# COPYRIGHT CO-OWNERS

*by* HERBERT I. LAZEROW*

*Contents*



*Professor of Law, University of San Diego. A.B. Pennsylvania, J.D. Harvard, LL.M. George Washington, D.E.S.S. Paris I Panthéon-Sorbonne. I very much appreciate a research grant from the University of San Diego School of Law to help complete this article, and the assistance of my research assistants, Kelly Reis, USD Class of 2020, and John McCallie, USD Class of 2021. I am grateful for the help of my colleagues Walter Heiser, Dennis Lilly, and Sharmila Sohoni; for the sound advice of Jay Dougherty of Loyola Law School, Lionel "Lon" Sobel, formerly faculty at UCLA and Southwestern, and Editor-in-Chief of the *Entertainment Law Journal*; and Alfred Yen of Boston College, and for the ever-resourceful sleuthing of Jane Larrington at the University of San Diego's Pardee Legal Research Center.

## *I. INTRODUCTION*

This article analyzes the rights and obligations of co-owners of copyrights. Co-ownership of a copyright may result from the initial creation of the work by more than one author. Copyright law refers to that as "joint authorship" or a "joint work." It may also result from ordinary property law. A married person in a community property state holds any copyright newly issued during the marriage as community property.[1] Likewise, a copyright acquired with community funds will be held as community property.[2] Co-ownership of a copyright can also occur in the usual ways in which property is transferred to more than one person: by sale, gift, will, intestate succession, or as part of a property settlement on divorce. This author believes that a large number of copyright co-ownerships result from community property, divorce, or estate planning by the copyright holder or her or his successor(s), rather than from joint authorship.

However the co-ownership is created, it is the thesis of this article that with a few exceptions mostly related to community property, the rules regulating co-ownership are the same no matter whether they result from joint authorship, operation of law, or transfer of the copyright.[3] It is my

---

1 Unless the parties have opted out of community property with a pre-nuptial agreement. *See* CALIF. FAMILY CODE §§ 1610-1617; WILLIAM W. BASSETT, BASSETT ON CALIFORNIA COMMUNITY PROPERTY LAW §§ 4.25-4.42 (2019).

2 ROBERT L. MENNELL & JO CARRILLO, COMMUNITY PROPERTY IN A NUTSHELL 55-58 (2014).

3 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.01 (referring to what I call co-ownership as "joint work"). That contradicts the defini-

further thesis that most of these rules depend on the state property law of co-ownership which has been applied to copyrights as well as other assets. Neither the relationship of one co-owner to third parties nor the inter-relationships of the co-owners is governed by federal copyright law — it is governed by state property law, except for a copyright of a joint work and a copyright that is community property. That has three practical consequences in copyright litigation:

1. Federal question jurisdiction may be unavailable and the plaintiff may be remitted to state court;
2. The choice of law rule the court uses may depend on whether the case is in state court, in federal court on diversity jurisdiction, or in federal court on federal question jurisdiction; and
3. It may determine whether a state or federal statute of limitations applies.

However, examination of the precedents indicate that those consequences may be less significant than one might initially think.

Part II discusses the differences between joint authorship and other forms of copyright co-ownership; part III treats the relationship of co-owners with third parties; part IV deals with the rights and duties of co-owners to each other; part 5 assesses some of the special problems of the right of the authors to terminate transfers of the copyright; part VI considers whether each of the previous rules enunciated are federal or state law, and the consequences thereof; and part VII concludes.

## *II. JOINT AUTHORSHIP*

Joint authorship occurs when a joint work is made. "A 'joint work' is a work prepared by two or more individuals, with the intention that their separate contributions be merged into inseparable or interdependent parts of a unitary whole."[4]

Joint authorship and joint work should not be confused with joint tenancy with right of survivorship.[5] Joint tenancy is a form of co-ownership where, on the death of one joint tenant, there is a right of survivorship in the other joint tenants. As a result, in a joint tenancy between A and B, if A dies first, A's heirs take no interest, and B becomes the sole owner of

---

tion in 17 U.S.C. § 101 (A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.) and is confusing.

4 17 U.S.C. § 101 (2018).

5 *Pace* property mavens. I know that the phrase "joint tenancy with right of survivorship" is a redundancy, as all joint tenancies have a right of survivorship. SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 281-82 (2011). This article is written for copyright lawyers who may have forgotten what they learned in first year Property.

the property.[6] Joint tenancies are fundamentally inconsistent with community property because they prohibit each member of the community from separately disposing of her interest at death, but parties could add by clear and convincing evidence a survivorship right to their community property.[7]

All joint authors are co-owners of the copyright.[8] Unless otherwise specified by private contract, the joint authors own the copyright equally.[9] However, not all co-owners of a copyright are joint authors.[10] Joint authors must meet the three requirements set forth above: multiple authors, intention to merge as authors, and intention to create a unitary whole.[11] Where the co-ownership is created as a result of marital status, divorce settlement, sale, gift or inheritance, there is no joint work because when the work was made, there were not multiple authors.

To be a joint author, one must contribute more than a minimal amount to the work. How much that might be has no precise answer. Whether one must contribute copyrightable material has adherents on both sides. Some contend that a person who contributes ideas that are not fixed in a medium of expression cannot be a joint author because the contribution, being unfixed, does not qualify for copyright.[12] Others assert that there is no such requirement in the statute and the generation of ideas may be an essential element in producing the work.[13]

All authors must intend to merge their individual work into a new combined work to have joint authorship. When a songwriter secures ap-

---

6 Technically, it was considered that B's interest did not change on A's death. B always owned the entire property, but before A's death that interest was subject to a correlative interest that A held. *Id.* at 278.

7 BASSETT, *supra* note 1, § 4:57; MENNELL & CARRILLO, *supra* note 2, at 127-63. The problem is that many financial institutions have forms for bank accounts or safe deposit boxes that specify that the item is held as joint tenants. Because of the prevalence of the use of these forms, that is generally insufficient to demonstrate that the couple intended to add survivorship to their community property holdings.

8 17 U.S.C. § 201(a) (2018).

9 The presumption is that they own the copyright as tenants in common, but the joint authors could agree to ownership as joint tenants. 1 NIMMER & NIMMER, *supra* note 3, § 6.09; 1 Paul Goldstein, *Goldstein on Copyright* § 4.2 points out that this sets the default rule. If the joint authors provide for any ownership other than equal ownership, the ownership cannot be as joint tenants because each joint tenant must have equal interests in the property. KURTZ, *supra* note 5, at 277-78. One court has held that any such non-proportional holding is a (partial) transfer of the copyright and must be in writing to comply with 17 U.S.C. §204(a). *See* Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1158-59 (1996).

10 GOLDSTEIN, *supra* note 9, § 4.2.

11 For a good analysis of these requirements, see 1 NIMMER & NIMMER, *supra* note 3, § 6.03-.04, .06-.07.

12 Ashton-Tate Corp. v. Ross, 916 F.2d 516 (9th Cir. 1960).

13 Gaiman v. McFarlane, 360 F.3d 644 (7Th Cir. 2004) (Posner, J.).

proval from a deceased poet's heirs to set the poet's poem to a song to be written, this is not a joint work because both authors did not intend when the work began to merge the poem and the tune.[14] It might be a derivative work or a collective work, but not a joint work. One might note that while there are certainly examples of joint works of literature[15] and art,[16] the overwhelming number of joint works are of songs,[17] comics[18] and children's picture books.[19]

The authors must intend that their work be merged into either inseparable parts or interdependent parts of a unitary whole. "Inseparable" would be a situation where the collaboration is so close that it is difficult to determine who contributed what. "Interdependent" would be where the contributions enhanced each other in creating the final product, like the text and drawings of a children's book. Note that the test is not whether

---

14 There were occasional exceptions under prior law, such as the 12th Street Rag case, *Shapiro v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir. 1955), where the piece was composed as an instrumental solo in 1914, and the court held that his assignee's intent formed in 1918 to have lyrics written and merged into the tune was sufficient intent. The case was criticized severely. *See* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970) (Three Little Pigs), and repudiated in the 1976 Act.

15 I think of Charles Nordhoff & James Norman Hall, *Mutiny on the Bounty* (1932), *Men Against the Sea* (1933), *Pitcairn's Island* (1934), and any number of co-authored "memoirs."

16 Jean-Michel Basquiat and Andy Warhol created six joint paintings in 1984–85. Peter Paul Rubens and Jan Breughel the Elder made two dozen works together 1598–1625.

17 One thinks immediately of great musical collaborations: Wolfgang Amadeus Mozart and Lorenzo Da Ponte on *The Marriage of Figaro* (1786), *Don Giovanni* (1787), and *Cosi fan tutti* (1790); Giuseppe Verdi and Arrigo Boito on *Otello* (1887) and *Falstaff* (1893), W.S. Gilbert and Arthur Sullivan on too many nineteenth century operettas to mention; Richard Rodgers and Lorenz Hart on twenty-eight early-twentieth century musicals, then Richard Rodgers and Oscar Hammerstein II on nine musicals, including huge hits like *Oklahoma!* (1943), *Carousel* (1945), *South Pacific* (1949), *The King and I* (1951), and *The Sound of Music* (1959).

18 *See, e.g.*, ASTERIX LE GAULOIS (Goscinny & Uderzo); the many creators of Batman. The fact that a work has many creators does not mean that it is a joint work, especially if the work was created before the 1976 Act when more formal requirements for copyright applied, and before there was a statutory definition of a joint work. A comic book is typically the work of four people: the writer, the penciler who creates the artwork, the inker who makes a black and white plate of the artwork, and the colorist who colors it. Gaiman v. McFarlane, 350 F.3d 644, 659 (7th Cir. 2004).

19 *See, e.g.*, the K'ton Ton books (Weilerstein & Berkowitz); the Dinomir le géant books (Blance, Cook, Plocki & Blake), Zoo-Looking (Fox & Whitman).

the items are actually inseparable or interdependent, but whether the joint authors intend them to be.[20]

Most motion pictures are not joint works because they are works made for hire, so the substantial and usually copyrightable contributions of the writer, director, producer, cameraman and actors are all considered to be the work of the employer, usually a film studio.[21]

There are two principal consequences of finding that a copyright is of a joint work. First is that the rights that each of the copyright owners holds apply to the entire work, not just to the portion of the work that each individual contributed.[22] Second, the duration of the copyright is for the life of the survivor of the joint authors plus seventy-years.[23] The duration of a copyright does not change with subsequent assignments because the transfers of interest neither create nor destroy a joint work. Even if one joint author acquires the interest in the copyright of the other joint authors and dies, the copyright still lasts for the life of the survivor of the original joint authors plus seventy years. Likewise, if an author conveys an undivided 50% interest in the copyright to her husband, the copyright expires seventy years after the death of the author; the lifespan of the husband is irrelevant because no joint work has been created.

## *III. RELATIONSHIPS BETWEEN CO-OWNERS AND THIRD PARTIES*

### *A. Nature of the Tenancy in Common*

All co-owners, whether it is of a joint work or not, are treated as tenants in common, except that there are some special rules for community property and joint tenancy. The basic intellectual framework of the tenancy in common is that each co-owner has the right to use the entire property, subject to the rights of the other co-owners to also use the entire property.[24] A co-tenant has the right to transfer his interest thereby making his transferee a co-tenant with his former co-tenants. The transferee

---

20 An extensive discussion of the formation of joint authorship is found at *Mapp v. UMG Recordings, Inc.*, 208 F. Supp. 3d 776, 794 (M.D. La. 2016).

21 1 GOLDSTEIN, *supra* note 9, § 4.3. 17 U.S.C. § 101 defines "work made for hire." For an example of failure to follow usual movie contracting procedures, see 1 NIMMER & NIMMER, *supra* note 3, § 6.08[B].

22 1 NIMMER & NIMMER, *supra* note 3, § 6.02-.03.

