DIVIDING THE INTANGIBLE: AN EXAMINATION OF COMMUNITY PROPERTY IN A WORLD OF CONTINGENT REVENUE

by Mariana Pedroza[*]

"If you don't find a way to make money while you sleep, you will work until you die."
—Warren Buffett

* J.D. Candidate, Texas Tech University School of Law, 2022; B.A., Azusa Pacific University, 2016. I would like to thank the Estate Planning & Community Property Law Journal editors for their guidance, support, and editorial feedback. I would also like to recognize and give a special thanks to Joseph C. Best for his invaluable mentorship, love, and encouragement in writing this Comment. Lastly, I would like to thank my father and brother, Alex and Marcos, for their endless love.

I. INTRODUCTION

We live in an ever-evolving world, increasingly expediting our dependence on technology—from our communication and transportation, down to the very types of revenue that sustain each of our livelihoods.[1] Many people are no longer interested in obtaining a typical nine-to-five job in which the income is predictable and constant.[2] Rather, they are deciding to risk having less stable revenue in exchange for the possibility of much higher earnings by investing in the world of modern contingent revenue.[3]

When discussing the profitability of her TV show versus her social media accounts, Kim Kardashian told David Letterman, "realistically, we can post something on social media and make more than we do a whole season."[4] Kardashian's hit show "Keeping up with the Kardashians" is wildly successful—airing a total of nineteen seasons thus far—and is often credited for launching and expanding the celebrity's lucrative career.[5] Yet, Kardashian affirms that the show pales in comparison to her online deals.[6] A single post on just one of her social media accounts is valued at $858,000.[7] This is but one example of the seismic shift in revenue streams the modern world has seen.[8]

Not only does this shift impact high-earning celebrities but it also has had a massive ripple effect, encouraging a huge percentage of everyday people to follow a similar trend.[9] As of 2019, nearly 3.5 billion users exist on

1. *See* Concordia St. Paul, *Emerging Trends in Psychology: Tech Dependency*, CONCORDIA ST. PAUL (Oct. 16, 2015), https://online.csp.edu/blog/psychology/technology-dependency/ [https://perma.cc/SL2H-A7PC].

2. *See* Ana Eksouzian-Cavadas, *This Is What Your Favourite Celebrities Get Paid for a Sponsored Instagram Post*, VOGUE (Dec. 7, 2020), https://www.vogue.com.au/culture/careers/this-is-what-your-favourite-celebrities-get-paid-for-a-sponsored-instagram-post/image-gallery/50c62cfadb98a9724f5544b6b113be17 [https://perma.cc/M66Y-PBTA].

3. *See My Next Guest Needs No Introduction with David Letterman: Kim Kardashian West* (Netflix 2020) [hereinafter *My Next Guest*].

4. *See id.*

5. *See* Eksouzian-Cavadas, *supra* note 2.

6. *See My Next Guest*, *supra* note 3.

7. Eksouzian-Cavadas, *supra* note 2.

8. *See id.*

9. Hopper HQ, *Instagram Rich List 2020*, HOPPER HQ (2020), https://www.hopperhq.com/blog/instagram-rich-list/ [https://perma.cc/VAN4-QXE8].

social media—45% of the world's population.[10] Among these users, half a million are considered "influencers," those with enough online popularity to be internet-celebrities having millions of followers on their social media accounts, such as on YouTube, Twitter, and Instagram.[11]

For argument purposes, this Comment will make a distinction between certain types of "contingent revenue," revenue that is dependent on some future event occurring.[12] "Traditional contingent revenue" is revenue that may or can be received after divorce, but does not derive from property that possess a creative component.[13] Typical forms of traditional contingent revenue include disability, retirement, and bonus payments.[14] In contrast, "modern contingent revenue" is revenue that may or can be received after divorce, and derives from property possessing a creative component, which depicts today's new wave of economy.[15] Examples of this type include revenue derived from intellectual property ("IP") and social media.[16]

