)-(e) (allocating community assets and liabilities).

91. *See* LA. REV. STAT. ANN. § 9:2801(2) ("At the trial of the traverses, the court shall determine the community assets and liabilities.").

92. *See, e.g.*, SPAHT & HARGRAVE, *supra* note 78, § 3.4, at 56 ("[S]pouses share with each other the proceeds of their labor while they are living together and supporting and working with each other. They do not share the products from labor that occurs before or afterwards."); *see also* LA. CIV. CODE ANN. art. 2344 (West 1985) ("damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse").

93. *See* LA. REV. STAT. ANN. § 9:2801(4) (West 1997) (providing that the court partitions only "the community," not separate assets and liabilities).

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termination works *are* subject to partition.[94] Therefore, a post-*Rodrigue* partitioning court must distinguish post-community works that are wholly-original from those that are copied from works created during the legal regime.

Doing so will be no easy task. Proof that the pre-divorce and post-divorce works in issue happen to be very similar simply is not dispositive. Indeed, in the analogous context of infringement, the mere similarity of two works does not mandate that the trier of fact find that one was copied from the other.[95] Indeed, even if one painting happens to be identical to an earlier one, the later work can nonetheless be "wholly original" rather than "derivative" if it is the product of independent creation by the author.[96] Thus, whether a particular work is "derivative" or "wholly original" turns solely on whether its author looked to an earlier-created work to create the later one.

Applying these unassailable principles to the *Rodrigue* case, George presented evidence to the trial court that his post-divorce *Blue Dog* works, although similar to some of his preexisting works, were derived from his mind's eye rather than from preexisting works.[97] The similarity of these works—even if striking—may be explained by the fact that the same artist, namely George, created them in the same style, just as many of Monet's *Haystack* works appear strikingly similar because they were created by the same artist in the same style. Therefore, the *Rodrigue* trial court must determine on remand which, if any, of George's post-divorce

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94. Rodrigue v. Rodrigue, 218 F.3d 432, 442 (5th Cir. 2000) ("works created after the termination of the community but based on pre-divorce works" are "subject to the rules of community property law").

95. *See* Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 68 (3d Cir. 1978); *accord* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 414 (7th Cir. 1992).

96. *See, e.g.*, Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775 (2d Cir. 1994); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (Frank, J.) (novelty is not a prerequisite to copyright protection); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53 (2d Cir. 1936) (Hand, J.) ("it makes no difference how far the [copyrighted work] was anticipated by works in the public demesne which the plaintiffs did not use"); *see also* NIMMER & NIMMER, *supra* note 2, § 13.01[B], at 13-13.

97. *See* Record on Appeal at 1474, Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir. 2001) (No. 99-30334). George also submitted evidence from an expert, Dr. Malt, who stated as follows: "I disagree . . . with Veronica Rodrigue's conclusion that works which contain the image of the *Blue Dog* are derivative. Use of the same or similar theme over and over does not imply non-originality. Every individually created object B regardless of its 'same theme' B is original and not derivative." *See id.* at 1498 (citing Malt Supp. Report at 2).

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works were copied from pre-divorce works. After all, only the fruits of such copied works are to be included in the judicial partition proceeding. In making this determination, the district court must remain cognizant that George's mere reduction of the first *Blue Dog* to a tangible medium of expression during his marriage did not somehow "capture the soul" of that image such that all similar subsequent works are ipso facto derivative.[98] Rather, the district court must evaluate each post-community work created by George to determine whether he looked to a pre-divorce work to create it. If so, then the court should find that work to be "derivative." If not—that is, if the court finds that the work originated from George's "mind's eye" rather than from an earlier work—then the court should find that work to be wholly original and not derivative.

