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COMMENT

RODRIGUE v. RODRIGUE:
ANOTHER COPYRIGHT AND COMMUNITY
PROPERTY CASE WORTH-Y OF CONTROVERSY

Joseph P. Reid*

I. Introduction

"Harmonization of [copyright and community property] goals is properly the product of legislative deliberation and compromise."1 With these words in its recent Rodrigue v. Rodrigue decision, the United States District Court for the Eastern District of Louisiana sent yet another signal to Congress regarding the perilous conflict between copyright and community property law.

The issue of how copyrights created during marriage should be treated upon divorce in community property states was first raised in 1987 by In re Marriage of Worth, which held that copyrights were part of a married couple's community property.2 Almost immediately, commentators in the two disciplines staunchly disagreed as to the merits

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Special thanks go to Professor Joseph Bauer for his help and advice with the manuscript and to Editor in Chief Jonathan Bridges for tolerating my penchant for publishing. Also, while I am grateful, as always, for the support and love of my wife, family, and friends, this Comment is especially for my mother, the consummate (and sometimes consumed) artist.

2 241 Cal. Rptr. 135 (1987). Note that although this was the first judicial treatment of the issue, scholars had raised similar questions before Worth arose. See, e.g., William Patry, Copyright and Community Property: The Question of Preemption, 28 BULL. COPR. SOC’Y USA 237 (1981).
of *Worth*. Intellectual property writers, concerned about the conflicts and confusion which could arise if two people were simultaneously vested with exclusive rights in a work, denounced *Worth* as a case whose practical implications would undermine copyright law's fundamental policy goals.\(^3\) Meanwhile, family and property law scholars found *Worth* to be a correctly decided case, whose result was obvious.\(^4\) Caught between these two extremes, authorities in both the courts and academia have begged for a legislative solution to this problem.\(^5\)

Unfortunately, no such redress has come, and now *Rodrigue* has muddied the waters even further. Although the *Rodrigue* court weighed *Worth*'s holding and rationale, it did not agree that copyrights were community property. However, the court's decision did not rest on *Worth*'s practical implications, either. Instead, the *Rodrigue* court found Louisiana community property law preempted by § 301 of the 1976 Copyright Act.\(^6\)

This Comment examines the district court's *Rodrigue* opinion and discusses its implications for the future of the copyright versus community property struggle. Part II briefly describes the different sets of law involved in such a discussion, paying particular attention to the policy goals of each substantive area. Part III recaps the *Worth* decision, and the commentary that has followed it, so that Part IV can examine how the *Rodrigue* court came to a conclusion opposite that of *Worth*. Part V concludes the Comment by suggesting that although the analysis employed in *Rodrigue* was more even-handed and thought-

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4 This confidence is indicated by the inclusion of the case in texts for those subjects. See, e.g., GAIL B. BIRD, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY (6th ed. 1994); WILLIAM A. REPPY, JR., COMMUNITY PROPERTY IN CALIFORNIA (2d ed. 1988).

5 See, e.g., 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6A.04, at 6-26 n.1 (1998) ("Obviously the best solution to this conundrum would be to enact new laws.") [hereinafter NIMMER ON COPYRIGHT]; David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. Rev. 383, 411, 415 (1988) (mentioning twice that alternative solutions are necessary only "absent legislative redress of the discrepancies" between copyright and community property laws); Peter J. Wong, *Asserting the Spouse's Community Property Rights in Copyright*, 31 Idaho L. Rev. 1087, 1090 (1995) (noting that other solutions are important because "Congress has not resolved this conflict").

6 See *Rodrigue*, 55 F. Supp. 2d at 540 ("On its face, § 301 does not expressly pre-empt community property law . . . . [H]owever, there are specific areas of potential conflict between the [two sets of law] . . . . that result in preemption.").
ful than *Worth*, it still provides no clear answer to the copyright versus community property debate, and thus stands as another sign that legislative resolution is required.