By 2022, the influencer industry is projected to grow to $15 billion, clearing the way for even larger streams of contingent revenue nationwide.[17] In addition to directly creating contingent revenue, social media provides the platforms necessary to expedite mental labor—that is, it gives users quicker and simpler ways to further their creative works.[18] Most of those works manifest themselves as IP, resulting in additional streams of contingent revenue.[19] With the instantaneous nature of brand-building online, this new wave of economy and entrepreneurship has taken greater advantages of IP.[20]

This profitable trend has raised two new legal issues: (1) why must the law recognize a distinction between traditional forms and modern forms of contingent revenue, and (2) how should modern contingent revenue be

10. Maryam Mohsin, *10 Social Media Statistics You Need to Know in 2020 [Infographic]*, OBERLO (Aug. 7, 2020), https://www.oberlo.com/blog/social-media-marketing-statistics [https://perma.cc/P5ZF-C765].

11. Ying Lin, *10 Influencer Marketing Statistics You Need to Know in 2020 [Infographic]*, OBERLO (Mar. 31, 2020), https://www.oberlo.com/blog/influencer-marketing-statistics#:~:text= You're%20probably%20wondering%3A%20how,Instagram%20(InfluencerDB%2C%202019) [https://perma.cc/BC8T-ZKJD]; Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, NY TIMES (Nov. 11, 2018), https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html [https://perma.cc/YV7S-PRQ4].

12. *See* discussion *infra* Part III.

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Part III.

15. *See* discussion *infra* Part III.

16. *See* discussion *infra* Section III.D.

17. Lin, *supra* note 11.

18. *See id.*

19. *See generally My Next Guest*, *supra* note 3 (depicting Kim Kardashian discussing her brand, SKIMS).

20. *See id.*

classified at the time of divorce?[21] These questions are of particular importance in states like Texas that follow a community property distribution system.[22]

Currently, Texas law has failed to acknowledge contingent revenue from social media; the only form of modern contingent revenue Texas has addressed is that from IP.[23] Yet as it stands today, Texas law has not adapted to the intricacies of modern technology, particularly relating to modern contingent revenue—it needs a new standard that respects the complexities of modern revenue.[24] In Texas, the presumption for community property classification is high, and Texas's equitable distribution approach may result in disproportionate awards.[25] Because of its contingent and unique nature, modern contingent revenue cannot simply be characterized as separate income after divorce—its contingent nature places this type of revenue in danger of being treated like traditional contingent revenue.[26] Under the current law, one's contingent revenue (i.e., from social media and IP) is likely to be characterized as community property, subjecting it to divorce distribution.[27]

While Kardashian may be able to survive if her social media revenue were to be categorized as community property, others who rely on this kind of revenue as their sole income may not be so fortunate.[28] The development of modern technology will only further exacerbate this problem.[29] The law must be revamped to account for this new form of revenue and adapt to the world of modern contingent revenue we live in today.[30] Our economy's shift to online or solely contingent forms of revenue puts our property in an unknown zone, which could lead to catastrophic impacts on many people's livelihoods.[31] To avoid these probable dangers, this Comment calls on the Texas legislature to serve as the model for other community property states by enacting a new presumption and reverse burden.[32]

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21. *See* discussion *infra* Parts III, IV.
22. *See* discussion *infra* Part II.
23. *See* discussion *infra* Sections III.B and IV.E.
24. *See* discussion *infra* Part III.
25. *See* discussion *infra* Section II.A.3.
26. *See* discussion *infra* Part III.
27. *See* discussion *infra* Part II.
28. *See My Next Guest*, *supra* note 3; *see also* Aurelie Corinthios, *Kim Kardashian Files for Divorce from Kanye West After Almost 7 Years of Marriage*, People (Feb. 19, 2021), https://people.com/tv/kim-kardashian-files-for-divorce-kanye-west/ [https://perma.cc/2NNS-63AD] (Kardashian has filed for divorce in 2021, and, at the time of writing, it is currently not clear if her divorce will address forms modern contingent revenue).
29. *See* Eksouzian-Cavadas, *supra* note 2.
30. *See* discussion *infra* Section III.D.
31. *See* discussion *infra* Section III.D.
32. *See* discussion *infra* Part V.