2. Excluding Revenues Generated by Factors Other Than Copyrights

Given that only the fruits of copyrights created during the community are subject to partition, partitioning courts will have to eliminate all revenues that, although related to the author's creative endeavors, are generated by factors other than the relevant copyrighted works.[99] Such factors include revenues generated by: (1) the skill and reputation of the author,[100] (2) the post-termination contributions of expression, labor and capital by third parties to create and to market the derivative work, (3) the value of the tangible artifact embodying the derivative work as an artifact,[101] and (4) market factors.[102] In addition, the court will have to

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98. If taken, this approach to copyright would be reminiscent of the (unfounded?) belief of many tribesman of the Masai in East Africa that "cameras capture their souls." *See* John Flinn, *Picture Imperfect: Masai, Tourists Set Dignity Aside to Capture Kodak Moments*, FORT WORTH STAR-TELEGRAM, June 21, 1998, at 7. Ironically, many Masai nonetheless "have transformed themselves into willing photo opportunities to raise some quick cash." *Id.*

99. *See* Walker v. Forbes, Inc., 28 F.3d 409, 413 (4th Cir. 1994) (citing Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 395 (1940); Rogers v. Koons, 960 F.2d 301, 313 (2d Cir. 1992)).

100. Revenues attributable to one's skill, reputation, and future earning prospects "would seem to be more an extrapatrimonial personal attribute not subject to sharing," and as such must be excluded from partition. *See* SPAHT & HARGRAVE, *supra* note 78, § 2.8, at 39.

101. *See* Ciolino, *supra* note 1, at 170.

102. For a discussion of the difficulties associated with deriving and apportioning net profits in the analogous context of copyright infringement, see Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 EMORY L.J. 1, 17-25 (1999); Ciolino, *supra* note 1, at 169-70.

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carve out all revenues attributable to the author's post-community labor and creative efforts.[103]

Therefore, in the *Rodrigue* matter the partitioning court will have to identify and exclude from partition any revenue that was not generated by a copyright—even though that revenue may be related to a work which embodies a copyrighted work. Take, for example, the revenue generated by the sale of a particular *Blue Dog* painting. If George copied the *Blue Dog* image embodied in the painting from a pre-divorce work, then Veronica would be entitled to one-half of any "fruits" of that work. However, any revenue obtained from that sale which is attributable to factors other than the copyright in the *Blue Dog* image must be excluded. For example, revenue attributable to George's post-community labor must be excluded. Revenue attributable to post-community expression (such as the background of the painting) must be excluded. Revenue attributable to the value of the physical artwork qua artifact must be excluded.[104] At the end of this exclusionary process, the only revenues remaining will be those which are directly attributable to the copyrighted work. Nevertheless, considering that these remaining revenues comprise both fruits and nonfruits, additional distillation is required.

3. Excluding Nonfruit Revenues

After culling out the revenues directly attributable to copyrights created during the community, the partitioning court then will have to evaluate the nature of those revenues. Because only the "fruits" of such works are community property,[105] the court will have to exclude from partition all revenues that do not constitute "fruits."

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103. *See* SPAHT & HARGRAVE, *supra* note 78, § 3.4, at 56 ("The rule is consistent with the basic principle underlying the community, that is, the spouses share with each other the proceeds of their labor while they are living together and supporting and working with each other. They do not share the products from labor that occurs before or afterwards.").

104. This value cannot be underestimated. The sale of an unsigned, mass-produced poster containing a *Blue Dog* image generates significantly less revenue than the sale of a signed, touched-by-the-author, oil painting.

105. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 437 (5th Cir. 2000) ("the community during its existence (and the former spouses or other successors after its termination) holds the element of *fructus*").

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Under the Louisiana Civil Code, a "fruit" is a thing that is "produced by or derived from another thing without diminution of its substance."[106] The Code classifies fruits as "natural" when they consist of "products of the earth or of animals," and "civil" when they consist of "revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions."[107] Considering this definition of "fruits," what revenues received through authorship are "fruits" subject to the community property regime?

First, "earnings" are not fruits, and, as a result, must be excluded from partition. As discussed previously,[108] the partitioning court must excluded any revenues that are attributable to the author's post-community efforts. In determining whether such revenues constitute "fruits," courts typically consider the extent to which labor and effort contributed to the production of the revenues in question.[109] Revenues constituting a relatively passive return on capital typically are considered "fruits," while revenues generated principally by labor and effort are not.[110] Unfortu-

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106. LA. CIV. CODE ANN. art. 551 (West 1980).

107. *Id.*

108. *See supra* Part III.A.2.