II. RELEVANT LAW

A. Copyright Law

The right of authors to copyright their works is drawn directly from the United States Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." Using this power, Congress first afforded copyright protection in 1790 and most recently revamped the copyright scheme in 1976.9

The twin goals of copyright law are purposely conflicting: (1) to encourage creative development, while (2) simultaneously ensuring access to the work for the public good.10 Copyright achieves creative stimulation by rewarding authors and artists with a bundle of exclusive rights in their own work. These rights give creators power and control, so that they can benefit financially from their products and prevent misuse by others through judicial remedies. However, copyright also maintains public access by limiting the time period of the exclusive rights and by allowing for "fair use" and other uses in certain circumstances.11

As with previous copyright legislation, the 1976 Copyright Act (1976 Act) grants protection to "original works of authorship fixed in any tangible medium of expression." At the time of the work's creation, the author is invested with the bundle of "exclusive rights"

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7 U.S. Const. art. I, § 8, cl. 8.
8 See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).
10 The Supreme Court has repeatedly endorsed copyright's twin goals and the balance they create. See Stewart v. Abend, 495 U.S. 207 (1990) ("[A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (noting that the granting of exclusive rights for a limited term "is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").
12 Id. §§ 101–810, 1001–10.
13 Id. § 102.
enumerated in § 106. Furthermore, under § 201, ownership of the copyright vests in the author, who is then free to transfer ownership "in whole or in part by any means of conveyance or operation of law." The one restriction on ownership transfer is found in § 201(e), which prevents involuntary transfers by "action [of] any governmental body or other official or organization." Co-ownership of a copyright is permissible under the statute in several situations and consists essentially of a tenancy in common.

In an attempt to unify and clarify copyright law, which had been ruled by both federal and state protection systems, the 1976 Act also included § 301, which preempts the assertion of "all legal or equitable rights that are equivalent to any of the exclusive rights" granted to authors under § 106 for copyrightable materials. This has had particularly significant effects on some state causes of action, as preemption can only be escaped if the right in question contains a so-called "extra element" to distinguish it from federal copyright.

14 See id. § 106. These rights include reproduction, the preparation of derivative works, distribution to the public, performance, and display. See id.

15 See id. § 201(a). The exception to this general scheme comes with so-called "works-for-hire." Under the work-for-hire doctrine, an employer for whom a copyrightable work is made is considered to be the author and thus receives the instantaneous vesting of rights described in § 201, unless the parties have expressly agreed in writing to the contrary prior to the work's creation. See id. § 201(b).

16 Id. § 201(d).

17 Id. § 201(e).

18 Section 201 permits co-ownership where the work is a joint work, i.e. where "a work is prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." Id. § 101. Nimmer enumerates other situations which would result in co-ownership. See 1 NIMMER ON COPYRIGHT, supra note 5, § 6.01, at 6-3 to -4.

19 In this way, each of the owners may transfer his interest in the copyright without consent but can only transfer the interest of the co-owner with consent. See id. § 6.11, at 6-34. Furthermore, each co-owner may nonexclusively license the copyrighted work with a duty to account for half of the profits to the other, but no duty to inform the other. See id. § 6A.02[C], at 6A-12.


21 One particularly controversial example is the "right of publicity," a particular form of the broader "right to privacy," which entitles people to control the uses of their likenesses by granting them a cause of action against tortfeasors who use their names or likenesses without consent to gain some pecuniary advantage. For a detailed treatment of the right of publicity preemption controversy, see Sean Elliott, Dancing Promotions, Dodging Preemption, and Defending Personas: Why Preempting the Right of Publicity Deprives Talent the Publicity Protection They Deserve, 73 NOTRE DAME L. REV. 1625 (1998).

Community property law, which draws its roots from the European civil law tradition, is a system embraced by several states where the married couple is examined as a unit, instead of as two individuals. This policy presumes that the husband and wife are equal, and that the marital unit is worthy of special legal recognition.

In such a regime, property that comes into the marriage can be designated as either "community" property or "separate" property. Much like partners in a business partnership, each of the spouses has an equal, undivided interest in the marital property, whereas the separate property belongs to only one of the two individuals. Thus, separate property can be disposed of by the owning spouse as if he or she were single. Although traditionally the husband was thought to manage the community property, this assumption has loosened to the point where the rule is that both spouses enjoy managerial and dispositional power. However, some exceptions remain for certain kinds of transfers and special situations, and several states have added so-called "business exceptions," whereby one spouse can individually manage a community property business within certain bounds.
C. Preemption Law

In general, federal law preempts state law in areas of conflict because of the Supremacy Clause of the Constitution. In matters of family law, however, federal courts are extremely deferential to state law; in *Hisquierdo v. Hisquierdo*, the Supreme Court established a special two-pronged test to determine whether preemption should apply in family-related cases. Under *Hisquierdo*, a court considering preemption must first examine the nature of the discrepancy between federal and state law. To achieve the proper level of deference in family cases, *Hisquierdo* dictates that preemption is only proper if there is an "express conflict" between federal and state family law. That is, Congress must have "positively required [preemption] by direct enactment... [because a] mere conflict in words is not sufficient." Once an express conflict is found, the court must then analyze its severity; preemption is deemed proper under *Hisquierdo* if the express conflict between the two laws does "major damage" to "clear and substantial" federal interests.