23 17 U.S.C. § 302(b) (2018). Whether the increased validity of the copyright is sufficient to induce a person to seek out younger collaborators is a matter that can be debated.

24 DALE A. WHITMAN, ANN M. BURKHART, R. WILSON FREYERMUTH & TROY A. RULE, THE LAW OF PROPERTY 160 (4th ed. 2019); for another summary of the rules, see Comment, *Accountability Among Co-Owners of Statutory Copyright*, 72 HARV. L. REV. 1550, 1550-55 (1959).

can now use the entire property subject to the rights of his now-cotenants to do the same. This is as true of copyrights as it is of realty.

A joint tenancy follows the same rules for use, but not for transfers. A transfer of one's interest in a joint tenancy changes the interest of the transferee into a tenancy in common with the remaining joint tenants who, as between themselves, are still joint tenants. If one of the joint tenants dies before conveying his interest, his interest disappears because of the right of survivorship inherent in joint tenancy. Thus, if A, B and C are joint tenants and B dies, A and C continue to own the property as joint tenants.[25] The implications of this structure are several.

### *B. Use of the Tenants in Common Property*

One co-owner cannot be guilty of copyright infringement,[26] just as a co-owner of realty cannot be guilty of trespass,[27] because each of the co-owners has the right to use the entirety of the property.

### *C. Status of Transferree from a Tenant in Common*

Since a grantee receives everything his grantor owned and purported to transfer, a transferee of one co-owner's entire interest in real estate[28] cannot trespass on the realty, and a transferee of one co-owner's interest in a copyright likewise cannot be guilty of copyright infringement.[29]

From the point of view of a transferee, the transferee receives an exclusive right to use the property only on receipt of exclusive transfers from all the co-owners. A single co-owner cannot transfer an exclusive right because he does not own an exclusive right.[30] If a single co-owner purports to transfer an exclusive right to the work, the recipient can prevent the transferor from using the work, but cannot prevent the transferor's former co-owners from using it.[31] If the transfer purports to be non-exclusive, even the transferor may continue to use the work.[32] The same rules apply to the transferee of a transferee.

---

25 For a fuller description of the incidents of joint tenancy and tenancy in common, see KURTZ, *supra* note 5, 277-90.

26 Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

27 *See, e.g.*, Zaslow v. Kroenert, 176 P.2d 1 (Cal. 1946).

28 Wash. Ins. Agency, Inc. v. Friedlander, 487 A.2d 599 (D.C. App. 1985) (lessee of a co-tenant becomes a co-tenant of the nonleasing co-tenants for the period of the lease for purposes of use).

29 *Morrill*, 157 F. Supp. 2d 1120.

30 WHITMAN ET AL., *supra* note 24, at 159 (4th ed. 2019).

31 Whether the transferee has an action in tort for misrepresentation or in contract for breach of warranty is beyond the scope of this article and may depend on other facts.

32 Other countries might require all joint owners to execute a transfer of the copyright. 1 NIMMER & NIMMER, *supra* note 3, § 6.10[D].

*D. Substantial Destruction*

There may be an exception to the above. It has been suggested in dicta that a co-owner cannot license a copyright in a way that will result in its substantial destruction,[33] and that any such license is void.[34] The proposition that a use by a co-owner that results in substantial diminishment of the value of the property is wrongful is well established in property law,[35] but the proposition that the agreement authorizing the use is void is without case support. This is a branch of the law of waste, and the proper remedy is to recover from the wasting co-tenant.[36]

*E. Co-Owners' Disabling Agreements*

The above rules apply even if the co-owners have agreed among themselves not to license the copyright or transfer their interests without the consent of all co-owners, except in the case where the transferee knew about the agreement.[37] In that case, the transferee takes nothing because he knew that his grantor lacked the authority to make the grant that he made. The co-owners are liable to each other for breach of this contract,[38] but the transferee receives the interest of the transferor unless the transferee knew that his transferor lacked the power to make the transfer.

*F. Community Property*

Community property co-ownership presents its own problems.[39] At least nine states apply community property rules: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.[40] While the rules in all those states are generally similar to each other,

---

33 Mapp v. UMG Recordings, Inc., 208 F. Supp. 3d 776, 789, 794 (M.D. La. 2016) (dictum); Brown v, Republic Prods., Inc., 161 P.2d 796, 798 (Cal. 1945) (dictum). Maurel v. Smith, 271 Fed. 211 (2d Cir. 1921) has been cited for this proposition, but there is no mention of it in the case.

34 Nimmer questions whether this is the right result, or whether the result should simply be liability of the co-owner for waste, a view with which I agree. *See* 1 NIMMER & NIMMER, *supra* note 3, § 6.10[B].

35 WHITMAN ET AL, *supra* note 24, at 162-63, 217-18.

36 *Id.* at 163.

37 Meredith v. Smith, 145 F.2d 620 (9th Cir. 1944) (dictum; court held that the agreement had expired).

38 Clifford Ross Co., Ltd. v. Nelvana, Ltd., 710 F. Supp. 517, 520 S.D.N.Y.), *aff'd mem.*, 883 F.3d 1022 (2d Cir. 1989) (dictum; court dismissed claim against co-owner for lack of jurisdiction because it arose under state law).

39 For a more in-depth discussion, see 1 NIMMER & NIMMER, *supra* note 3, §§ 6A.01–6A.05.

40 As does the Commonwealth of Puerto Rico. One can elect some form of community property in Alaska, Oklahoma and Tennessee. Community property was in effect for a short period in Michigan and a number of other states in the 1940s, where it was repealed, and in Pennsylvania, where it was declared unconstitu-

the details vary. References herein are only to California community property. The rules of other states should be consulted as appropriate.

The basic rule of community property is that spouses can have separate property and community property. Separate property includes property earned by either spouse when not a resident of a community property state or before the marriage; property received by gift or bequest; and the income from, or the proceeds of the sale of, separate property. Community property is income earned from the skill or effort of either spouse during marriage.[41] Where the skill or labor of one spouse is employed in earning a return on separate property, a proportion of that return will be community property.[42] Property bought with community property is community property. Separate property may be transmuted into community property either by agreement or by so confusing the separate property with community property that the two cannot be separated.[43] There is also a beast known as "quasi-community property." This is property acquired by either spouse before the couple became California residents that would have been community property had the couple resided in California at the time of acquisition. Quasi-community property is separate property, not community property, but it is treated as though it were community property if the spouses divorce while California residents or should one of them die domiciled in California.[44]

The first question that one must consider is whether it is possible to hold a copyright as community property without a formal transfer from separate property to community property. When Congress passed the Copyright Act, its provisions may have pre-empted the field because copyright provisions conflict with community property. There is no clear statement to that effect in the law or the legislative history, but copyright is vested in "authors"[45] as is the right to terminate transfers.[46] The provisions for devolution of the right to terminate transfers clearly pre-empts all state law to the contrary,[47] whether community property or not. The Copyright Act states that no government body (except the bankruptcy

tional. 2 AM. L. PROP. §§ 7.1–7.5 (1952). It is sometimes possible to elect the results of community property by forming a partnership with appropriate provisions, though professional rules for physicians, lawyers and others might prohibit the sharing of income from the practice of the profession.

41 MENNELL & CARRILLO, *supra* note 2, at 55, 77.

42 BASSETT, *supra* note 1, § 6:62.

43 MENNELL & CARRILLO, *supra* note 2, at 30.

44 BASSETT, *supra* note 1, § 5:1-5:5.

45 17 U.S.C. § 201(a) (2018).

46 *Id.* § 203(a).

47 *Id.* § 304(c).

court) may involuntarily transfer any of the rights comprised in copyright.[48]

The only case that has considered the question held that copyright law did not pre-empt California community property law.[49] Its reasoning mentioned that copyrights are *initially* vested in the author, but may be transferred. The court did not discuss this, but it could have argued that there was no involuntary governmental transfer; the transfer instead resulted from three voluntary acts by the author: marrying, residing in a community property state, and obtaining a copyright.

The result was slightly different in a Louisiana case. The district court had held that conflict pre-emption applied to invalidate the application of Louisiana community property law to a copyright because that law would have vested property in someone other than the author.[50] The Fifth Circuit partially reversed, holding that the only part of Louisiana community property law that conflicts with copyright law is granting management rights to the non-author party. There was no conflict in granting rights to the proceeds derived from the copyright. It held the part of Louisiana community property law granting management to either spouse pre-empted, but the part granting both spouses the *usufruit* not pre-empted.[51] For that reason, the court said that the author had the right to manage the copyright, but both spouses (actually ex-spouses in this case) would enjoy its earnings (in this case, proceeds of an infringement suit).

Under California's community property rules, either spouse may sell or license the community property without the consent of the other, but the proceeds of that alienation remain community property.[52] One spouse may not dispose of community property for less than fair market value without the written consent of the other spouse.[53] Where community property is substantially all the personal property of a business operated by one spouse, the operating spouse has primary management and control over the property, but must give prior written notice of intent to transfer substantially all of the business personal property assets. Failure to do so does not invalidate the transfer, but makes the transferring spouse liable to the other spouse.[54]

---

48 *Id.* § 201(e).

49 *In re* Marriage of Worth, 241 Cal. Rptr. 135 (Cal. Ct. App. 1987) (divorced wife entitled to half the damages received for infringement of a copyright secured during the marriage). *See* 1 GOLDSTEIN, *supra* note 9, § 5.1.6.2.

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

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

52 CAL. FAM. CODE § 1100(a).

53 *Id.* § 1100(b).

54 *Id.* § 1100(d).

There is no definition of "business" and no California cases on that point. One solution would be to adopt the federal income tax definition, which itself is not so clear. It requires regular and continuous activity in pursuit of a profit. One court suggested that an absolute requirement was the provision of goods or services for another,[55] but another equally well-placed court rejected that test, called for a facts-and-circumstances examination, then held that managing your own investments, no matter how active, could never be a trade or business.[56] Alternatively, it can be argued that a person is in a business when the business is managing investments only where the personal services and skill required are more than minimal.[57]

Taken literally absent a business, this means that an exclusive grant from either spouse would give the grantee the exclusive right to the copyright, thereby differentiating the rights of transferees of community property copyrights from the rights of transferees of other copyright co-owners. This is particularly troublesome if the transferring spouse is not the author of the copyright because it opens the possibility of complete loss of control by the author. The solution suggested by Nimmer[58] and endorsed by the Fifth Circuit[59] discussed above gives the author exclusive management rights in the copyright. The copyright remains community property, but the rule for management and sale is altered for copyrights. It remains to be seen whether other circuits, especially the Ninth Circuit, containing community property jurisdictions adopt this solution.[60] It would only be

55 Deputy v. Dupont, 308 U.S. 488 (1940).

56 Higgins v. Comm'r, 312 U.S. 212 (1941). These precedents did not facilitate the job of the lower courts. *Compare* Alfred A. Gentile, 65 T.C. 1 (1975) (professional gambler who supported his family entirely on winnings not in a trade or business) *with* Comm'r v. Groetzinger, 480 U.S. 23 (1987) (oh yes, he is!); *see* DOUGLAS A. KAHN & JEFFREY H. KAHN, FEDERAL INCOME TAX 425-33 (2016).

57 The argument is that *Beam v. Bank of America*, 490 P.2d 257 (Cal. 1971) provides such a definition. In that case, husband managed his investments, which were all separate property. The divorcing wife argued, however, that he used his skill and labor in that management, which created some value that was community property. The court agreed, saying that whenever the application of skill and labor to separate property was more than minimal during the marriage, it created community property. The only connection to the term "business," however, lay in the remedy ordered by the court, related to management of a business. From that, one might deduce that a business exists for California law when more than minimal effort is put into the management of investments. I am not convinced.

58 1 NIMMER & NIMMER, *supra* note 3, §§ 6A.05.