109. Under former article 545 of the Louisiana Civil Code of 1870, natural fruits produced with the assistance of human effort were considered "fruits of industry," while natural fruits produced spontaneously by the earth were considered "natural fruits." *See* LA. CIV. CODE ANN. art. 551 cmt. e (West 1980); *see also* 1 PLANIOL & RIPERT, *supra* note 7, pt. 2, no. 2781, at 644-45 (noting that the French Civil Code divides "fruits in kind," but not civil fruits, into "natural fruits and industrial fruits. The former are those that come without cultivation. The latter are those that require man's labor."). The Louisiana Civil Code's present definition of "natural fruits" "combines the categories of natural fruits and fruits of industry [from the 1870 Code] into a single category, but it does not change the law." LA. CIV. CODE ANN. 551 cmt. f (West 1980).

110. *See, e.g.*, Gautreau v. Gautreau, 697 So. 2d 1339, 1349 (La. App. 3d Cir. 1997) (holding that income that "is not derived by virtue of . . . ownership interest . . . but rather is a result of . . . 'effort, skill, or industry,'" is not a fruit); Paxton v. Bramlette, 228 So. 2d 161, 163 (La. App. 3d Cir. 1969). *See generally* SPAHT & HARGRAVE, *supra* note 78, § 3.8, at 64-68; Clarence J. Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 24-25 (1959) ("fruits" constitute "income from capital alone and from capital plus relatively little labour"); Howard W. L'Enfant, Jr., Comment, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 104 (1964) ("if the revenue received was the result of substantial capital with relatively little labor, it would be a fruit").

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nately, many, if not most, sums of money are produced through *both* the use of capital and the expenditure of labor.[111]

Second, revenues that are merely incidental to the author's "use" of the relevant copyright are not "fruits," and, as a result, must be excluded from partition. This is so because under *Rodrigue* the author is the sole owner of the *usus* of such copyrights.[112]

Whether revenues from authorship constitute "fruits" turns on the nature and source of that revenue. Authorship revenues fall into three categories. As discussed below, only one category constitutes copyright fruits.

a. Revenues Derived From Copyright Transfers

A copyright owner can generate revenues through transfers of copyright ownership. Under the Copyright Act, a "transfer of copyright ownership" includes: "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect."[113]

For example, a fiction writer who grants a publisher the *exclusive* right to publish and distribute his novel for either a sum certain or for a payment of periodic royalties has generated revenues through the transfer of his copyright in a literary work. The revenues produced by such a transfer of ownership are clearly not the "fruits" of the author's copyright, but rather constitute the "products" of that copyright. This is so because a copyright "trans-

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111. Because characterizing such revenues dichotomously as either "fruits" or "earnings" is difficult, some equitable proration of revenues is probably appropriate. *See* SPAHT & HARGRAVE, *supra* note 78, § 3.8, at 68; *see also Gautreau*, 697 So. 2d at 1349 ("[I]t is quite common for many investments to combine one spouse's separate capital with community labor to produce fruits. In such an instance proration is necessary and an often less than precise allocation is required.") (quoting Kyson v. Kyson, 596 So. 2d 1308, 1311 (La. App. 2d Cir. 1991)).

112. Rodrigue v. Rodrigue, 218 F.3d 432, 437 (5th Cir. 2000) ("The author-spouse alone holds the elements of *usus* and *abusus* . . . free of any management, consent, or participation of the non-author spouse.").

113. 17 U.S.C. § 101 (1994) (defining "transfer of copyright ownership"). Any transfer of ownership, other than by operation of law, is "not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." *Id.* § 204(a).

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fer" diminishes the substance of the author's rights in the work.[114] Indeed, the result of a "transfer of ownership" is that the transferee is given the ability to exercise the right or rights transferred *to the exclusion of the owner* (and all others). Under the regime of copyright ownership established in *Rodrigue*, revenues generated through such transfers of ownership belong to the author as the owner of the *abusus* of copyright.[115] Applied to the *Rodrigue* case, the partitioning court must exclude from partition all revenues generated by George's *transfers* of copyrights.

b. Revenues Derived From the Sale of Tangible Copies

A copyright owner also can generate revenue through "using" his copyrights. A copyright owner "uses" a copyright when he exercises the exclusive rights enumerated in § 106 of the Copyright Act, including, the rights to reproduce, adapt, distribute, perform and display.[116] For example, a copyright owner "uses" his copyright in a song when he performs the work publicly or burns a copy onto a compact disc. Likewise, a visual artist such as George "uses" a copyright in a pictorial or graphic work when he produces a copy of the work in a print or painting, or when he displays the work publicly.