III. In re Marriage of Worth

A. The Decision

1. Facts

Frederick Worth was an author who completed several books during his marriage to his wife, Susan; two of these were books of trivia, published in 1977 and 1981. In 1982, Frederick and Susan Worth
divorced, agreeing as part of the dissolution to evenly split future royalties from the books. When Frederick brought a copyright infringement action against the makers of the board game Trivial Pursuit in 1984, Susan claimed she was a co-owner of the copyrights, and sought a judicial order entitling her not only to an equal share of the royalties, but to any other proceeds Frederick received from his infringement claim as well. When the California trial court issued this order, Frederick appealed.

2. Holding and Rationale

Frederick Worth made three arguments on appeal: he contended (1) that because the 1976 Act defines copyright as "vesting initially in the author," only the author can own a copyright; (2) that because the divorce agreement concerned only the book royalties, it did not transfer any other substantive rights to his wife, and therefore she had no claim to the copyrights in question; and (3) that California community property law was preempted implicitly by Hisquierdo and ex-
pressly by § 301 of the 1976 Act, and thus his wife had no claim to the copyrights. The court rejected each of these arguments in turn.

First, the court examined Frederick's assertion that only he, the author, could own the copyrights in question. Feeling that this idea ran afoul of California's "general proposition that all property acquired during the marriage is community property," the court dismissed Frederick's role of sole author as not determinative, because "the principles of community property law do not require joint or qualitatively equal spousal efforts or contributions." Ultimately, the court found § 201(d)'s language conclusive, characterizing California's community property statute as transferring copyright ownership to the spouse "by operation of law" after the copyright had "vest[ed] initially in the author." In doing so, the court embraced the legal fiction that an instantaneous transfer of rights to Susan occurred just after the initial vesting in Frederick. Using this interpretation, the court found the conclusion that the copyrights were community property to be "inescapable."

The court dismissed Frederick's second argument regarding the difference between royalties and substantive rights as "specious." While the court agreed with Frederick's proposal that the royalty agreement did not address Susan's substantive powers, it took this fact to mean that Susan retained exactly what the community property system gave her: an equal right to the two copyrights.

Finally, the court held that California's community property law was neither implicitly nor expressly preempted by federal copyright law. While Frederick Worth emphasized the similarity between the federal railroad benefits at issue in Hisquierdo and the rights vested in authors by federal copyright law, the Worth court disagreed. Although it did not explicitly perform the two-pronged Hisquierdo analysis, the court believed that Hisquierdo and its progeny were "readily distinguishable" because the benefits in those cases were "defined by Congress to be the separate property of the designated recipient." In contrast, the court found that the 1976 Act specifically allowed for "co-ownership as well as transfer of all or part of a copyright" through § 201, and this flexibility of ownership, in turn, meant that "noth-

45 See id. at 139–40.
46 Id. at 136.
48 Worth, 241 Cal. Rptr. at 139.
49 Id. at 137.
50 Id. at 138.
51 See id. at 138–39.
52 Id. at 139.
ing . . . precludes the acquisition of a community property interest by a spouse."

With regard to express preemption, the court reasoned that Congress's intent with § 301 was "to supersede only state copyright laws." It then concluded that "[r]ights of ownership and division of marital property are in no way equivalent to rights within the scope of copyright" and thus held that § 301 did not prevent the vesting of copyright co-ownership in Susan Worth.

B. Commentary

As mentioned earlier, opinions regarding Worth correlate strongly with the particular author's area of legal expertise. This Part presents both of the primary viewpoints.

1. Commentary by Intellectual Property Writers

Not surprisingly, intellectual property scholars as a group have been extremely critical of Worth. This criticism began with David Nimmer's comprehensive analysis of the case, which raised two basic objections. First, Nimmer detailed both the inconsistent results that would occur if copyrights were treated as community property and the logical questions raised by the decision. Second, Nimmer contended that the vesting of copyright in an author was exactly analogous to the vesting of the railroad benefits at issue in Hisquierdo; thus,