59 Rodrigue v. Rodrigue, 218 F.3d 432 (5th Cir 2000), *cert. denied*, 532 U.S. 905 (2001).

60 The Ninth Circuit contains the most community property states with Alaska, Arizona, California, Idaho, Nevada and Washington. New Mexico and Oklahoma are in the Tenth Circuit; Louisiana and Texas, the Fifth; Wisconsin the Seventh; Tennessee the Sixth; and Puerto Rico, the First.

needed in the case where one of the co-owners of the community property is also the author. That is probably the most typical case involving community property in copyrights because a copyright is always earned as a result of a person's labor, which would make it community property if the person were married and living in a community property state. Where co-ownership of a copyright is formed by gift, inheritance or divorce, the copyright would be separate property unless it is transmuted.[61]

### *G. Co-Ownership Other Than Community Property*

The community property solution is not the same as the result where there are other types of co-owners. Absent community property, all co-owners must join to convey exclusive rights, but any co-owner can convey a non-exclusive right. That is true whether the co-owners are the joint authors, only one of them is the author, or the co-ownership results from assignment, divorce or inheritance and none of them is the author. All that distinguishes these cases from community property is that the original copyright holder must have consented either by creating the joint work or by creating co-owners of his copyright. However, the same argument of fictional consent can be offered for community property co-owners. By marrying and residing in a community property jurisdiction while doing the work to produce a copyrightable item, the copyright owner consented to the rules of community property in force in the appropriate jurisdiction,

---

[61] Property earned by either spouse during marriage is community property. Property inherited by a person who is married is separate property unless that person decides to transmute it into community property. Separate property can be transmuted into community property intentionally, or it may be transmuted because the owner comingles it with community property in a way that makes it difficult to distinguish the separate property from the community property. The comingling is unlikely to occur with copyrights. To consider some common situations, suppose author dies and leaves the copyright to his son, who is married and residing in a community property state. The son holds the copyright as his separate property unless he decides to transmute it into community property. If transmuted, the copyright would be community property, but neither owner is the author. To take another case, suppose author and spouse residing in a community property state decide to divorce. In case A, the property settlement allocates the copyright to author. It is author's separate property. Author remarries. The copyright remains author's separate property because not earned during the second marriage. If author transmutes the copyright into community property, we have a case of the author owning a copyright as community property. In case B, the divorce settlement allocates the copyright to author's spouse. It is separate property. The spouse remarries. The copyright remains the spouse's separate property. If the spouse transmutes the copyright into community property, it is community property, but there is no reason to apply the special rule because neither of the owners of the community property is the author.

which might make the spouse a co-owner of any copyright secured during the marriage.

The conflict between state community property law and the idea that federal copyright law mandates that the author control copyright is only a problem where the author(s) continue to hold the copyright. It is not unusual for the author to transfer the copyright to a merchant in order to commercialize it, taking a contractual promise in return. In that case, merchant and spouse may hold the business that has purchased the copyright as community property, but neither is the author. The more usual case is where the merchant insists on an assignment from both the author and the author's spouse in return for a contractual promise.

## *IV. RIGHTS OF CO-OWNERS BETWEEN THEMSELVES*

### *A. Introduction*

The rights of co-owners of a copyright between themselves are not as simple as most commentators assume. A standard statement of the rule is:

> Unless the owners of fractional interests in the copyright have agreed otherwise, each owner of a fractional interest in the copyright has the right to exercise the rights of a copyright owner or any part thereof and to authorize others to do so nonexclusively, all subject to a duty to account to the remaining co-owners for their share of any profits earned.[62]

That is a fair general rule, but it is not the whole truth and nothing but the truth.

The copyright statute is absolutely silent on this question, but it was not a question that Congress overlooked. The committee report on the 1976 Copyright Act states:

> There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work: court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.[63]

The report reiterates this point in the section discussing the ability of a copyright's author(s) to terminate grants covering an extended term. "Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would

---

62 The statement is adapted from *Restatement of the Law Copyright* § 3.04(b)(1) (Proposed Draft 3 2017).

63 H. R. REP. No. 1476, 94th Cong. 2d Sess. 121 (1976), *as corrected in* 122 Cong. Rec. H10,727 (daily ed. Sept. 21, 1976).

have an independent right to sell his share, or to use or license the work subject to an accounting."[64]

These brief, Delphic statements leave a number of questions unanswered, but they establish a framework. The rights of joint authors are the same as the rights of any co-owner. Common law establishes what those rights are.

Commentators generally believe that an exploiting co-owner must always account to the other co-owners for profits derived from the copyright.[65] That is the law in two of the three common situations for real property: where the co-owner receives rent from another for the use of the property, and where the co-owner commits waste. The law is not uniform in the third situation because Congress decided to leave it to "court-made law." The courts have not decreed a uniform solution in the case where one co-owner uses the property herself. There are decisions in copyright cases that are not uniform, and there are decisions in the general law of property, usually related to realty, that vary from state to state.

A co-owner has the absolute right to exploit the real property or the copyright with or without the consent of the other co-owners unless they have made a contrary agreement between themselves.[66] That is a point on which all U.S. courts agree.[67] Whether one co-tenant is obligated to ac-

---

64 *Id.* at 125.

65 1 NIMMER & NIMMER, *supra* note 3, § 6.10[B]; 1 WILLIAM PATRY, PATRY ON COPYRIGHT § 5.7, 5.9 (2020).

66 JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 67 (2012).

67 The copyright rule in France is to the contrary. *See* Code of Industrial Property art. L113-3 ("A work of collaboration shall be the joint property of its authors. The joint authors shall exercise their rights by common accord. In the event of failure to agree, the civil courts shall decide."). English law is similar, also requiring unanimous consent for licensing or transfer, though it is unclear whether, if agreement of the co-owners cannot be reached, an appeal to the courts can result in positive action. DANIELA SIMONE, COPYRIGHT AND COLLECTIVE AUTHORSHIP, 257-62 (2019). U.S. law encourages the broader distribution of copyrighted products, but at the expense of devaluing the property aspects of copyright by depriving each co-owner of exclusive control. My colleague Avi Bell has suggested that a good remedy might be that old fashioned common law institution, the trust, which would place control in a single hand, the trustee, with fiduciary duties to the co-owners. He says that this avoids the problem of the commons, which results in over-exploitation, as well as the problem of the anti-commons, or universal veto, that results in one co-owner being able to hold up the others for an outsize share of the profit, or under-exploitation. The trust solution solves the problem of co-owners each being able to exploit, perhaps to the detriment of all, and permits a potential licensee to receive an exclusive license from just one person. It does not appear to solve the problem of all the co-owners losing control, unless one of them is appointed trustee, in which case all but one loses control. Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 CORN. L. REV. 1015 (2015).

count to the others, and how that accounting is to be made, is not uniformly decided.

### *B. The Co-Owner Who Receives Payment from a Third Party*

#### *1. Payment for Use of the Property*

*a)* Realty

The uniform rule in the United States is that a co-tenant who receives payment from a third party in exchange for the use of the co-tenancy real property must account for that receipt to the other co-tenants.[68] The authorizing co-tenant has received something from the outside that is easy to measure, there is no risk of out-of-pocket loss on the transaction, and the receipt is for the use of an asset held in common with the other co-tenants.

*b)* Copyright

The same rule has been applied when the co-ownership is of a copyright.[69]

#### *2. Payment for Sale of the Property*

*a)* Realty

Contrast the rule on payments from third parties for use with the sale by the co-tenant of the co-tenancy interest in realty. The remaining co-tenants are not entitled to an accounting for the sale price. The selling co-tenant has only sold his interest and simply substituted the buyer as the owner of the co-tenancy interest that the seller formerly held. Since the other co-owners still own their interests, the seller need not share the sale proceeds with them.

*b)* Copyright

The same rule applies where the co-owned property is a copyright.[70]

---

[68] AMERICAN LAW OF PROPERTY. § 6.14 text at notecall 14 (A. James Casner ed. 1952); 7 RICHARD POWELL, POWELL ON REAL PROPERTY § 50.04[1] (2000).

[69] Klein v. Beach, 232 Fed. 240 (S.D.N.Y. 1916) (movie royalties received by co-owner of a play must be accounted for if received from a third party for movie use of the copyrighted property); Jerry Vogel Music Co. v. Miller Music, Inc., 74 N.Y.S.2d 425 (1st Dep't 1947) (person who licenses the song copyright to a third party must account for the royalties received).

[70] Warrick v. Roberts, 34 F. Supp. 3d 913 (N.D. Ill. 2014) (transferee of co-owner's copyright in a song cannot be liable for infringement even if transferee combined the tune with offensive lyrics).

*3. Contrast Community Property*

Again, the rule for most co-owners contrasts with the rule for community property. In one respect, they are the same. Since the returns from the use of community property is community property, any income from the use or sale of either realty or a copyright that is community property becomes community property. The difference is that under *Rodrigue* only the spouse that is the author can move to generate that income. In other co-ownerships, any co-owner can generate the income. Also, since the sale by the author-owner of community property transfers the entire interest in the copyright, the receipt from the sale is community property shared by both spouses.

## C. *The Co-Tenant Who Uses the Property in a Way That Substantially Reduces Its Value*

*1. Realty*

The co-owner who uses the co-tenancy real property in a way that substantially reduces its value must account to the other co-owners for their proportionate share of the reduction in value.[71] This rule is part of the law of waste. A person in rightful possession of land was allowed to make a reasonable use of it, but could not significantly reduce its permanent value to the detriment of future possessors.[72] The possessor was entitled to estovers, cutting wood for reasonable domestic use on the property, but was not entitled to engage in the commercial harvesting of timber.[73]

*2. Copyrights Generally*

Whether the same rule can be applied to copyrights is an open question. Several courts have stated that a co-owner may not license a copyright in a way that would cause its destruction, but I have been unable to find a case that so held.[74] Indeed, Nimmer doubts that the total destruction of the value of a copyright is likely because of the many uses to which a copyright can be put, such as movie, television, theater, video, or

---

71 WHITMAN, ET AL., *supra* note 24, at 163.

72 KURTZ, *supra* note 5, at 76-77, 112-14.

73 WHITMAN, ET AL., *supra* note 24, at 162-63, 217-18; *see, e.g.*, Price v. Andrew, 10 N.E.2d 436 (Ind. Ct. App. 1937) (removal of coal).

74 Mapp v. UMG Recordings, Inc., 208 F. Supp .3d 776, 794 (M.D. La. 2016) (dictum; plaintiff failed to prove that the license of the song damaged the copyright); Brown v. Republic Prods., Inc., 161 P.2d 796 (Cal. 1945) (dictum; trial court did not find whether license destroyed value of copyright, and fact that plaintiff was entitled to accounting for royalty received indicates that copyright was not valueless.)

novel.[75] He might take the same view if the question were whether the value of the copyright were significantly reduced, or he might not. Though there is no justification for it in copyright law, one might draw a distinction between copying the entire copyrighted property,[76] which might be considered a significant reduction in value, and preparation of a derivative work,[77] which might not. The usefulness of this distinction seems limited, as both the direct use and the derivative use values might be very different and might either increase or decrease the value of the copyright. One possible case might be where the copyright to a novel is held by co-tenants, and one co-tenant licenses the making of a movie that does not do well. The other co-tenants might allege that the licensing had destroyed the only or a major value remaining in the copyright. I doubt that diligent lawyering would be unable to prove significant remaining value in the copyright, or that the licensing co-tenant knowingly engaged in activity that destroyed the copyright's value.