Such uses can, but need not, generate revenues. For example, if the copyright owner chooses to sell copies of the work, or to charge fees to the public to see performances or displays of the work, he can generate revenues that are incidental to his "use" of the copyright. Under the regime of copyright ownership established in *Rodrigue*, such nonfruit revenues incidental to "use" belong to the author as the sole possessor of the *usus* of copyright.[117] For example, any revenues obtained by George from the sale of

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114. *See* LA. CIV. CODE ANN. art. 551 (West 1980) ("Fruits are things that are produced by or derived from another thing *without diminution of its substance.*") (emphasis added).

115. *Rodrigue*, 218 F.3d at 437 ("The author-spouse alone holds the elements of *usus* and *abusus*—a combination that comprises the exclusive rights to possess, use, transfer, alienate, and encumber the copyright as he sees fit—free of any management, consent, or participation of the non-author spouse.").

116. *See* 17 U.S.C. § 106 (1994).

117. *Rodrigue*, 218 F.3d at 437 ("The author-spouse alone holds the elements of *usus* and *abusus*—a combination that comprises the exclusive rights to possess, use, transfer, alienate, and encumber the copyright as he sees fit—free of any management, consent, or participation of the non-author spouse.").

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post-divorce tangible *copies* of his works, including tangible copies of pre-divorce *Blue Dog* works, are merely incidental to his exercise of the *usus* of the copyright.

That such use-related revenues are not "fruits" of the copyright is confirmed by the Copyright Act. Under the Act, the sale of a "material object . . . in which a work is fixed"[118] conveys no rights whatsoever "in the copyrighted work embodied in the object."[119] Thus, the sale of a painting of a *Blue Dog*, even if copied from a pre-divorce work, does not transfer or license any copyrights embodied in the painting. Considering this, any revenues generated from George's sale of a *copy* of a copyrighted work reflects only the value of the *copy* sold, and not value of the copyright which, of course, forms no part of the transaction.[120]

That such use-related revenues are not "fruits" of a copyright is likewise confirmed by analogy to more familiar corporeal things. Consider the distinction between the "fruits" of a horse and revenues garnered incidental to its "use." If property rights in a hypothetical horse were apportioned in the manner announced for copyrights in *Rodrigue*, namely, *usus* and *abusus* in one person (*U-A*), and *fructus* in another (*F*), then horse-related fruits and revenues would be apportioned as follows. The foals whelped by the horse would constitute the "natural fruits" of the horse,[121] and clearly would belong to *F* as holder of the *fructus*. Rental payments received from horseback riders would constitute

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118. 17 U.S.C. § 101 (1994) (defining the term "[c]opies").

119. *Id.* § 202.

> Ownership of a copyright, or any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of any material object, including the copy or phonorecord in which the work is first fixed, does not itself convey any rights in the copyrighted work embodied in the object.

Id.

120. Granted, more valuable *copyrights* will undoubtedly permit an artist to create more valuable tangible *copies*. However, if the artist has the right to use the copyright in question—either because he has received a license from the copyright owner or the *usus* from the Fifth Circuit—he has no further obligation to account to anyone for revenues incidental to his rightful use.

121. *See* LA. CIV. CODE ANN. art. 551 (West 1980) ("Natural fruits are products of the earth or of animals.").

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the "civil fruits" of the horse,[122] and likewise would belong to *F* as holder of the *fructus*. In contrast, monies paid to *A-U* to deliver a letter by stagecoach to a neighboring parish would not be considered "fruits" of the horse. Rather, such monies would constitute revenues incidental to *A-U*'s use of the horse.[123] As such they would belong to *A-U* as the holder of the *usus*, rather than to *F* as holder of the *fructus*.