53 Id.
54 Id.
55 Id. at 140. The court noted, "State laws granting or protecting other rights (such as breach of contract, conversion, defamation, etc.) have not been preempted." Id. at 139-40. At no point, however, did the Worth court perform the extra element test or formally analyze the community property rights in question.
56 Again, note that Patry's commentary, written before Worth was even heard, raised similar objections to copyright-community property integration as those expressed by authors commenting on the Worth case itself. See supra note 2.
57 For most intellectual property scholars, the most troublesome implication of Worth stems from the ability of the copyright holder to assign or license the work. As Nimmer discussed at length, co-owners of a copyright are tenants in common, as each owner may individually license the work nonexclusively without a duty to inform, but must account to the other for half the profits obtained from the license. Spouses holding community property are essentially joint tenants, however, and thus each would be able to exclusively license the work, unless a primary management rule applies, in which case the spouse with the ability to license the work would have a duty to inform.
58 Nimmer was especially troubled by two questions: the rights of surviving spouses and the role of § 201(e) regarding transfers by operation of law. See Nimmer, supra note 5, at 403-10.
for Nimmer, federal preemption in the copyright arena should have been obvious. While Nimmer did admit that Worth's logical syllogism was "unassailable," for him the combination of practical implications and precedent was overwhelming. To solve this predicament, Nimmer ultimately proposed that California's business exception to community property could be altered to simultaneously assure the author spouse's control of the copyright while still protecting the financial interests of the non-author spouse. 

Several critics followed Nimmer's lead in attacking Worth's practical implications. Debora Polacheck echoed Nimmer's comments regarding Worth, forecasting "far reaching effects" for the entertainment industry, "where performance between parties often takes place before a contract is written." Similarly, Francis Nevins assailed Worth, but disagreed with Nimmer's proposed solution, arguing instead that a careful redrafting of § 201(e) would solve the problem.

Worth's critics did not focus solely on practicality and logistics, however. They also raised serious constitutional and preemption objections to the decision. For example, Polacheck contended that community property law is both implicitly and expressly preempted. Nevins, again, relied on the language of § 201(e) to make a preemp-

59 See id. at 400.
60 Id. at 391.
61 See id. at 411-15. Nimmer expressed frustration that the original language of the business exception codified in California Civil Code § 5125(d) (now California Family Code § 1100(d)) was amended to change "sole management and control" to "primary management and control." See id. However, Nimmer believed that spousal consent could be used to overcome even this change in wording and achieve his purpose. See id.
63 Id. at 628.
64 See Nevins, supra note 3, at 398-400. After suggesting that Nimmer's ideas about consent "would stand our system of federalism on its head," id. at 400, Nevins contends that Nimmer's proposal regarding the business exception "has even less to commend it," id.
65 See id. at 401-06.
66 See, e.g., Polacheck, supra note 3, at 616-20. Polacheck takes particular issue with the Worth court's dismissal of Hisquierdo and its progeny as distinguishable and concludes that Worth's approach fails both prongs of the Hisquierdo test.
67 See, e.g., id. at 621-25. Polacheck maintains that the rights at issue in Worth meet both of § 301's requirements for preemption: she concludes that Worth's books were the subject matter of copyright, and that the rights at issue were equivalent to those established by § 106. Polacheck admits, however, that a court applying the extra element test could find that marriage was an additional element, removing the Worth situation from § 301. See id. at 624.
tion argument. Some others have even suggested that *Worth* may run afoul of the Commerce Clause.

2. Commentary by Community Property and Family Law Scholars

In contrast to those in the intellectual property community, property and family law scholars have viewed *Worth* as "unremarkable," because of its "ground[ing] in one of the most important tenets of the community property system: the fruits of the labors of either spouse are the shared property of the marital community." In general, the commentary that has been written on *Worth* has taken one or both of two tacks: (1) trying to improve the *Worth* rationale regarding preemption, and (2) attempting to discredit the practical objections of intellectual property writers.

In addressing the preemption arguments in *Worth*, most agree that the court could have engaged in a more thorough *Hisquierdo* analysis. Simultaneously, those authors believe that such an examination would have reached the same conclusion as the *Worth* court: that California community property was not preempted. Regarding the first *Hisquierdo* prong, authors assert that *Worth*’s reasoning could have been strengthened in several ways: (1) by including a more thorough consideration of § 201(d); (2) by using the legislative history to show that implied consent to transfer can overcome the prohibitions of § 201(e); and (3) by analogizing such an implied consent

68 See, e.g., Nevins, *supra* note 3, at 396–401 (“If Section 201(e) means what it plainly says, state law purporting to divide a divorcing author’s copyright interests is preempted no matter what form the law takes.”); see also Polacheck, *supra* note 3, at 625–26.

69 See, e.g., Roberts, *supra* note 3, at 1065–72. Roberts applies both the “per se” test of *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and the “balancing” test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and concludes that the application of community property standards as performed in *Worth* will “impermissibly interfere[] with interstate transfers of copyright,” *id.* at 1066; see also Polacheck, *supra* note 3, at 617.