Part II of this Comment follows the history, policies, and principles governing community property systems, and explores how community property states, especially Texas, go about characterizing property at the time of divorce.[33] Although minimally referencing other community property states—in order to highlight how the law varies within each—this Comment will primarily focus on Texas law to encourage the proposed legislation.[34] Part III analyzes the unique features of modern contingent revenue and explains why Texas law must recognize its distinction from traditional contingent revenue.[35] Part IV argues that in order to safeguard and promote human creativity, avoid disproportionate awards, and protect the freedom to divorce, modern contingent revenue must be characterized as separate property at the time of divorce.[36] Part V lays out and explains this Comment's legislative proposal, which will enact a new presumption that validates modern contingent revenue as separate property, and a reverse burden of proof, making the non-creating spouse bear the burden to prove that such property is part of the community.[37]

II. COMMUNITY PROPERTY SYSTEM

A community property system serves as a marital regime in which "each spouse owns an undivided one-half interest in all of the property acquired by the marital partners during the [marriage]."[38] Imperatively, community property serves to control each spouse's property and ownership rights entirely through marriage, divorce, and death.[39]

Traditionally, community property encompasses all property or financial rights of either spouse when obtained by "toil, talent, thrift, energy, industry, or other productive faculty, and all the rents, issues, profits, fruits, and revenues of separate property."[40] Generally, this scope covers salary, wages, and other similar revenue obtained during the marriage.[41] Nonetheless, community property definitions may be codified in a manner

33. *See* discussion *infra* Part II.
34. *See* discussion *infra* Part II.
35. *See* discussion *infra* Part III.
36. *See* discussion *infra* Part IV.
37. *See* discussion *infra* Part V.
38. Margaret Berger Strickland, *What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse How the Non-Existent Notice Requirement in Louisiana Civil Code Article 2339 Contravenes Community Property Principles*, 51 LOY. L. REV. 989, 992–93 (2005).
39. Stefania Boscarolli, *Characterization of Separate Property Within the Community Property Systems of the United States and Italy: An Ideal Approach?*, 19 GONZ. J. INT'L L. 1 (2015).
40. *See* Bush v. Bush, 336 S.W.3d 722, 740 (Tex. App.—Houston [1st Dist.] 2010).
41. *See* Boscarolli, *supra* note 39.

that leads to broader interpretation.[42]

A. History, Policies & Principles

Under state legislatures, community property systems are founded upon principles and policies that derive most of its essence from history or legal tradition.[43] History suggests that community property systems were put in place to provide for both spouses *equally*.[44] Community property's origins date back to Germanic tribes, while the marriage model was brought to America by the Spanish and French.[45] In short, community property today rests on the principle of providing each spouse sharing rights, title, and interests of equal dignity.[46]

Community property seeks to endorse a partnership theory of marriage, where each spouse economically contributes to the partnership.[47] This system allows each spouse to work both as a co-owner and as a beneficiary of the property.[48] Community property systems heavily rely on the principle that gains and efforts belong to the community.[49] Thus, the very essence of community property is founded almost entirely in equal marital sharing.[50]

Additionally, community property seeks to protect not only the marriage but each spouse long past the marriage and until their eventual death.[51] While legally the community property system is terminated at death, the property held within the community is still accessible to a widowed spouse.[52] Similarly, while a divorce also terminates the community, divorce proceedings still provide for each spouse by giving him or her access to the community property assets.[53]

After the community property is terminated, the court will apply either the relevant laws of spousal-share or the court's own discretion, which vary

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42. *See* TEX. FAM. CODE ANN. § 3.002.

43. Boscarolli, *supra* note 39.

44. *See* Paul J. Goda S.J., *Principles of Community Property*, 12 SANTA CLARA L. REV. 638, 639 (1972) (emphasis added).