### *3. Copyrights Held as Community Property*

The liability of one co-tenant to another for use that significantly diminishes the value of the property is even less likely when either real property or a copyright is held as community property. In California, *Marriage of Duffy*[78] held that one spouse has a duty of loyalty to the other spouse in the management of community property, which implies a duty of good faith and fair dealing.[79] The duty of one spouse in managing the community property includes the duty to inform the other spouse, but it

---

[75] Even within the same use, sequels (which would be derivative works) and remakes are not unknown. 1 NIMMER & NIMMER, *supra* note 3, § 6.10[B] (citing Herbert v, Fields, 152 N.Y. Supp. 487 (Sup. Ct. N.Y. Cnty. 1915). Nimmer also notes that even where a song has been produced by one record company, other companies often believe it is likely to be profitable to produce their own version of the song, demonstrating that the copyright retains value. There is, however, one case in which the court stated, without supporting the statement, that the license by the co-tenant had destroyed the value of the screenplay copyright, though the statement was not necessary to accord plaintiff the accounting of license fees received that he sought. Crosney v. Edward Small Prods., 52 F. Supp. 559 (S.D.N.Y. 1942); Comment, *supra* note 24, at 1556 (arguing that modern means of dissemination permit one co-owner to destroy the value of the copyright by disseminating the work to all potential buyers).

[76] *See, e.g.*, Carter v. Bailey, 64 Me. 458 (1874) (books subject to copyright printed by co-owner in their entirety).

[77] *See, e.g.*, Klein v. Beach, 232 Fed. 240 (S.D.N.Y. 1916) (co-owner of play authorized making it into a film).

[78] *In re* Marriage of Duffy, 111 Cal. Rptr. 2d 160 (Cal. Ct. App. 2001) (wife could not recover from husband for investing community funds in investments that did not satisfy prudent investor rule).

[79] CAL. FAM. CODE §§ 721(b), 1100(e).

did not include a duty of care. This meant that the managing spouse was never liable for making imprudent investments as long as they were made in good faith.[80] So it appeared after *Duffy* that one spouse would only be liable to the other for waste if the waste was malicious. The court said: "[A] spouse . . . does not owe the other spouse the duty of care one business partner owes to another."[81]

The proposition that a person owed less duty to a spouse than to a business partner did not sit well with the California legislature. In the year after *Duffy* was decided, it changed the rule in *Duffy* so that a spouse owes a duty of care that is the same as that owed to a business partner. In both cases the duty of care "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[82]

Thus, the question will be whether the acts of the author-spouse (or the acting spouse, if neither spouse is the author) rise to the standard of gross negligence in authorizing a use of the realty or copyright that substantially depresses its value.

### *D. Co-tenant Self-Use of the Property*

#### *1. Realty*

Alas, there is no uniform rule in the United States about co-tenants who exploit the real property themselves. Different states adopt different views. The majority rule is that one co-tenant need not account to the other co-tenants for profits made from her own use of the property unless the use significantly depletes the property's value or the using co-tenant excludes the other co-tenants. However, a few states require that the co-owners receive their proportionate share of the fair value of the asset used if the using co-owner derives a profit from it, and one state may require an accounting even if the using co-tenant earns no profit from the use.[83]

---

80 *Marriage of Duffy*, 111 Cal. Rptr. 2d 160 (wife could not recover from husband for investing community funds in investments that did not satisfy prudent investor rule).

81 *Id.* at 173.

82 CAL. CORP. CODE § 16404(c).

83 At old common law, if one cotenant was in sole possession of property subject to concurrent ownership but had not excluded the others, she was not accountable for either the rental value of her use and occupation or for the actual net income she received from the property unless [she was appointed agent for them, her co-tenants had given her exclusive possession, or she was their guardian or trustee]. But England changed the common law rule by a statute enacted in 1705 that is commonly known as the Statute of Anne. It provided that a cotenant must account, as bailiff, for any rents and profits he might receive from the property in excess of his just proportion. English courts have narrowly construed this statute

Most states have held that an occupying co-tenant need not account to his co-owners as long as these three conditions all apply: he does not exclude his co-tenants, he receives no payment from a third party for the use of the property, and the use does not significantly reduce the value of the property. Typically, the property being used is a family home or a farm, and in most farm cases it includes a residence.

In *Estate of Randall*, where two co-tenants who had occupied the home during their mother's lifetime continued to live in the residence after her death, the court held that they need not account to the other co-tenants for the value of the occupancy:

> It is an established rule in this state, as well as elsewhere, that a tenant in common is entitled to the use and possession of the common property, subject only to the condition that he may not exclude another cotenant from like use and possession. [citations omitted] It is also well settled that a cotenant in possession is liable for rent only in cases where he has leased or let property for profit, in which case he must account for the profits realized. [citations omitted]. Here there is no contention made that appellants realized any rents or profits from the residence property, nor does it appear that any one of the cotenants sought possession or occupancy of the premises during the time appellants occupied it.[84]

There are cases to the same effect in Alabama,[85] Alaska,[86] Arkansas,[87] California,[88] Colorado,[89] Delaware,[90] District of Columbia,[91] Flor-

---

> to apply only to rents that a cotenant receives from a third person but not to income derived from the co-tenant's non-tortious use of the property, even if the income was from exploiting mineral or timber resources in a way that permanently reduced the property's value.
>
> Most American jurisdictions have either substantially re-enacted the Statute of Anne or have declared it to be part of their common law. In most of these jurisdictions, the duty to account has been limited almost as narrowly as in England, except that a cotenant who derives income from a non-tortious use of the land that permanently reduces its value generally must account to the other cotenants. In a minority of American jurisdictions, the duty to account applies more broadly whenever one cotenant derives any income from the sole possession of the property in the form of rents or otherwise. In a few states, a cotenant in sole possession must account for the reasonable rental value of the land even if he derives no actual income from it.

WHITMAN, ET AL., *supra* note 24, at 161-62 (footnotes omitted).

84 132 P.2d 763, 766 (Idaho 1942).

85 Cochran v. Leonard, 85 So. 693 (Ala. 1920) (farm) (partition action). There is also dicta to that effect in Turner v. Johnson, 19 S.2d 397 (Ala. 1944) (nature of property not mentioned) (partition action) and Burk v. Burk, 22 So.2d 609 (Ala. 1944) (farm).

86 Ashley v. Baker, 867 P.2d 792 (Alaska 1994) (co-owner who occupied co-owned cabin not liable for rent to other co-owner).

87 Clifton v. Clifton, 810 S.W.2d 51 (Ark. Ct. App. 1991) (residence) (partition).

ida,[92] Georgia,[93] Illinois,[94] Kentucky,[95] Louisiana,[96] Massachusetts,[97] Michigan,[98] Missouri,[99] Nevada,[100] New Jersey,[101] New Mexico,[102] New York,[103] North Carolina,[104] North Dakota,[105] Oklahoma,[106] Oregon,[107]

---

88 Pico v. Columbet, 12 Cal. 414 (1859) (Field, J.) (Nature of property not mentioned); Howard v. Throckmorton, 59 Cal. 79 (1881) (dictum) (ranch); Nevarov v Nevarov, 256 P.2d 330 (Cal. Ct. App. 1953) (farm) (partition).

89 Keith v. El-Kareh, 729 P.2d 377 (Colo. Ct. App. 1986) (family home).

90 *In re* Estate of Gedling, 2000 Del. Ch. LEXIS 73 (Feb. 29, 2000) (residence); Mougianis v. Embassy Realty Co., 112 A.2d 844 (Del. Ch. 1955) (parking lot) (dictum).

91 Allen v. Jones, 12 F.2d 186 (D.C. App. 1926) (nature of property not mentioned).

92 Coggan v. Coggan, 239 S.2d 17 (Fla. 1970) (office building) (partition). There is an additional exception in Florida. Where one of partitioning co-tenants claims credit for more than her share of expenses, such as taxes and mortgage interest, in dividing the proceeds of a partition, the other co-tenant can claim credit for half the fair rental value of premises occupied. Brisciano v. Byard, 615 So. 2d 213 (Fla. Ct. App. 1993) (residence) (partition).

93 Clements v. Seaboard Air-Line Rwy. Co., 124 S.E. 516 (Ga. 1924) (co-tenant not entitled to accounting from two other co-tenants for value of use of a railroad depot) (partition).

94 Clark v. Covington, 438 N.E.2d 628 (Ill. Ct. App. 1982) (residence) (partition); but see Sajdak v. Sajdak, 586 N.E.2d 716 (Ill. Ct. App. 1992) (two-unit residential building one of which was occupied by a co-tenant), holding to the contrary on the basis of a statute.

95 Martin v. Martin, 878 S.W. 2d 30 (Ky. Ct. App. 1994) (owner of a mobil home park could not demand rent from an occupying co-tenant); accord, Taylor v. Farmers & Gardeners Market, 173 S.W.2d 803 (Ky. 1943) (vacant land used for loading and parking by co-tenant's adjacent business) (partition).

96 Wagner v. Wagner, 134 So. 2d 670 (La. Ct. App. 1961) (residence); Arcemont v. Arcemont, 162 S.2d 813 (La. Ct, App. 1964) (residence).

97 Goff v. MacDonald, 129 N.E.2d 115 (Mass. 1954) (residence). There is also much dictum to the same effect.

98 Walton v. Walton, 283 N.W. 687 (Mich. 1938) (business and residence) (partition); DesRoches v. McCrary, N.W.2d 511 (Mich. 1946) (dictum).

99 Metzger v. Metzger, 153 S.W.2d 118 (Mo. Ct. App. 1941).

100 Lanigir v. Arden, 450 P.2d 148 (Nev. 1969) (nature of property not stated).

101 Jager v. Jager, 42 A.2d 201 (N.J. Eq. 1945) (residence) (partition); Mastbaum v. Mastbaum, 9 A.2d 51 (N.J. Eq. 1939) (residence) (partition).

102 Olivas v. Olivas, 780 P.2d 640 (N.M. 1989) (residence); Williams v. Sinclair Ref. Co., 47 P.2d 910 (N.M. 1935) (gas station).

103 Cooney v. Shepard, N.Y.S.2d 728 (4th Dep't 2014) (vacation residence) (partition); *In re* Sontag, 151 B.R. 664 (Bankr. E.D. N.Y. 1993) (applying New York law) (residence); Oliva v. Oliva, 523 N.Y.S.2d 859 (2d Dep't 1988).

104 Whitehurst v. Hinton, 184 S.E. 66 (N.C. 1936) (nature of land not specified) (partition). The court did not discuss the contrary dictum in *McPherson v. McPherson*, 33 N.C. 391 (1850) (unable to determine the nature of the property), possibly because of the antiquity of the case.

105 Parceluk v. Knudtson, 139 N.W.2d 864 (N.D. 1966) (family farm).

Texas,[108] Utah,[109] Virginia,[110] Washington,[111] and Wisconsin.[112] In Kansas,[113] this rule is stated in dictum.

In nearly every state where an occupying co-tenant must account for the occupation to his fellow co-tenants, there is a specific state statute requiring it. In Illinois, the statute reads: "When one or more joint tenants, tenants in common or co-partners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons, his or their executors and administrators, shall account there for [sic] to his or their co-tenants jointly or severally."[114] The court applied that statute to a joint tenancy in a trust of land and held the co-tenant liable for the fair rental value of the unit occupied.[115] Similar statutes changed the common law in Connecticut,[116] Montana,[117] Ohio,[118] Pennsylvania[119] and West Virginia.[120] The Pennsylvania statute is even clearer:

---

106 Airington v. Airington, 192 P. 689 (Okla. 1920) (nature of property not mentioned) (partition action).

107 Hanns v. Hanns, 423 P.2d 499 (Ore. 1967) (residence).

108 Grieder v. Marsh, 247 S.W.2d 590 (Tex. Civ. App. 1952) (residence); Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App. 1947) (dictum) (residence) (partition).

109 Roberts v. Roberts, 584 P.2d 378 (Utah 1978) (pasture).

110 Daly v. Shepherd, 645 S.E.2d 485 (Va. 2007) (residence) (partition action). Virginia adds another requirement to find non-liability, that the property be suitable for use by all the co-tenants, which was met in this case. However, this disregards Virginia. Code Annotated § 8.01-31, which calls for an accounting if one co-tenant is "receiving more than comes to his just share or proportion."