71 See, e.g., Wong, *supra* note 5, at 1099–1108.

72 See *id.* at 1101–02. Wong contends that the argument that § 201(d) did not contemplate community property dispositions fails, given the other kinds of transfers envisioned by the section, including transfers at death (by way of wills or intestacy), bankruptcy, and mortgage foreclosure.

73 See *id.* at 1102. Specifically, Wong relies on the House Report regarding § 201(e) to argue that an author’s implied consent, as shown through overt acts, can overcome § 201(e)’s prohibition of involuntary transfers. The House Report notes, Traditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures, are not within the scope of . . . subsection [201(e)]; the authors in such cases have voluntarily con-
concept to ideas present in other parts of the 1976 Act.\footnote{See id. Wong justifies his belief in an implied consent exception to § 201(e) by noting that it is consonant with other provisions of the 1976 Act, such as the work-for-hire doctrine. The 1976 Act defines a work-for-hire as one which is "prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101 (1994). In such a case, "the employer or other person for whom the work was prepared is considered the author," and as such, is the owner of the copyright. \textit{Id.} § 201(b).} As to the second \textit{Hisquierdo} prong, those writing from a property or family law perspective see nothing incongruous between community property principles and the twin goals of copyright; in their opinion, no major injury is posed to substantial federal interests, and thus, there should be no preemption.\footnote{See id. at 1103-07. Wong argues that a community property regime neither reduces the author's incentives to create nor decreases public welfare derived from access to the creations. When the author is part of a marital community, Wong argues, the author's financial goals are identical to those of the marital community. Wong states furthermore that he believes the personal motivations of creativity and control over one's own work are similarly maintained in a community property system, a conclusion he founds on everyday experience. In confronting the issue of divorce, Wong analogizes the disputes which could arise over copyrights to those which already do, regarding other community property assets, and reasons that if the current community property system can handle those disputes, it can handle copyright disputes as well. \textit{See id.}}

Property and family law commentators have also had little trouble rationalizing away the practical problems of dual ownership raised by intellectual property scholars. Some argue that dual ownership is necessary, given the policies underlying community property, regardless of any inconvenience caused to the creative spouse or third parties.\footnote{See id. at 1109-10.} These scholars see community property as serving a protective function, safeguarding the non-author spouse from the other spouse's attempts to hoard financial resources in preparation for divorce.\footnote{See id. In particular, Wong asserts, \footnote{Id. at 1110.} There is absolutely no reason to believe that the [non-author] spouse needs any less protection from abuse simply because the other spouse is a creative individual—an author—or the property is arguably more complex to commercially exploit—a copyright. Any scheme for management and control of the copyright must balance the need to effectively commercially exploit the copyright with the need to protect either spouse from the financial abuse of the other.} Others contend that the proposed problems are actually not a con-

cern given the current state of community property law. They rely on the so-called “business exception” to the rule of equal management under California community property law, which provides that “a spouse who is operating or managing a business . . . that is all or substantially all community personal property has the primary management and control of the business.” Although they acknowledge the criticism that the “business exception” provision has not yet been applied in a copyright case, they assert that it would apply in a case such as Worth and thus eliminate the problem of dual management while still achieving financial equality for the non-author spouse.

3. Summary

Given that Worth was the first case to address this tumultuous issue, it is not surprising that the court’s decision left many fundamental questions unanswered. Taken together, the court’s opinion and the conflicting commentary written about it elucidated several key issues that seemed ripe for another case to answer. Was state community property law expressly preempted by § 301 of the 1976 Act? If not, what about preemption under Hisquierdo? If there were no preemption, could the competing ideas of copyright and community property with regard to ownership be harmonized? It was with this background that the district court heard Rodrigue.

IV. Rodrigue v. Rodrigue

A. Facts

As was the case in Worth, the facts of Rodrigue are fairly straightforward. George Rodrigue, a distinctive painter, has a stable of imaginary characters he has copyrighted and consistently reuses; each of his works depicts one of these characters in a particular locale. George’s two most famous characters are known in the art world as the “Blue Dog” and “Jolie Blonde.” He created these characters during the time of his marriage to Veronica Rodrigue, which existed from 1967 to 1994 under the Louisiana community property regime. During the Rodrigues’ 1994 divorce proceedings, Veronica asserted