45. *See* Boscarolli, *supra* note 39.

46. *See* Leyva v. Rodriguez, 195 S.W.2d 704, 705 (Tex. App.—San Antonio 1946, writ ref'd n.r.e.).

47. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63, 73 (1993).

48. *Id.*

49. *See* Mark E. Cammack, *Symposium: Marital Property in California and Indonesia: Community Property and Harta Bersama*, 64 WASH. & LEE L. REV. 1417, 1428 (2007).

50. *See* Frances Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 199–201, 224–25 (2001).

51. *See* Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 92 (2008).

52. *See id.*

53. *See id.*

wildly from state-to-state.[54] This section will discuss common approaches to community property presumptions, including Texas's approach, which become heavily influential for purposes of property division at the time of divorce.[55]

1. Community Property Presumption

A key feature of the judicial process between spouses after the community property is destroyed is the rebuttable "community property presumption."[56] All nine community property states have codified a community property presumption.[57] By adopting a presumption that favors a community property system, a spouse claiming separate property bears the burden of proving that it is in fact separate property.[58] The specific type of burden and standard of proof also varies from state-to-state.[59]

2. Presumption Approaches

Approaches to rebutting the presumption are (1) "the acquisition formula;" (2) "the long marriage exception to the acquisition formula;" (3) "the possession formula;" and (4) "the unlimited presumption."[60] This Comment will focus on the possession formula exemplified by Texas's community property presumption.[61] The Texas presumption places emphasis on the property currently possessed by each spouse.[62] Discretion of what constitutes "possession" has led to broad interpretations.[63]

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54. *See* TEX. FAM. CODE §§ 7.001–7.002; *In re* Knott, 118 S.W.3d 899, 902 (Tex. App.—Texarkana 2003).

55. *See* discussion *infra* Section II.A.3.

56. *See* Richard J. Armstrong, *Rebutting the Pro-Community Presumption by Way of Total Recapitulation: Zemke v. Zemke*, 31 IDAHO L. REV. 1123, 1136 (1995).

57. *See id.*

58. *See id.*

59. *See* TEX. FAM. CODE ANN. § 3.003; IDAHO CODE ANN. § 15-2-201 (West); LA. CIV. CODE ANN. art. 2340; WIS. STAT. ANN. § 766.31(2) (West); WIS. STAT. ANN. § 766.55 (West).

60. WILLIAM REPPY & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 66 (7th ed. 2009).

61. Thomas M. Featherston, Jr., *Separate Property or Community Property: An Introduction to Marital Property Law in the Community Property States*, 12 (Sept. 9, 2017), https://www.baylor.edu/law/facultystaff/doc.php/301687.pdf [https://perma.cc/9K7K-7N6J]; *see In re* Caswell's Estate, 105 Cal. App. 3d. 475, 483 (Cal. Ct. App. 1930).

62. *See* TEX. FAM. CODE ANN. § 3.003.

63. *See id.*

3. The Texas Presumption

Broad interpretations of community presumptions in effect create strong judicial support for a community property system.[64] Texas affords a greater level of protection to the community property system through the language in both its definition of community property and its community property presumption.[65]

The Texas presumption is an incredibly high hurdle to clear in order to maintain or obtain a characterization of separate property.[66] Texas defines community property as "property, other than separate property, acquired by either spouse during the marriage."[67] Texas's community property presumption states that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property."[68] As it relates to contingent revenue, the Texas presumption is problematic because by definition, neither spouse will possess contingent revenue at the time of divorce, making characterization difficult.[69]

To overcome the Texas presumption, a spouse must establish that property is separate property by clear and convincing evidence—the highest standard of legal proof.[70] Should a spouse fail to rebut the presumption, the court will deem the property community property.[71] This standard of proof differs from other jurisdictions that only require a preponderance of evidence.[72]