111 Yakavonis v. Tilton, P.2d 908 (Wash Ct. App. 1998) (rental residences) (partition action); Cummings v. Anderson, 614 P.2d 1283 (Wash. 1980) (residence) (partition action); Fulton v. Fulton, 357 P.2d 169 (Wash. 1960) (realty used in construction business) (partition action).

112 Rainer v. Holmes, 75 N.W.2d 290 (Wis. 1956) (residence) (partition).

113 Speer v. Shipley, 85 P.2d 999 (Kan. 1939) (farm) (partition).

114 ILL. REV. STAT. 1983, ch. 76, par. 5.

115 Sajdak v. Sajdak, 586 N.E.2d 716 (Ill. Ct. App. 1992) (two-unit residential building one of which was occupied by a co-tenant); *but see* Clark v. Covington, 438 N.E.2d 628 (Ill. Ct. App. 1982) (residence) (partition), not discussed in *Sajdak*, where the statute is not mentioned.

116 Lerman v. Levine, 541 A.2d 523 (Conn. Ct. App. 1988); Hill v. Jones, 170 A. 154 (Conn. 1934) (dictum) (business property).

117 Ayotte v Nadeau, 81 P. 145 (Mont. 1905) (dictum) (saloon and residence); Thompson v Flynn, 58 P.2d 769 (Mont. 1936) (dictum) (pasture and residence).

118 West v. Weyer, 18 N.E. 537 (Ohio 1888) (unfenced pasture land); Cohen v. Cohen, 106 N.E.2d 77 (Ohio 1952) (home); Modic v. Modic, 633 N.E.2d 1151 (Ohio 1993) (transmission repair business) (all citing what is now *Ohio Revised Code Annotated* § 5307.21).

119 68 PA. STAT. § 101; Beck v. Beiter, 22 A.2d 90 (Pa. Super. 1941).

120 Hatcher v. Narcise, 375 S.E.2d 198 (W. Va. 1988) (unable to determine the nature of the property) (citing West Virginia. Code § 55-8-13).

> In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession his or their proportionate part of the rental value of said real estate for the time such real estate shall have been in possession as aforesaid; . . . ."[121]

An intermediate position is that the occupying co-tenant is not normally liable, but the court can consider the value of the occupancy, especially exclusive occupancy, in dividing the proceeds of a partition action[122] or where the occupying co-tenant asks for reimbursement of the costs of maintaining the property, such as taxes and mortgage payments, from co-tenants.[123]

In some states, a co-tenant who occupies more than the co-tenant's proportionate share of the property is liable to his co-tenants for the proportionate share of net profits earned or the fair market value of the excess used. The former is the measure of accounting in South Carolina,[124] while the latter has been held in one Washington case.[125] The South Carolina remedy requires an accurate cost accounting of the profit earned and the degree to which the co-owned property contributed to that earning. In the absence of profit, nothing is owed to the co-owner. The Washington solution requires determining the fair rental value of the property, which must be shared with the co-owner regardless of whether the using co-owner derived any profit. Whether the Washington case is still good law may be doubted in light of its treatment by subsequent Washington cases.[126]

---

121 68 PA. STAT. § 101.

122 Forler v. Williams, 241 N.W. 823 (Mich. 1932) (dictum) (residence); Klawitter v. Klawitter, 623 N.W.2d 169 (Wis. 2000) (farmette) (partition); Gaynor v. Hird, 424 S.E.2d 240 (Va. Ct. App. 1992).

123 Lanigir v. Arden, 450 P.2d 148 (Nev. 1969) (nature of property not stated); Capital Finance Co. of Delaware Valley Inc. v. Asterbadi, 942 A.2d 21 (N.J. Super. App. Div. 2008) (residence).

124 James v. Massey, 14 S.C. 292 (1880) (farm); Thomson v. Peake, 17 S.E. 45 (S.C. 1893) (farm).

125 McKnight v. Basilides, 143 P.2d 307 (Wash. 1943) (residence), a case that later courts decided was an ouster by one co-tenant of the other, but the court did not ground its opinion on the ouster. The result is that the prudent Washington attorney could not advise a client about the outcome with any confidence. *See* cases cited in note 111 *supra*.

126 Which was the case in *McKnight v. Basilides*. The co-tenant occupied the residence, making no discernible profit.

*2. The Copyright Cases on Self-Use*

The caselaw applied to self-use of copyrights by co-tenants is quite meager and contradictory. The seminal case where it is unambiguously clear that the co-owner is exploiting the copyright himself is *Carter v. Bailey*.[127] The parties were tenants in common of the copyrights to several books. Bailey printed the books without Carter's permission. Absent an agreement between the parties to the contrary, the court held each co-owner has the right to print, publish, and sell the copyrighted work without accounting for profits. The court said, "[a] use only upon condition of accounting for profits, would compel a disuse, or a risk of skill, capital and time with no right to call for a sharing of possible losses."[128] *Carter* was decided under previous copyright law, but the current law did not purport to change the rules for accounting between co-tenants.

*United States ex rel. Berge v. Board of Trustees*[129] supports the rule of not requiring an accounting when a co-owner uses the copyrighted work. Berge, a doctoral candidate, alleged that the university and university officials made false statements to the National Institutes of Health on grant reports by using her thesis abstract and research. The court found that Berge and the university were co-owners of the copyright in the work used in the report. The defendants were within their rights as co-owners to use the copyrighted work without compensating the plaintiff. No accounting was ordered. While the case held that one co-tenant need not account to the other for self-use, its persuasiveness is somewhat reduced by the fact that it is not clear that the using co-tenant derived any monetary profit from the use, or that the use had a readily ascertainable fair market value.

There is one case that is commonly cited to support a rule requiring a co-tenant who uses a copyright himself to account to his co-tenants. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*[130] ordered a reciprocal accounting between co-owners of a song. However, the facts do not state whether one co-owner licensed the song to another, in which case the holding would be consistent with *Carter* and *Berge*, or exploited the work itself, in which scenario it would contradict those cases. This case neither supports nor negates the non-liability of the co-owner for using the copyright himself.

*Oddo v. Ries*[131] seems to reach a contrary result. It allows the court in its discretion to require the using co-tenant to account. The parties were business partners who owned the copyrights in a book and manu-

127 64 Me. 458 (1874).
128 *Id.* at 463.
129 104 F.3d 1453 (4th Cir. 1997).
130 223 F.2d 252, 253 (2d Cir. 1955).
131 743 F.2d 630 (9th Cir. 1984).

script that Oddo was to prepare for publication. When Ries was unhappy with Oddo's progress toward finishing the manuscript, Ries hired another writer to finish Oddo's work. Ries then published the finished product. The court found that Ries may have to account to Oddo for any profits he made from use of those copyrights in the finished book. "[T]he district court may also consider whether, in its discretion, it should exercise jurisdiction pendent to the infringement claim to compel Ries to account to Oddo for any profits earned from use of the co-owned copyrights."[132] It is unclear to me why the court says the accounting is discretionary with the trial court. Nimmer endorses this rule, saying that the *Carter* rule "has almost without exception been rejected in modern decisions," but the only case he cites that so held is *Oddo v. Reis*.[133]

One should know that there are many statements of the general rule that a co-tenant must account to his fellow co-tenants for any profits received. Most of those cases involve payments from third parties for the right to use the copyright, or cases where accounting was denied for other reasons.[134]

---

[132] *Id.* at 635.

[133] 1 NIMMER & NIMMER, *supra* note 3, § 6.12[A].

[134] Siegel v. Warner Bros. Entm't, Inc., No. CV 04-08400-SGL (RZx), 2009 U.S. Dist. LEXIS 66115 (C.D. Cal. July 8, 2009) (person who licenses movie rights must account to his co-owner); Brownstein v. Lindsay, 742 F.3d 55 (3d Cir. 2014) (remanded to determine whether there was a repudiation of co-owner's rights in software that one co-owner licensed); Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co., 510 F.3d 77 (1st Cir. 2007) (statute of limitations expired on plaintiff's attempt to establish co-ownership of copyright); Corbello v. DeVito, 832 F. Supp. 2d 1231 (D. Nev. 2011) (co-owner licensed book to a third party to produce a stage play); Brown v. McCormick, 23 F. Supp. 2d 594 (D. Md. 1998) (plaintiff and defendant were not joint authors); DeBitetto v. Alpha Books, 7 F. Supp. 2d 330 (S.D.N.Y. 1998) (copyright infringement case dismissed); Greene v. Ablon, 794 F.3d 133 (1st Cir. 2015) (parties assumed that an accounting would be due, but the court found that no profits were earned); Meredith v. Smith, 145 F.2d 620, 620 (9th Cir. 1944) (case dismissed for lack of federal jurisdiction because the claim was for breach of contract); Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949 (11th Cir. 2009) (co-authorship not claimed; fiduciary duty claimed but not found); Warren Freedenfeld Assocs. v. McTigue, 531 F.3d 38 (1st Cir. 2008) (architectural firm and its client were not co-owners of the copyright in the building plans); Piantadosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943) (licensee of a co-tenant is not an infringer and owes no royalties to the other co-tenants); Klein v. Beach, 232 F. 240 (S.D.N.Y. 1916) (royalties received must be accounted for if received from a third party for use of the copyrighted property); Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010) (parties were not co-owners of the copyright); CCNV v. Reid, 846 F.2d 1485 (D.C. Cir. 1988) (remanded to determine if parties are joint authors); Jerry Vogel Music Co. v. Miller Music, Inc., 74 N.Y.S.2d 425 (1st Dep't 1947) (person who licenses the song copyright to a third party must account for the royalties received).

*3. Community Property*

As noted above,[135] the California legislature in 2002 changed the duties that one spouse owes the other in the management of community property to add a limited duty of care to the obligations of the person managing the community property. The method by which this was done was sloppy. It amended the California Family Code § 721 to cross-reference all of Corporations Code §16404, instead of only cross-referencing paragraphs (c)-(g) which deal with the duty of care. Subsection (b) says:

> A partner's duty of loyalty to the partnership and the other partners includes all of the following: (1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.[136]

That subsection is not exactly self-defining in relation to community property where the community property is used by one spouse, but no profit is derived from its use from the outside. The specific reference to "fiduciary" is not helpful, as there are many different kinds of fiduciaries with different duties.[137] The cases decided under this section and its predecessor tend to speak in high minded phrases like good faith, not taking unfair advantage, render a full and exact account of transactions, etc. That language is often followed by qualifying language such as by "misrepresentation, concealment, threats, or adverse pressure of any kind."[138] Most of the cases involve partnerships, not community property, and involve situations where the partner received payments from persons outside the partnership.[139] I find no guidance whatsoever on our special case, either from the clear language of the provision or from the decided cases.

What is clear is that the spouse using the copyright must provide relevant information to the other spouse of the use upon request.[140] That, however, is not very helpful, because the spouse seldom asks, "Darling,

---

135 *See* notes 78–82 *supra* and accompanying text.

136 CAL. CORP. CODE § 16404(b) & (b)(1).

137 *See, e.g.*, Sparks v. Gue (*In re* Gue), 2005 Bankr. LEXIS 3364 at *10-11 (9th Cir. July 15, 2005).

138 Page v. Page, 359 P.2d 41, 45 (Cal. 1961) (absent agreement on a term for the partnership, a partner can dissolve the partnership at any time as long as he does not exclude other partners from the business opportunity).

139 *See, e.g.*, Leff v. Gunter, 658 P.2d 740 (Cal. 1983) (plaintiff told defendant that federal government would be taking bids for lease to IRS for service center in Fresno. They formed partnership, which terminated before bids were due. Defendant submitted winning bid. Held, working on the bid during the partnership was taking a partnership opportunity.).

140 CAL. FAM. CODE § 721(b)(1) & (2); *In re* Marriage of Duffy, 111 Cal. Rptr.2d 160, 165 (Cal. Ct. App. 2001).

are you doing anything with that copyright you have which is our community property?"

*4. The Policy*

*a)* Textual arguments

At this point, it is appropriate to return to the legislative history. The committee report on the 1976 Copyright Act states:

> There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work: court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.[141]

The report reiterates this point in the section discussing termination of grants covering an extended term.

> Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would have an independent right to sell his share, or to use or license the work subject to an accounting.[142]

What can that mean?

A first observation is that these statements relate to a law that only considers joint authorship. Though one might argue that joint authorship differs from other co-ownerships (and it does), joint authorship does not differ from other co-ownerships on the right of a co-owner to an accounting. A second observation is that the reference to "court-made law" is ambiguous.

The "court-made law" may refer to general court-made law regarding co-ownership of all types of property (though the cases mostly involve real estate). That general court-made law is certainly state law. *Goodman v. Lee*, a copyright case, takes the position that the result of a suit by one co-tenant against another co-tenant who profited from the copyright depends on state law.[143] Its authority is somewhat reduced by the fact that all

---

141 H. R. REP. NO. 1476, 94th Cong. 2d Sess. 121 (1976), *as corrected in* 122 Cong. Rec. H10,727 (daily ed. Sep. 21, 1976).

142 *Id.* at 125.

143 78 F.3d 1007 (5th Cir. 1996). The court ordered an accounting of royalties received from third parties on a jointly owned song, *Let the Good Times Roll*, based on Louisiana law. The court said, "The [Copyright] Act details at length precisely which civil actions and remedies are available for copyright infringements. Nowhere in the Act, however, do its provisions detail any action available to a co-owner for an accounting. Instead . . . such an action is governed by state law." *Id.* at 1013. Louisiana law requires an accounting between co-tenants for income received from a third party.

states and federal caselaw would have ordered an accounting under the facts of that case, which involved song royalties paid to one co-tenant by third parties.

Alternatively, "court-made law" may refer to court-made law specifically treating co-ownership of copyrights. That might still be state law, or it might be federal common law borrowing from state law. A third approach would see it referring to both bodies of law, since they are generally consistent.

Finally, how seriously should one take the final words of each quotation which seem to require an accounting in all cases? One can argue that they establish a uniform federal law as interpretations of copyright law, at least for joint works. Alternatively, one could argue that they are simply a loose statement that covers the overwhelming majority of cases, where one co-owner receives compensation from a third party for the use of the copyright. Under that view, they do not establish federal law, but simply refer to existing law as indicated above, though that reference is inaccurate in a small number of cases. In this state of the law, where the cases are few and conflicted, what should one do?

The cases, no matter how they come out, rarely provide a reason for the rule they announce. It is as though the rule were announced by God on Mt. Sinai,[144] and need not be justified due to the authority of the lawgiver. There are, however, occasional guides to the underlying rationale.

*b)* Policies supporting non-liability

Some cases point out that the exploiting co-owner is not a wrongdoer. He has the right to exploit the property. For that reason, he should not need to account to his co-owners.[145] This reasoning is buttressed because many cases state that a co-tenant must account to fellow tenants if the co-tenants are excluded from the use because that makes the exploiting co-tenant a wrongdoer.[146] It is certainly true that the co-owner has the right to exploit the property; it does not necessarily follow that the right is free.[147] Nonetheless, it is hard to think of a situation where a person has a non-contractual right to exploit an asset where the exploiter must also pay for the privilege.

Future Supreme Court Justice Stephen J. Field suggested a more entrepreneurial rational:

---

144 The whole incident is related at *Exodus* chapters 20 to 34.

145 *See, e.g.*, Williams v. Sinclair Ref. Co., 47 P.2d 910, 911-12 (N.M. 1935).

146 *See, e.g.*, *id.* However, this is all dictum, as I have found no case in which a court has actually held that one co-tenant excluded another.

147 Jane Ginsburg, *Fair Use for Free or Permitted-but-Paid*, 29 BERKELEY TECH. L.J. 1383 (2014) suggests that the fact that the use is fair does not necessarily mean that it should be free. Courts have not yet followed her suggestion.

> There is no equity in the claim asserted by the plaintiff to share in profits resulting from the labor and money of the defendant, when he has expended neither, and has never claimed possession, and never been liable for contribution in case of loss. There would be no equity in giving to the plaintiff, who would neither work himself, or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks.[148]

There seems to be an equitable argument here, that a person who shares neither the risk nor the labor should not also share the gains. This is the reasoning adopted in *Carter v. Bailey*,[149] and it is quite persuasive when the non-using co-owner is seeking an accounting of *profits* derived from a business involving the use of the copyright. Putting a co-owner who has not engaged in copyright infringement to the trouble and expense of complying with the complex rules of accounting for profits designed to be imposed on persons who infringe copyrights seems unfair.[150] However, it is not clear that the measure of an infringer's profits should be applied to determine the profits derived by a co-owner. Measuring the co-owner's appropriate profit might be a matter of state law, since it is not specified in the Copyright Act; only the measure of damages for copyright infringement is specified.[151]

One might also argue that a copyright is more likely to be exploited if the exploiter need not pay some of the profits to co-tenants. This would be a pro-development, economic argument. There is no empirical evidence indicating that this proposition is either true or false, and the paucity of cases would seem to argue that the underlying legal rule does not have much motivating force.

*c)* Policies supporting liability

The argument for requiring an accounting for self-use of a copyright is also based on fairness. The co-owner has used an asset of which he is only a part owner (though in property theory each co-owner owns the entirety of the property subject to the correlative rights of the co-owners.)[152] It does not seem unjust to require that the other co-owners be compensated

---

148 Pico v. Columbet, 12 Cal. 414, 422 (1859).

149 64 Me. 458 (1874).

150 17 U.S.C. § 504(b) provides: "In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

151 17 U.S.C. § 504 is entitled: "Remedies for infringement: Damages and profits," and subsections (b) on actual damages and (c) on statutory damages both refer to "infringement" and "infringer."

152 KURTZ, *supra* note 5, at 285.

for their share of the value he used, unless that value is too difficult to determine.

So an accounting seems appropriate when what is sought is a proportion of the fair market value of what is used, but not appropriate if what is sought is an accounting for the profits derived. In most cases, it will be easier to determine the fair market value of using the copyright than it will be to determine the extent to which use of the copyright contributes to the profits of an ongoing business.[153] In some industries there will be standard rates for licensing the copyright. The rates tend to vary with the user, the nature of the use and other factors, but it appears that there are predictable ranges.[154] Yet the theory of co-tenancy is that the entire asset belongs to all the co-tenants, and each has the right to use all of it, subject to the correlative rights of the other co-tenants.

One argument for requiring the using co-owner to account might be that there is a fiduciary relationship between co-tenants, so the using co-tenant holds the proceeds as a constructive trust.[155] Such an argument, like other arguments for constructive trusts, is simply the conclusion. There is generally no fiduciary relationship between co-owners. The statement about constructive trusts admits that there is none, but the law wishes to impose similar duties. Such a statement, to be persuasive, requires a statement of why there should be a constructive trust, such as unjust enrichment, exploitation, etc., and what the particular duties might be that attach to such a trust. The limited instance where courts have held co-owners to have a duty of good faith to one another is where one co-owner acquires an interest in the co-owned property for himself, either by acquiring an encumbrance or buying the property outright. In such a case, the acquisition is held to be for the co-tenancy upon payment to the acquiring co-tenant of the other co-tenant's proportionate share of the purchase price.[156] There is also the requirement noted above that spouses holding community property owe each other a duty of loyalty.

One might argue that this is an area where applying the state rule for co-owners is inappropriate. Use by a co-owner of realty is essentially different from use by a co-owner of a copyright. Co-ownership of realty mostly involves the family house, sometimes accompanied by the family

---

153 "Determining the amount of contingent compensation expressed as a percentage of the money thus generated is a complicated task." Siegel v. Warner Bros. Entm't, Inc., No. CV 04-08400-SGL (RZx), 2009 U.S. Dist. LEXIS 66115, at *2 (C.D. Calif. July 8, 2009).

154 *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 90-107, 138-65, 220-73 (2019).

155 *See, e.g.*, Maurel v. Smith, 220 Fed. 195 (2d Cir. 1915) (Hand, D.J.); for an article adopting this position, see Avner D. Sofer, *Joint Authorship: An Uncomfortable Fit with Tenancy in Common*, 19 LOY. L.A. ENT. L.J. 1, 3, 11-20 (1998).

156 KURTZ, *supra* note 5, at 289-90.

farm. That is a living situation. The family farm may generate income, but the prime purpose of using the family home and farm is to provide living quarters for a family member. In contrast, a copyright is a revenue-producing asset. In every litigated case, the use of the copyright by one co-owner has produced revenue. That may make the two situations different.

Further, the reason there are so few copyright cases is probably because it is unusual for one co-owner to use the copyright himself rather than license it. In most cases, self-use requires considerable skill. It is likely to be engaged in by one of the original joint authors rather than someone who acquired the interest as a result of death or divorce (though one should note that in at least two of the cases described above, the co-tenant using the work appears to have been a businessperson who did not have the special skills required to produce it).[157]

It is also useful to have as few rules as possible. Two rules in the same area require that a court decide under which rule particular facts fall. A general rule that one co-tenant must account to another for income of the property, whether generated externally or internally, makes some sense. However, there seems to be little difficulty in distinguishing income derived from third parties, such as royalties or sale proceeds, from income generated from the self-use by one co-owner, such as preparing and performing a derivative work.

It may be argued that Congress intended a uniform federal rule.[158] Sometimes Congress does intend a uniform federal rule. This is clearest when Congress inserts a legal term in a federal statute. *Community for Creative Non-Violence v. Reid*[159] required that the court define the term "employee" to determine whether the sculpture that Reid created was a work made for hire. Justice Marshall said:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. [citations omitted] This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." [citation omitted] Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation.[160]

---

157 United States ex rel. Berge v. Bd. of Trustees, 104 F.3d 1453 (4th Cir. 1997); Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984).

158 Craig Y. Allison, *Note: Does a Copyright Coowner's Duty to Account Arise Under Federal Law?*. 90 MICH. L. REV. 1998, 2014, 2016-20 (1992).

159 490 U.S. 730 (1989).

160 *Id.* at 740.

The court then proceeded to define "employee" based on the *Restatement (Second) of Agency*,[161] rather than on the law of the particular state involved.

However, in another copyright case, *DeSylva*, the Supreme Court was faced with defining the word "children," and held that the copyright statute incorporates the appropriate state law definition. The dissent wanted a uniform federal definition.[162]

This argument for a uniform federal rule is generally buttressed by the ease by which both jurisdiction and venue can be found anywhere in the United States for most allegations of copyright infringement,[163] so there is a real danger of forum shopping if state law rules are to be applied. However, just because a case is brought in a state or in the federal court sitting in that state does not mean that its choice of law rules will choose the law of that state to govern whether an accounting is due or for any other purpose.

However, this case differs from both *Reid* and *DeSylva*. Here there is no word in a federal statute to be defined. The question of accounting is not mentioned in the copyright statute; it is only alluded to in the committee report, and then only with respect to joint works.

It should be noted that there are times when Congress has expressly incorporated the rules of state law into a federal statute. It has done so in its definition of "widow" and partially "children" in the copyright law.[164]

## *V. THE SPECIAL PROBLEM OF TERMINATION RIGHTS*

A good illustration of the interplay of federal and state law regarding copyright is the termination right for post-1977 grants of copyright. Copyright law permits an author to terminate his assignment or transfer (other than by will) of a copyright (that is not a work made for hire) thirty-five years after the post-1977 grant.[165] The provision is considerably more complicated than that,[166] and has been diluted by a couple of Courts of Appeal,[167] but I want to focus on who can terminate — the identity of the terminator.

---

161 RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

162 DeSylva v.Ballentine, 351 U.S. 570 (1956).

163 *See* 3 NIMMER & NIMMER, supra note 3, § 12.01(C), (D).

164 17 U.S.C. § 101 (2018).

165 *Id.* § 203. In the case of a publication, the earliest the termination can occur is 35 years after publication, or forty years after the grant, whichever first occurs.