78 See Nayo, supra note 39, at 170–74.
80 See Nayo, supra note 39, at 174–75.
82 See id. Veronica Rodrigue limited her claim so that only her rights in these two images were at issue. See id. at 536 n.1.
83 See id.
that Louisiana law and § 201(d) of the 1976 Act granted her equal rights in the Blue Dog and Jolie Blonde characters; thus, she sought an accounting in state court for paintings George would create with them after the marriage.\textsuperscript{84} George went to federal court, seeking a declaratory judgment regarding his ownership of the characters.\textsuperscript{85} The state court stayed its proceedings, and in federal court both sides sought summary judgment.\textsuperscript{86}

\subsection*{B. Holding and Rationale}

Whereas the \textit{Worth} court dealt with preemption last, the \textit{Rodrigue} district court saw federal preemption as the “threshold issue,”\textsuperscript{87} and it disregarded \textit{Worth}’s non-preemption rationale in a footnote.\textsuperscript{88} After reiterating the federal preference to leave family issues for state fora, the \textit{Rodrigue} court briefly examined federal preemption of community property laws in other contexts. Although it concluded that “[c]ommunity property law has not fared well in preemption battles before the Supreme Court,”\textsuperscript{89} citing examples such as \textit{Hisquierdo}, the \textit{Rodrigue} court did note that, despite this general rule, Congress had legislatively overruled \textit{Hisquierdo} and other similar cases.\textsuperscript{90}

The \textit{Rodrigue} court then began its own preemption analysis with the possibility of express preemption by § 301. After illustrating some of § 301’s limits, the \textit{Rodrigue} court came to the same result as the \textit{Worth} court: it found no express preemption because community property law “does not necessarily purport to provide rights ‘equivalent’ to those specified by the [1976] Act.”\textsuperscript{91} However, the \textit{Rodrigue} court wasted no time in qualifying that conclusion. In the very next sentence of its opinion, it declared that “there are [two] specific areas of potential conflict between the [1976] Act and Louisiana community property law that result in preemption.”\textsuperscript{92}

The first “area of potential conflict” according to the \textit{Rodrigue} court involved the initial ownership of the copyright, which the court called “[t]he critical point of friction.”\textsuperscript{93} Because § 201 explicitly vests

\textsuperscript{84} See Rodrigue v. Rodrigue, 57 Pat. Trademark & Copyright J. (BNA) 356 (Feb. 12, 1999).

\textsuperscript{85} See id.

\textsuperscript{86} See id.

\textsuperscript{87} Rodrigue, 55 F. Supp. 2d at 537.

\textsuperscript{88} See \textit{id.} at 537 n.2.

\textsuperscript{89} \textit{id.} at 539.

\textsuperscript{90} See \textit{id.}

\textsuperscript{91} \textit{id.} at 540.

\textsuperscript{92} \textit{id.} (emphasis added).

\textsuperscript{93} \textit{id.}
initial copyright ownership in the author at the moment of creation, the *Rodrigue* court felt that any simultaneous vesting of copyright in a spouse under a community property scheme would “clash head-on” with federal law.\textsuperscript{94} Arguing that “[c]ommunity property law may not defeat the clearly expressed intention of Congress,” the court felt satisfied that Louisiana community property satisfied both parts of the *Hisquierdo* test.\textsuperscript{95} Thus, it quickly concluded that “any community property ownership provision, such as [the Louisiana statute in question] . . . , that permits copyright ownership to vest initially in anyone other than the author is . . . preempted.”\textsuperscript{96} Thus, Veronica could not have obtained a stake in the copyrights at the time of initial vesting.

The second “area of potential conflict” analyzed by the court concerned transfer of copyright ownership. Veronica insisted that § 201(d) of the 1976 Act should be read as the *Worth* court had done—i.e. permitting an “instantaneous” transfer of copyright ownership to the spouse “by operation of law”\textsuperscript{97}—hoping that this “legal fiction” embraced by the *Worth* court would circumvent the vesting problem that the *Rodrigue* court had just constructed. Although the *Rodrigue* court noted the scholarly appreciation of *Worth*’s instantaneous transfer idea,\textsuperscript{98} it did not end its analysis there. Instead, it turned to the text of § 201(e). After acknowledging that § 201(e)’s original purpose was to fight the oppression of Soviet dissidents,\textsuperscript{99} the court relied upon both legislative history\textsuperscript{100} and academic scholarship\textsuperscript{101} to

\textsuperscript{94} Id. at 541.

\textsuperscript{95} Id. (holding that the Louisiana statute “not only literally conflicts with the Act [satisfying the first part of the *Hisquierdo* test] . . . , it does major damage to the substantial federal interest in providing exclusive rights to authors [satisfying the second part of the *Hisquierdo* test]”).