A person with the right of "use," such as the hypothetical letter carrier above, or the author-spouse under the *Rodrigue* regime of copyright ownership, has no obligation whatsoever to account to anyone for his use of the thing in question. Indeed, his "real right of enjoyment"[124] consists of the right to use the thing gratuitously.[125] If it were otherwise, that is, if the author-spouse with the *usus* of a copyright were required to account to the community for his use of the copyrighted work, then the utility of the copyright would be exhausted and the community would in fact possess the usufruct of the copyright rather than *fructus* alone.[126] For these reasons, an author-spouse, such as George, will have no obligation to account to the community for any revenues incidental to his "use" of the copyright, including revenues attributable to sales of material objects embodying the copyrighted work.

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122. LA. CIV. CODE ANN. art. 551 ("Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions.").

123. The French treatise writers Aubry and Rau have recognized as much in distinguishing the *profits* generated through the *use* of a factory from the *rents* paid by another for the right to occupy it: "We speak of rent (*loyer*) in relation to factories and shops, because the profits a person draws from exploiting a factory are not natural profits (*fruits*), but the result of his work and the use of his capital." *See* AUBRY & RAU, *supra* note 65, § 192, at 186 n.35.

124. YIANNOPOULOS, *supra* note 7, § 237.

125. *See, e.g.*, Arnauld v. Delachiase, 4 La. Ann. 109, 109-10 (La. 1849) (the "right of use, as defined by the Code, is that given to any one to make a gratuitous use of a thing belonging to another"); Wagner v. Alford, 741 So. 2d 884, 888 (La. App. 3d Cir. 1999) (noting that a right-of-use servitude is not conferred by instrument premising right to use on payment of fee). *See generally* YIANNOPOULOS, *supra* note 7, § 237 ("right of use" under the 1870 Civil Code was the right to "make a gratuitous use of a thing belonging to another").

126. *See* LA. CIV. CODE ANN. art. 639 cmt. b (West 1980) ("The personal servitude of right of use confers advantages less than full enjoyment of an estate. . . . If a juridical act confers advantages that exhaust the utility of the property, it establishes a usufruct rather than a right of use."). *See generally* YIANNOPOULOS, *supra* note 7, § 232 (as to the substantially similar personal servitude of habitation, if the "right styled 'habitation' exhausts the utility of a house, it is a usufruct").

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c. Revenues Derived from Nonexclusive Licensing

Finally, a copyright owner can generate revenues through the granting of nonexclusive licenses to third parties. A nonexclusive license is distinct from a "transfer" of copyright ownership because such a license grants the licensee only the nonexclusive ability to exercise the licensed rights, but not the ability to exclude others from doing so.[127] From a management standpoint, *Rodrigue* permits author-spouses to grant such nonexclusive licenses and to thereby generate revenues.[128]

From an ownership standpoint, however, such revenues will belong to the community to the extent that they are "fruits" of copyrights created during the legal regime.[129] Thus, for example, if George Rodrigue has generated passive income through granting third parties the nonexclusive right to reproduce works created during the community, then those passive revenues clearly constitute "fruits" of the copyrights in question and belong to the community. But if the generation of any nonexclusive licensing revenue requires labor or effort on the part of George, then those

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127. *See, e.g.*, Kennedy v. Nat'l Juvenile Det. Ctr., 187 F.3d 690, 694 (7th Cir. 1999) ("[T]he owner of a copyright may permit another to merely use the copyrighted material without transferring ownership in the copyright. This is called a nonexclusive license."); I.A.E., Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996) ("[I]n the case of an implied nonexclusive license, the licensor-creator of the work . . . does not transfer ownership of the copyright to the licensee. The copyright owner simply permits the use of a copyrighted work in a particular manner."); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 778 (3d Cir. 1991) ("Nonexclusive license does not amount to a 'transfer' of ownership."); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990).

128. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 441 (5th Cir. 2000) ("the author-spouse has the exclusive right to manage and control the copyright"); *see also id.* at 437 (the "author-spouse alone holds the element[] of *abusus*"). Note that if the author-spouse held only the *usus* of the copyright without the *abusus*, he would have no right to grant nonexclusive licenses to others. *See, e.g.*, YIANNOPOULOS, *supra* note 7, § 237 (the right of use under the 1870 Civil Code was "nontransferable"); Shael Herman, Essay, *Utilitas Ecclesiae: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239, 2245 (1996) ("Like the ancient clerical *use*, a *use* under Louisiana's modern formulation confers upon a *usuarius* a purely personal, nontransferable right."). Likewise, under Roman law, a person with *usus* had no right "to transfer his rights to another in any way." *See* W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 409-10 (4th ed. 1903); *see also* JORGE R. COQUIA, PRINCIPLES OF ROMAN LAW 71 (1979) (observing that the usuary "could not, unlike the usufructuary, let, sell, or give the exercise of his right"); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 206 (1976) (noting that the usuary "could not let the premises").

129. *See Rodrigue*, 218 F.3d at 437 ("the community during its existence (and the former spouses or other successors after its termination) holds the element of *fructus*"); *see also supra* Part III.A.

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revenues would constitute both "fruits" and "earnings." Such "mixed" revenues must be prorated between the community and the author.[130] Given that an ex-spouse's post-community earnings are unquestionably his separate property,[131] such proration is clearly fair.[132] Moreover, it is consistent with the principle that the costs of producing co-owned fruits—including, arguably, the cost of a co-owner's labor[133]—must be deducted from gross fruits prior to sharing.

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130. *See* SPAHT & HARGRAVE, *supra* note 78, § 3.8, at 68; Gautreau v. Gautreau, 697 So. 2d 1339, 1349 (La. App. 3d Cir. 1997) ("It is quite common for many investments to combine one spouse's separate capital with community labor to produce fruits. In such instance proration is necessary and an often less than precise allocation is required.").

131. *See, e.g.*, SPAHT & HARGRAVE, *supra* note 78, § 3.4, at 56 ("[S]pouses share with each other the proceeds of their labor while they are living together and supporting and working with each other. They do not share the products from labor that occurs before or afterwards."); *see also* LA. CIV. CODE ANN. art. 2344 (West 1980) ("the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse").

132. It would also be consistent with opinions classifying as "separate property" any pension rights earned through post-community "personal effort and achievement." *See* Hare v. Hodgins, 586 So. 2d 118, 128 (La. 1991); *accord* Blanchard v. Blanchard, 731 So. 2d 175, 179-82 (La. 1999); Hannan v. Hannan, 761 So. 2d 700, 704-05 (La. App. 1st Cir. 2000); Schlosser v. Behan, 722 So. 2d 1129, 1129-31 (La. App. 5th Cir. 1998).

133. There exists authority suggesting that a co-owner should *not* be permitted to deduct the value of any post-community labor expended by him to produce co-owned fruits. Particularly, comment c to Civil Code article 798 states that "[a] co-owner does not have the right to claim compensation for his own labor or services." *See* LA. CIV. CODE ANN. art. 798, cmt. c (West Supp. 2001); *see also id.* art. 2369.2 cmt. d ("the producing spouse co-owner may not claim reimbursement for the value of his services or labor in producing fruits"); Poirier v. Poirier, 664 So. 2d 532 (La. App. 3d Cir. 1995). *See generally* SPAHT & HARGRAVE, *supra* note 78, § 7.20, at 434 ("Costs of production do not include the value of the producing co-owner's services or labor in producing the fruits or products."). Nevertheless, more persuasive authority suggests otherwise. Most significantly, the text of article 798 clearly does not exclude "labor" from the "costs of production" that are deductible. *See* LA. CIV. CODE ANN. art. 798. In addition, several reported decisions have in fact compensated productive spouse co-owners for the value of their labor. *See* Donnell v. Donnell, 567 So. 2d 1143, 1150 (La. App. 2d Cir. 1990); Dugas v. Dugas, 544 So. 2d 111, 113 (La. App. 3d Cir. 1989). *See generally* SPAHT & HARGRAVE, *supra* note 78, § 7.20, at 434-35; Symeon C. Symenoides & Nicole D. Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 100-02 (1993). In any event, even if the value of the co-owner is not deducted pursuant to article 798, the co-owner nonetheless "may be entitled to such compensation under the law of unjust enrichment." *See* LA. CIV. CODE ANN. art. 798, cmt. d.