166 For a full treatment, see 3 NIMMER & NIMMER, *supra* note 3, ch. 11.

167 Milne ex rel. Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005), *cert. denied*, 548 U.S. 904 (2006) (Winnie-the-Pooh); Penguin Group (USA), Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008), *cert. denied,* 556 U.S. 1253 (2009).

If the author is alive at the time the right of termination vests, it is only the author who can terminate. Where there was a grant by two or more joint authors, a majority of the grantors may terminate.[168] Where an author is deceased at the time the right of termination vests, the rules become more complicated. The copyright law adopts a forced share approach to the question of who can terminate the transfer if the author is deceased.[169] The beneficiaries of the forced share are the surviving spouse, children and grandchildren of the author. In the future, there will be fewer forced shares because current trends include increased longevity,[170] fewer and later marriages,[171] more divorces (and therefore fewer surviving spouses),[172] and fewer children,[173] but there will still be many situations to which the forced share applies.

---

168 17 U.S.C. § 203(a)(1) (2018). This means that if there are two joint authors, they can only terminate unanimously. If there are three joint authors, it requires two of the three joint authors to terminate. It should be noted that where the shares of the copyright are not held equally, or where fewer than all of the holders of the joint copyright executed the grant, that grant is revocable by a majority of the grantors, not by persons who hold a majority of interests in the copyright.

169 The persons who receive the right to terminate transfers occurring before 1 January 1978 are the same. *Id.* § 304(c)(2). It is unclear whether the persons who receive the right of renewal for copyrights existing on 1 January 1978 are the same. The statutory formulation is different. *Id.* § 304(a)(1)(C)(ii). While *DeSylva v. Ballentine*, 351 U.S. 570 (1956) clarified that the widow and the children did not take per capita, but were two different categories each taking half, it referenced state law to define "children." The 1976 Act defined children specifically, while its definition of "widow" references state law and specifically permits the surviving spouse to remarry if state law permits it. For a case in which the remarried person was classified as a widow, see Marks Music Corp. v. Borst Music Publ'g Co., 110 F. Supp. 913 (D.N.J. 1953). It is unclear from the opinion whether Ms. Davis remarried after the death of her husband, the author, or they were divorced and she remarried before his death.

170 Based on the people who died during that year, the average life expectancy in 1970 was 70.8 years; in 1980, 73.7 years; in 2017 (the most recent year for which statistics are available), 78.6 years. Table 22. *Life expectancy at birth, at 65 years of age, and at 75 years of age, by race and sex: United States, selected years 1900–2007*, CENTERS FOR DISEASE CONTROL, http://www.cdc.gov/nchs/data/hus/2010/022.pdf (last visited Feb. 4, 2020); *United States Life Tables, 2017*, 68 NAT'L VITAL STATISTICS REPORTS 1 (June 24, 2019), http://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf.

171 The median age of first marriage in the United States in 1976 was 23.8 for men, 21.3 for women; in 2019, 29.8 for men, 28.0 for women. In 1970, 67% of the men and 62% of the women fifteen and older had been married; in 1980, the figures drop to 63% of men and 59% of women; by 2019, it was 54% of men and 51% of women. *Historical Marital Status Tables*, UNITED STATES CENSUS BUREAU (Nov. 2019), http://www.census.gov/data/tables/time-series/demo/families/marital.html Tables MS1 & 2.

172 In 1979, the earliest year for which I could find statistics, 47% of decedents left a surviving spouse; by 1996, that percentage drops to 41%; in 2017, 37% of dece-

If the deceased author leaves a surviving spouse, but no surviving children or grandchildren, the surviving spouse has the right to terminate.[174] If the author leaves any surviving children or grandchildren and no surviving spouse, the children and grandchildren have the termination right per stirpes.[175] If the author leaves both a surviving spouse and children/grandchildren, the termination right is held half by the surviving spouse and half by the children/grandchildren per stirpes, the children/grandchildren's right to be exercised by a majority per stirpes, and a majority within the line of each child in case the child is deceased.[176] If there is neither surviving spouse nor surviving children nor surviving grandchildren, the statute gives the termination right to the "executor, administrator, personal representative or trustee."[177] Presumably, none of these officials take the termination right personally, but only in their official capacity, for the benefit of the ultimate beneficiary of the estate or trust to whom the author has left the termination right or the copyright specifically, or the person who is the residuary beneficiary or the intestate successor. One might note that although the surviving spouse, children and grandchildren have forced shares, the children's and grandchildren's spouses do not take the termination right unless the author leaves neither surviving spouse,

---

dents left a surviving spouse. The percentage of decedents who never married went from 10% in 1979 and 1996 to 13% in 2017, and the percentage who were listed as divorced climbed from 6% in 1979 to 10% in 1996 to 16% in 2017, while the percentage of those widowed went from 35% in 1979 to 38% in 1996 to 33% in 2017. For 1979, see DEP'T OF HEALTH & HUMAN SERVS., 2 VITAL STATISTICS OF THE UNITED STATES 1979, at 315 (tbl. 1-31) (1984), https://www.cdc.gov/nchs/data/vsus/mort79_2a.pdf; for 1996, see *Deaths: Final Data for 1996*, 47 NAT'L VITAL STATISTICS REPORTS 1 (Nov. 10, 1998) www.cdc.gov/nchs/data/nvsr/nvsr47/nvs47_09.pdf; for 2017, see Deaths: Final Data for 2017, 68 NAT'L VITAL STATISTICS REPORTS 1 (JUNE 23, 2019), http://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_09_tables-508.pdf.

173 In 1976 when the Copyright Law was enacted, 10.2% of women age 40-44 were childless. That percentage rose to a peak at 20.4% in 2006, then declined to 15% in 2018, the last year for which statistics are available. That represents a net increase of 50% in the percentage of childless women over the course of forty-two years. A person who has no children will likewise have no grandchildren. UNITED STATES CENSUS BUREAU, https://www2.census.gov/programs-surveys/demo/tables/fertility/time-series/his-cps/h1.xlsx (last visited Feb. 3, 2020). I noted in my study of Holocaust art recovery cases that eleven of the twenty-two owners whose heirs tried to recover art taken during the Holocaust never had children, an exceptionally high percentage both then and now. Herbert I. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 INT'L LAW. 195, 196 n.8 (2018).

174 17 U.S.C. § 203(a)(2)(A), (B) (2018).

175 *Id.* § 203(a)(2)(C).

176 *Id.* § 203(a)(2).

177 *Id.* § 203(a)(2)(D).

surviving children, or surviving grandchildren, and the children's or grandchildren's spouse is specifically named in the author's will.

Clearly, these rules substantially deviate from the common law of property, where a person can leave most rights that he owns to anyone of his choosing subject to the ability of a surviving spouse to elect against the will.

The term per stirpes itself raises questions. There are two different forms of per stirpes, as well as several per stirpes wanna-bes.[178] With property other than copyright, a person who conveys his property has no right to terminate the conveyance unless such a right is specifically reserved. A person can dispose of any property right he has by sale, gift or will, but an author cannot dispose of his termination right. In disposing of property by will, the only limit on legatees is that the surviving spouse may be entitled to a forced share. In community property states, the testator can dispose of only his interest in the community property, but he can dispose of that freely. With a copyright, the identity of the person who can terminate a grant is fixed for two successive generations. It is only if the author dies leaving no surviving spouse, no children, and no grandchildren that the author can freely dispose of his termination right, but only by will.

What of the case where the author and the author's spouse divorce, and the court assigns the copyright or an interest in it to the author's spouse. Does the spouse also receive the termination right? Suppose the divorce decree specifically allocates the termination right to the author's spouse? No cases have been found on this question, but the policy behind the termination right seems to argue that the spouse does not receive it despite the divorce decree. The termination right is not transferable from the author, either voluntarily or involuntarily. This seems to reflect a strong policy to keep the termination right with the author. Suppose the

---

178 In medieval days when I was in law school, per stirpes had a clear meaning. In the common law, it meant that the children of the designated person took equally and, if any of the children were deceased, the deceased child's heirs took that child's share equally. Example: O dies intestate owning Blackacre. She leaves no surviving spouse. O's children A, B and C all pre-decease her. A has living children A1 and A2, and deceased child A3; A3 leaves no issue; B has child B1; C was childless. In classic per stirpes, at O's death, there is one share of Blackacre for each child of O who has living issue, so B1 gets an undivided 50%, and A1 and A2 share the remaining 50%, each with 25%. But in some states, courts held that you do not divide the estate until the first generation in which there are living issue, which would be the generation of the grandchildren. In that case, the estate would be divided into three equal shares, with A1, A2 and B1 each taking 33 1/3%. Then there are the solutions of the Model Probate Code, the old Uniform Probate Code, and the revised Uniform Probate Code, each of which may be regarded as a marriage of some form of *per stirpes* and some form of per capita. *See* Lawrence Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants*, 66 Nw. U. L. Rev. 626 (1971).

author dies before the termination right vests, having re-married, and leaves a surviving spouse? I believe that the federal law trumps the state judge's mistaken divorce decree because of the express federal disposition of the termination right, and the termination right goes to the second spouse.[179]

## *VI. FEDERAL COPYRIGHT LAW OR STATE LAW*

It is important to determine whether any of the rules set forth above are federal copyright law or state law. Several important consequences result from that decision.

### *A. Federal Court Jurisdiction*

Whether a claim is made under federal copyright law or under state law may determine whether jurisdiction is proper in the federal courts, whether the action cannot be brought in state courts, or whether the action must be brought in state court. Most litigants can bring actions in federal courts only if it is an action "arising under the Constitution, laws or treaties of the United States" (federal question jurisdiction)[180] or if the litigation is between parties who are citizens of different states and the amount in controversy exceeds $75,000 (diversity of citizenship jurisdiction).[181] The federal question must be colorable and must appear from the complaint. The classic statement by Justice Hugo Black is:

> [W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit. . . . [A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[182]

---

179 I do not believe that the copyright law contemplates that an author might have more than one surviving spouse, but 17 U.S.C. § 101 says that the identity of the surviving spouse is determined "under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried." It is common to state that a person can have only one domicile, but that rule does not seem to apply where money is at stake. For a person who had more than one domicile at death and whose estate was therefore in the (Campbell) soup, compare *In re* Dorrance's Estate, 163 A. 303 (Pa. 1932), *cert. denied*, 288 U.S. 617 (1933) with *In re* Estate of Dorrance, 170 A. 601 (N.J. Eq. 1934).

180 28 U.S.C. § 1331 (2018).

181 *Id.* §§ 1603–1611 There is also jurisdiction in the federal courts based on the Foreign Sovereign Immunity Act (cite), but that is not relevant here because based on the status of defendant.

182 Bell v. Hood, 327 U.S. 678, 681-83 (1946).

If no federal question need be decided to resolve the litigation, the federal court does not have jurisdiction over the case unless diversity jurisdiction applies. But since this decision is usually made at a very early stage of the proceedings, it does not take into consideration the fact that the crucial issue in the decision may be the defense of a license which depends entirely on state law. Thus, it is likely that in many cases where the only disputed issue is a question of state law, the case will remain in federal court because it was not certain at the time the jurisdictional question was entertained that the only disputed issue would be one of state law.

An illustration is *Meredith v. Smith*,[183] where the co-owner of a copyright sued both the licensee of his co-owner for copyright infringement, and his co-owner for breach of a contract not to license the copyright without unanimous consent of the co-owners. The court dismissed the case against the co-owner because it was for breach of contract, which was not a federal question, after the co-owner filed his answer alleging his co-ownership. It retained jurisdiction over the infringement action against the licensee, and found that the agreement between the co-owners existed, but was terminated before the publication.[184] It is entirely possible that had the suit against the co-owner been for copyright infringement, the co-owner raised his co-ownership as a defense, and the jurisdictional question was raised after the complaint but before the answer, the suit against the co-owner might have continued in federal court as arising under the copyright law.