\textsuperscript{96} Id. In footnotes, the court noted (1) that although the community would not acquire an interest in the paintings’ copyrights, the community would acquire ownership of the paintings themselves, see id. at 541 n.9, and (2) that, as Nimmer had suggested after *Worth*, such an arrangement was also more logically consistent regarding surviving spouses. See id. at 541 n.10; see also supra note 57.

\textsuperscript{97} 17 U.S.C. § 201(d) (1994).

\textsuperscript{98} See *Rodrigue*, 55 F. Supp. 2d at 541–42 (citing to articles by Nimmer, Patry, and Wong for the “transfer theory [which] purports to allow the community to obtain through an infinitesimal passage of time what it is prohibited from doing at the copyright’s inception”).

\textsuperscript{99} See id. at 542.

\textsuperscript{100} The court quotes from the House and Senate Reports on § 201(e):

The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer. It is the intent of the subsection that . . . the governmental body or organization may not enforce or exercise any rights under this title . . . .
conclude that § 201 (e) "prohibits any involuntary transfer by operation of law."102 Thus, if the proposed instantaneous transfer of copyright to Veronica was involuntary, it would fail based on copyright law alone, regardless of any copyright-community property interaction.

This conclusion left the Rodrigue court with only one final issue to consider: whether the proposed instantaneous transfer was constructively voluntary because of George’s knowing and continuing presence in a community property jurisdiction.103 The court began this analysis by noting the academic support for such an approach,104 as well as the fact that the Rodrigues could have opted out of the community property regime either before or during their marriage.105 However, the court expressed concern that “[t]here is little support in the body of copyright law for the concept of implied voluntariness.”106 The closest analogy to implied consent that the Rodrigue court could find within the 1976 Act was the work-for-hire doctrine,107 but the court relied heavily upon William Patry’s pre-Worth commentary108 to

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101 Here in particular the court cites to 1 Nimmer on Copyright, supra note 5, Nevins, supra note 3, and Wong, supra note 5. See Rodrigue, 55 F. Supp. 2d at 542.

102 Id. (emphasis added). The Rodrigue court did consider a counterrationale, however. It briefly examined one case, In re Peregrine Entertainment, Ltd., 116 B.R. 194 (C.D. Cal. 1990), which had construed § 201(e) in light of its legislative history to apply only to situations where government bodies were acting in their own interests, not “in furtherance of private objectives.” Id. (quoting In re Peregrine Entertainment, Ltd., 116 B.R. at 206 n.16). Although the Rodrigue court considered this rationale and the commentary that followed it to be “somewhat persuasive,” it ultimately dismissed it in favor of § 201(e)’s “plain language.” Id. at 543.

103 See id. at 544–46. The court reasoned, [T]o conclude that entering into a community property regime constitutes implied consent to the transfer of copyright ownership would require the court to ignore a variety of additional issues: the author’s actual intent, possible disincentives to the author to create, inconsistencies that might arise in other jurisdictions, whether community property states or not, and the problems that could arise in a mobile society if the author and spouse move to a community property state. Id. at 544.

104 In particular, the court cites to 1 Nimmer on Copyright, supra note 5, Patry, supra note 2, and Wong, supra note 5. See id. at 543.

105 Both approaches are possible under the Louisiana Code, although opting out during the marriage would have required judicial action. See La. Civ. Code Ann. art. 2328, 2329 (West 1999).

106 Rodrigue, 55 F. Supp. 2d at 543.

107 See 17 U.S.C. § 201(b); see also supra note 15.

108 See Patry, supra note 2.
conclude that such a comparison would fail on several grounds.\textsuperscript{109} First, the court noted that “Congress itself [has] expressly provided” the work-for-hire doctrine but did not include any similar provision regarding community property.\textsuperscript{110} Second, although “an employee’s acceptance of employment is deemed to be consent to the employer’s ownership,” the court decided that marriage vows are not analogous because work-for-hire is considered a doctrine “of authorship and not of transfer of rights.”\textsuperscript{111} Finally, the court found that “none of the theoretical underpinnings of the work-for-hire doctrine are present in the community property context,” because the works are not produced for or under the control of the nonauthor spouse, there is no pay involved, and the nonauthor spouse does not bear business costs and risks as an employer would.\textsuperscript{112} In addition, the court could find no basis in Louisiana law for the idea that one could implicitly consent to convert separate property to community property.\textsuperscript{113}

Given the dearth of legal support for implied consent, the \textit{Rodrigue} court finally considered the policy implications of recognizing such a transfer.\textsuperscript{114} It examined much of the post-\textit{Worth} criticism,\textsuperscript{115} including the idea that the business management rules of community property states might provide a solution to the copyright-community property conundrum.\textsuperscript{116} Ultimately, however, the \textit{Rodrigue} court agreed with post-\textit{Worth} intellectual property scholars that the practical implications of either instantaneous transfer or implied consent would “inflict[] major damage on the [1976] Act’s goals of predictability and certainty,”\textsuperscript{117} and thus both approaches were preempted under \textit{Hisquierdo}.