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B. Step Two: Valuing the *Fructus* of Copyrights Created During Marriage

The second step in any post-*Rodrigue* copyright partition proceeding will be that of valuing, as of the time of trial, the *fructus* of any copyrights created during marriage.[134] This step will be nettlesome for at least one reason: valuing that *fructus* as of the time of trial presents the risk of improperly appropriating for the community increases in the value of the author's separately-owned *abusus*.

A copyright *fructus* has value to the extent that the underlying copyright can produce a stream of nonexclusive licensing[135] revenue. The larger the size and length of any such revenue stream, the greater the present value of the *fructus*. The stream of licensing revenue from a popular and enduring work will, of course, be greater than the stream from a less popular more transient work. After all, a person seeking a nonexclusive license to, for example, reproduce a graphic work on a T-shirt will pay more for a license to reproduce a valuable work than for a license to imprint a work that is less valuable. Considering this, the present value of the *fructus* of a copyright is a function of the value of the underlying copyright.

As a naked owner of sorts, the post-*Rodrigue* author-spouse holding the copyright *abusus* is entitled to reap the benefits of increases in the value of that *abusus*. However, valuing the copyright *fructus* as of the time of partition, as Louisiana law clearly requires,[136] imperils the author's right to reap the full[137] benefits of any post-termination increases in the value of his *abusus*. For example, the value of each of George Rodrigue's pre-divorce copy-

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134. *See* LA. REV. STAT. ANN. § 9:2801(4)(a) (West 1997). Note that the *Rodrigue* court opined that "it is for the state court that has jurisdiction over judicial partition and settlement of the Rodrigue community to determine . . . the proper method for establishing the value of Veronica's share" of the copyright *fructus*. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 443 (5th Cir. 2000).

135. As discussed above, the only "fruits" of a copyrighted work are revenues derived from nonexclusive licensing. *See supra* Part III.A.3.

136. *See* LA. REV. STAT. ANN. § 9:2801(4)(a).

137. Of course, the author will be able to reap *some* of the benefits of any increase in the value of the *abusus* through increased transfer-related and use-related revenues. *See supra* Parts III.A.1-III.A.2.

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righted works has undoubtedly increased markedly since his divorce in the early 1990s. Correspondingly, the value of the *fructus* of each of those copyrights has increased as well. To give the community the benefit of this increase in value would give Veronica the benefit of the capital appreciation of George's copyright *abusus*. Considering this problem, a court valuing the community *fructus* should attempt to carve out any portion of the *fructus* value that is attributable to the capital appreciation of the *abusus* after termination of the legal regime—a difficult task indeed.[138] Perhaps the only practical way to do so will be to value the *fructus* as of termination of the regime.

C. Step Three: Allocating the Community Copyright *Fructus*

The third and final step in the post-*Rodrigue* copyright partition proceeding will be that of allocating to one spouse or the other the *fructus* of all copyrights created during the marriage, and if necessary, equalizing the net distribution between the spouses.[139] Presumably, partitioning courts will allocate the *fructus* "in its entirety to one of the spouses."[140] As to *which* spouse should receive the *fructus*, federal law arguably prohibits its allocation to the nonauthor spouse unless the author has previously transferred the work. Indeed, § 201(e) of the Copyright Act provides that no "action by any governmental body or other official or organization purporting to . . . transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect" if the copyright "has not previously been transferred voluntarily by that individual author."[141] If this provision applies to the copyright

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138. Such problems do not arise in typical partition proceedings because the former spouses co-own outright all former community property. *See* LA. CIV. CODE ANN. art. 2369.2 (West Supp. 2001). That is, they co-own not just the *fructus*, as is the case for copyrights, but also the *abusus* and *usus*. As co-owners of the *abusus*, they are clearly entitled to share the benefits of any capital appreciation following termination of the legal regime. *See* SPAHT & HARGRAVE, *supra* note 78, § 7.27, at 472 ("Delaying the valuation date is consistent with the legal status of former spouses as co-owners of property to be partitioned.").