Further, it is the court's obligation to assure that it has subject matter jurisdiction even if the parties do not raise the question,[185] and at any point in the proceedings. As a practical matter, courts are unlikely to dismiss a case far into the proceedings because of the waste that involves.

Jurisdiction of the court is not defeated even if there is no federal question involved if the parties can establish diversity of citizenship jurisdiction. That requires that there be at least $75,000 in controversy as well as diversity of citizenship.[186]

---

183 145 F.2d 620 (9th Cir. 1944).

184 Even where federal question jurisdiction no longer exists because the facts do not support it, the court has discretion to exercise supplemental jurisdiction under 28 U.S.C. § 1367, but this is usually not done when the federal questions are dismissed at an early stage (before trial) in the proceedings. *See* Mapp v. UMG Recordings, Inc., 208 F. Supp. 3d 776, 794 (M.D. La. 2016).

185 FED. R. CIV. P. 12(h)(3); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (federal question must be part of part of plaintiff's case, not defendant's response); Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) (dictum); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) (dictum)

186 28 U.S.C. § 1332(a) (2018); Gerig v. Krause Publ'ns., Inc., 58 F. Supp. 2d 1261 (D. Kan. 1999) (both diversity and federal question jurisdiction).

One should note that copyright is relatively unique in that federal court copyright jurisdiction precludes state court jurisdiction.[187]

### *B. Statute of Limitations*

If the case is in a state court because there is no federal question jurisdiction, the statute of limitations that is applied will be that of the state, or that indicated by the state's choice of law rule. The same is true if the case is in federal court based on diversity jurisdiction, as the federal court must apply the law of the state in which it sits in diversity cases if that law is determinative.[188] However, if the case is in federal court through federal copyright jurisdiction, the statute of limitations will be the federal copyright statute, which is three years.[189]

### *C. Choice of Law*

If the case is in state court, the choice of law rules of that state are applied. The same is true if the case is in federal court based on diversity jurisdiction, as the federal court must apply the law of the state in which it sits in diversity cases if that law is determinative.[190] If the case is in federal court because of federal question jurisdiction, federal choice of law rules will apply.

It is true that choice of law questions seldom arise in copyright cases because there are no state copyright laws. They sometimes arise in the international sphere.[191] On the other hand, with issues such as inheritance and property transfers, they arise with frequency.

---

187 28 U.S.C. §1338(a) (2018); Maxey v. R.L. Bryan Co., 368 S.E.2d 466 (S.C. 1988) (suit for breach of contract to use best efforts to register a copyright requires construction of copyright law to determine whether copyright in the work could have been registered and what damages would have been recoverable had it been registered).

188 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (implication because "otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Id.* at 496); Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co., 510 F.3d 77 (1st Cir. 2007) (statute of limitations expired on plaintiff's attempt to establish co-ownership of copyright even though state statute of limitations for accounting had not expired).

189 17 U.S.C. § 517(b) (2018); Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996).

190 *Klaxon Co.*, 313 U.S. at 487.

191 *See, e.g.,* Itar-Tass Russian News Agency v. Russian Kurier, 153 F.3d 82 (2d Cir 1998); Richard Arnold & Jane C. Ginsburg, *Comment: Foreign Contracts and U.S. Copyright Termination Rights: What Law Applies?*, COLUM. J. L. & ARTS (2020), ssrn.com/abstract=3523310.

*D. Distinguishing Federal Copyright Law from State Law*

Distinguishing a case that "arises under" the copyright law from a case that does not may not always be easy. One suggested rule, endorsed by many cases, was declared by Judge Henry Friendly:

> [A]n action "arises under" the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g. a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. [citations omitted] The general interest that copyrights, like all other forms of property, should be enjoyed by their true owner is not enough to meet this last test.[192]

So a suit for copyright infringement or for any distinctive remedies provided by copyright law "arises under" federal law.[193]

It should be clear that any question specifically dealt with in the federal copyright law is federal law because "[a] case arises under federal law if rights claimed by one party may be defeated by one construction of the statute and sustained by the opposite construction."[194] Having said that, the court qualified it, saying that construction of the federal statute need not be the turning point of the case, but the complaint must set forth a cause of action of which federal law is an essential ingredient. That would include whether the copyright exists,[195] who initially owned it,[196] whether it is a work made for hire,[197] whether the requirement for a signed writing to transfer it has been fulfilled,[198] whether the copyright is a joint work, a derivative work, or a collaborative work,[199] whether plaintiffs are the proper parties to terminate the grant of a copyright or have followed the correct procedure to do so,[200] and whether the copyright has been infringed.[201]

---

192 T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), *cert. denied* 381 U.S. 915 (1965).

193 Prominent Consulting, LLC v. Allen Bros, 543 F. Supp. 2d 877 (N.D. Ill. 2008); Gerig v. Krause Publ'ns, Inc., 58 F. Supp. 2d 1261 (D. Kan. 1999) (alleged reproduction beyond scope of contract; alternative holding, as there was diversity jurisdiction).

194 Hines v. Cenla Cmty. Action Comm., Inc., 474 F.2d 1052, 1056 (5th Cir. 1973).

195 17 U.S.C. § 101 (2018).

196 *Id.* § 201(a)-(c).

197 *Id.* § 101; Butler v. Cont'l Airlines, Inc., 31 S.W.3d 642 (Tex. Ct. App. 2000).

198 17 U.S.C. § 204(a) (2018); Sullivan v. Naturalis, Inc., 5 F.3d 1410 (11th Cir. 1993).

199 17 U.S.C. § 101 (2018); Merchant v. Levy, 92 F.3d 51, 55-56 (2d Cir. 1996) (dictum re 1909 Act).

200 17 U.S.C. § 203 (2018).

201 *Id.* §§ 106, 107–122.

There are other matters that are clearly governed by state law. State law governs the question of who inherits the copyright on the death of the copyright owner. This is true despite the fact that inheritability is specifically mentioned in the copyright statute[202] because the statute makes no provision for the means of inheritance, referring instead to state law. It should be noted, however, that federal copyright law specifically governs what can be done with an author's right of termination. The statute vests this power in the author if the author is alive, and in a statutorily defined succession of family members if the author is dead.[203] The author cannot change this by transfer or will,[204] and the statute leaves termination rights to an author's estate only if the author leaves no children, grandchildren or surviving spouse.[205] Federal law therefore pre-empts state inheritance law with respect to termination, and state law determines who can exercise termination rights only when an author dies without a surviving spouse, children or grandchildren.

Where the question is whether the transfer of a copyright is sufficiently in writing and signed, that is a matter of federal law because it is a specific requirement of the federal statute.[206] Whether a person has the capacity to transfer a copyright is a matter of state law.

The most difficult cases are situations involving contractual relations. These cases often arise where one person provides services to another resulting in copyrighted product, and the recipient does not pay the agreed price. Plaintiffs typically style those cases as copyright infringement, claiming that the recipient did not receive the right to use the copyrighted material, while defendants characterize them as breach of contract actions seeking payment of the agreed price. Plaintiffs have been allowed to remain in federal court because of the allegation of copyright infringement,[207] but jurisdiction has occasionally been declined when infringement followed automatically on decision of the contracts question.[208] But

202 *Id.* § 201(d).
203 *Id.* § 203(a)(1)-(2).
204 *Id.* § 203(a)(5) (grants, including agreements to make a will or future grants, do not affect who has power to exercise termination rights).
205 *Id.* § 203(a)(2)(D) (termination rights may be exercised by author's executor only in the absence of surviving spouse, children or grandchildren).
206 *Id.* § 204(a); Sullivan v. Naturalis, Inc., 5 F.3d 1410 (11th Cir. 1993).
207 *See, e.g.*, Holm v. Pollack, 2000 U.S. Dist. LEXIS 16007 (E.D. Pa. Nov. 1, 2000) (homeowner used architect's plans); Prominent Consulting, LLC v. Allen Bros., 543 F. Supp. 2d 877 (N.D. Ill. 2008) (web designer alleged his software used for unpermitted purpose). This is especially true when the remedies sought are under the copyright act. MCA Television, Ltd. v. Pub. Interest Corp., 171 F.3d 1265 (11th Cir. 1999).
208 Elan Assocs., Ltd. v. Quackenbush Music, Ltd., 339 F. Supp. 461 (S.D.N.Y. 1972) (suit styled as copyright infringement really requires determination of who owns copyright as a result of assignment).

the important point here is that federal question jurisdiction may exist whether a particular matter that needs to be decided is federal or state law because of the broad scope of "arising under federal law" and the fact that the decision is usually made on the allegations of the complaint.

The results have been mixed in cases involving suits by one co-owner against another for an accounting. Accounting is normally a state law remedy, so these suits should not arise under the copyright law, and one co-owner cannot infringe the copyright.

It has been contended that at least for joint works, the right to an accounting should be considered federal law. The argument is that it is federal law because the lack of any statement about the subject in pre-1976 copyright law implicitly invited the courts to create it, or delegated authority to the courts to create it, they did, and Congress ratified the law by enacting the provision on joint work in 1976 and referring to court-made law in the committee report.[209] The argument is thin, and completely falls apart when one considers that the accounting rules are the same for joint works as they are for other forms of co-ownership, and those rules are decreed by state law.

The fact that a case "arises under federal law" does not mean that the entire decision is made under federal law. Indeed, at the end of the day, it may be that the crucial decisions are ones of state law. It is relatively common for other federal statutes to refer to matters determined by state law. The Internal Revenue Code often incorporates state law by reference. For instance, federal law permits a married couple to file a joint return, but contains no definition of who is married.[210] That is left to state law.

The same is true of copyright. The copyright law contains a definition of "children"; its definition of "widow" and "widower" refer to state law with a modification; and there is no definition of "executor."[211] Many of the legal rules relating to co-ownership are state law rules.

## *VII. CONCLUSION*

This article demonstrates that most of the rules relating to co-ownership of copyright are in fact state law rules regulating the co-ownership of all types of property. The results of that are hardly earth-shaking. Be-

---

209 Craig Y. Allison, *Note: Does a Copyright Coowner's Duty to Account Arise Under Federal Law?*. 90 MICH. L. REV. 1998, 2014-21 (1992).

210 INT. REV. CODE OF 1986 § 6013. Federal law does decree when a marriage has been terminated for purposes of filing a joint return, which is when a legal decree of separate maintenance or divorce has issued, but not on the issuance of an interlocutory decree. 26 C.F.R. § 1.6013-4(a) (2019). When a legal decree of separation or divorce has been issued is determined by the applicable state law.

211 17 U.S.C. § 101 (2018).

cause of the broad definition of "arising under federal law," the number of cases that cannot be brought in federal court under federal jurisdiction will be small, and mostly cases that are inartfully pleaded. That may lead to a few decisions about choice of law and the statute of limitations that will take a different turn than they would if these matters were considered to be federal law.

It is not clear that the substantive law would be different. Whether it results from state or federal law, or federal law adopting state law, a co-owner of a copyright will still be able to secure an accounting from a co-owner who receives royalties from a third party. The proposition that the rules about securing an accounting from a co-owner who uses the copyright himself are state law does not resolve the question of what state law is appropriate. It might be the state law applicable to realty, in which case the current non-uniformity among the states would continue, and one might need to make a choice of law decision. Each state might decide that copyrights are sufficiently different from real estate that a different law should apply, in which case there might be either more or less uniformity among the states, but given the exclusive jurisdiction of the federal courts in copyright infringement cases, it is hard to see how state courts are likely to make that choice. Were that decision a matter of federal law, there would be uniformity, but Congress or more likely the courts would need to decide what that uniform law would be.

Community property creates its own problems, and there have been a few steps toward solutions. Community property mostly eliminates the accounting and authorization problems, as the income received would be community property. Community property poses significant management conflicts with the Copyright Act that require resolution as a matter of federal law. Both community property and common law inheritance rules must yield to the inheritance rules for copyright termination and renewal rights.