Having found all of the alternatives for copyright-community property integration implicitly preempted by the \textit{Hisquierdo} test, the \textit{Rodrigue} court held that federal copyright law preempted Louisiana community property law. Thus, the court found George Rodrigue to be the sole author and owner of the “Blue Dog” and “Jolie Blonde” copyrights and granted him summary judgment against Veronica.

\textsuperscript{109} See id. at 543–44 (relying on Patry, \textit{supra} note 2).
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} See id.
\textsuperscript{114} See id. at 544–45.
\textsuperscript{115} See id. & 545 n.13.
\textsuperscript{116} See id. at 545 (“The presence of competing management rules ‘threatens chaos for both the copyright creative and consuming communities.’”) (quoting 1 Nimmer on Copyright, \textit{supra} note 5, § 6A.02[C]).
\textsuperscript{117} Id. at 547.
V. ANALYSIS

Although it had the potential to settle, or at least to address, many of the difficult questions surrounding the copyright-community property conflict, the Rodriguez decision may end up creating more confusion than it resolved. Taken together, Rodriguez, Worth, and the Worth commentary do suggest that express preemption of community property law under § 301 of the 1976 Act is an impossibility. This conclusion makes sense given the additional interests and extra elements present in the community property regime.

However, given the differing results in Rodriguez and Worth, the question of Hisquierdo preemption remains open. Although the Rodriguez court was more thorough in considering both sides of the issue and examined every major piece of scholarship written from both perspectives in making its decision, even this logical approach may not be enough to carry the day before another court. As the commentary regarding Worth shows, the two Hisquierdo prongs can easily be manipulated by those on either side of the argument; thus it is unclear how another court might apply the Hisquierdo test, and ultimately whether it would find preemption or not.

In addition to leaving the Hisquierdo question unanswered, Rodriguez also adds another confounding factor to the equation: Does it matter, for the purposes of preemption or harmonization, in which community property state the case is situated? Commentators have consistently examined the copyright-community property conflict through the eyes of California law because of the state’s prominence, and no differences are readily apparent in the plain language of the two states’ relevant statutes. But given the differing outcomes in

118 Comparing the community property statutes of California and Louisiana uncovers no significant differences regarding what constitutes community property, compare CAL. FAM. CODE § 760 (West 1994) (“Except as otherwise provided by statute, all property . . . acquired by a married person during the marriage . . . is community property.”), with LA. CIV. CODE ANN. art. 2338 (West 1985) (defining community property as comprising “property acquired during the existence of the . . . [marriage] through the effort, skill, or industry of either spouse”), the extent of each spouse’s interest, compare CAL. FAM. CODE § 751 (1994) (“The respective interests of the husband and wife in community property . . . are present, existing and equal interests”), with LA. CIV. CODE ANN. art. 2336 (1985) (“Each spouse owns a present undivided one-half interest in the community property”), or the dual rights of ownership and management invested in both spouses, compare CAL. FAM. CODE § 1100(a) (1994) (“[E]ither spouse has the management and control of the community personal property . . . with like absolute power of disposition . . .”), with LA. CIV. CODE ANN. art. 2346 (1985) (“Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law”). Note that one difference, which was not significant to the decisions at hand but could be to a harmonization effort, is that
Worth and Rodrigue, one must now wonder if differences in the laws of all of the community property states are significant.

Finally, there is the ultimate question of harmonization: if pre-emption is not the solution to the copyright-community property conflict, can the two sets of law be made to peacefully co-exist? Most commentators suggest they can, and each proposes solutions to the problem that require various adjustments to either or both sets of law. However, scholars and the Rodrigue court itself all independently suggest that this kind of modification effort is best made by the legislature. And all are correct in this conclusion. Given that copyright vests federally-created powers and benefits in authors, regardless of their state of residence, in the end it should be Congress which decides how the difficulties regarding community property should be resolved. This answer, however, must come sooner rather than later, as the next court to consider the issue could easily derive a different answer than that of either Worth or Rodrigue and leave authors, lawyers, and scholars even more puzzled as to what the law is and what it should be.