139. *See* LA. REV. STAT. ANN. § 9:2801(4)(b-e) (West 1997).

140. *Id.* § 9:2801(4)(c).

141. 17 U.S.C. § 201(e) (1994).

> Involuntary transfer. When an individual author's ownership of a copyright . . . has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expro-

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fructus, then the partitioning court will be permitted to allocate the *fructus* to the nonauthor spouse only if the copyright has "previously been transferred voluntarily" by the author-spouse.

Irrespective of this federal-law limitation on the partitioning court, in most cases it will be preferable for the partitioning court to allocate the *fructus* of each copyright to the author so that it can be united with the *abusus* and *usus* already held by him.[142] After valuing and allocating each community copyright *fructus*—and all other community property—the court then must order the payment of "an equalizing sum of money" if the net distribution of assets and liabilities is unequal.[143]

IV. CONCLUSION

The Fifth Circuit in *Rodrigue v. Rodrigue* undertook a commendable yet formidable task: to "reconcile the respective rights and obligations of authors under federal copyright law and their spouses under Louisiana community property law."[144] As a matter of federal preemption law, the court failed. It failed not for want of effort or creativity. Rather, it failed because the rights of authors and spouses to copyrighted works are irreconcilable under our federal statutory and constitutional framework. It failed, in short, because neither the Constitution nor the Copyright Act permit the vesting of copyright ownership, or any of its constituent rights, in non-author spouses.

Ironically, the court also failed as a matter of state community property law. By vesting only the copyright *fructus* in the community without the *usus* and *abusus*, the court denied the

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priate, transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect under this title, except as provided under title 11.

17 U.S.C. § 201(e). Title 11 relates to bankruptcy proceedings. *See* 11 U.S.C. §§ 1-1330 (1994).

142. After all, the author-spouse in most cases will be the party best able to exploit the copyright, including its *fructus*, through putting it to its highest and best use. *Cf.* Razzaghe-Ashrafi v. Razzaghe-Ashrafi, 558 So. 2d 1368, 1371-72 (La. App. 3d Cir. 1990) (allocating stock of medical corporation to doctor husband); Ziegler v. Ziegler, 537 So. 2d 1207, 1211-14 (La. App. 4th Cir. 1989) (allocating limited partnership interests to general partner husband).

143. *See* LA. REV. STAT. ANN. § 9:2801(4)(c) (West 1997).

144. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 433 (5th Cir. 2000).

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community the bulk of the economic benefits generated by copyrights—namely, economic benefits flowing from copyright use (*usus*) and transfer (*abusus*). Of course, the court easily could have captured these economic benefits for the community simply by declaring all copyrights to be co-owned community property with exclusive management authority in the author-spouse.[145] Nevertheless, it chose not to do so.[146] By fracturing ownership and allocating the dismembered parts the way it did, the court took away much of what it had hoped to give the non-author spouse.

The problematic and ineffectual rule announced by the Fifth Circuit in *Rodrigue* should be short lived. Sister circuits should reject its curious approach and simply hold that federal copyright law preempts state community property law. So too should state courts in Louisiana and elsewhere.[147] Until then, misadventure awaits the judges, litigants, and lawyers who now must pass through *Rodrigue*'s looking glass to implement its odd new copyright-ownership regime.

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145. Had it done so, copyrights could have been treated just like innumerable other items of community property in which one spouse has exclusive management authority (for example, registered movables).

146. Presumably, the court chose this odd approach to avoid, albeit unsuccessfully, running afoul of federal preemption law.

147. The courts of most states, including Louisiana, treat federal circuit court opinions on issues of federal law as merely persuasive authority rather than as binding precedent. In these states, the courts will be free simply to reject *Rodrigue*. *See, e.g.*, Chase v. Louisiana Riverboat Gaming, 709 So. 2d 904, 908 (La. App. 2d Cir. 1998) ("The United States Supreme Court is the only federal court whose decisions are binding upon this court; the decisions of lower federal courts are only persuasive authority."). *See generally* Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151-76 (1999).

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