Texas defines separate property as "(1) property owned before marriage; (2) property acquired during marriage by gift or inheritance; and (3) recovery for personal injuries sustained during marriage (except loss of earnings)."[73] Therefore, it is irrelevant whose name is on the property title, but rather when and how the spouse received such property.[74] This suggests a legal principle based specifically on timing and how the property is acquired, rather than

64. *See* discussion *supra* Section II.A.2.
65. *See* TEX. FAM. CODE ANN. § 3.003.
66. *See id*.
67. *See id*. § 3.002; *see* TEX. CONST. art. XVI, § 15.
68. TEX. FAM. CODE ANN. § 3.003.
69. *See id*.
70. *See id*.
71. Thomas Ausley, *What is Needed to Prove Separate Property at Time of Divorce*, GORANSON BAIN AUSLEY, https://www.gbfamilylaw.com/blogs/what-is-needed-to-prove-separate-property-at-time-of-divorce/ [https://perma.cc/NJ52-SXPL] (last visited Sept. 23, 2020).
72. Featherston, *supra* note 61, at 10.
73. Judith E. Bryant, *Till Death Do Us Part? Splitting Up Can Be Difficult, Especially If You Don't Know the Truth About Family Law in Texas*, 77 TEX. B.J. 870, 871 (2014); *see* TEX. FAM. CODE ANN. § 3.001; TEX. CONST. art. XVI, § 15.
74. Bryant, *supra* note 73.

other ownership factors such as title of property.[75] Accordingly, the Texas Supreme Court held that if a legal title vests only in one spouse, and was birthed during the marriage, then the benefit remains part of the community.[76]

Recently, the Ninth Circuit demonstrated strict devotion to community property principles by holding that the California presumption triumphs over the record title presumption in bankruptcy cases.[77] Therefore, while rebuttable, overcoming the presumption proves difficult and ultimately, demonstrates the grand effect the presumption may have over defining property and the strong hand the judicial system has in evaluating any challenge to the presumption.[78]

B. Spousal Relationship: Managerial System

The individual rights a person has to manage and control their property suddenly change when married in a community property state.[79] While managerial rights vary by state, the underlying principle is unambiguous: equal shares in property allow for equal management rights to that property.[80]

However, managerial rights are not absolute and are subject to a fiduciary duty; a breach of this duty may result in damages.[81] The management system falls into one of two categories: sole management or joint management.[82] Separate property is managed only by its owner and falls under the sole management category.[83] In most cases, property subject to sole management applies to property the spouse would have owned had they not married in a community property state.[84] Here, the managing spouse obtains the legal right to choose between controlling or disposing of the property, which can be done without the other spouse's consent.[85] Revenue is the best example of separate property that is under sole management.[86]

In Texas, management rights "fall into the five groups: the wife's separate property, the husband's separate property, the joint management

75. *Id.*
76. *See* Patty v. Middleton, 17 S.W. 909, 913 (Tex. 1891).
77. *See* Brace v. Speier (In re Brace), 566 B.R. 13 (B.A.P. 9th Cir. 2017).
78. *See id.*
79. *See* TEX. FAM. CODE ANN. § 3.102(a).
80. *See id.*
81. *See* REPPY & SAMUEL, *supra* note 60, at 18.
82. J. Thomas Oldham, *Management of the Community Property Estate During Intact Marriage*, 56 SPG. LAW & CONTEMP. PROBS. 99, 106 (1993).
83. William O. Huie, *Divided Management of Community Property in Texas*, 5 TEX. TECH L. REV. 623, 623 (1974); TEX. FAM. CODE ANN. § 3.101.
84. *See Huie*, *supra* note 83, at 623; TEX. FAM. CODE ANN. § 3.101.
85. Oldham, *supra* note 82, at 106.
86. *See* TEX. FAM. CODE ANN. § 3.102(a); Featherston, *supra* note 61, at 6.

community property, the wife's sole management community property, or the husband's sole management community property."[87] Nevertheless, even under those five categories, it remains possible to "mix" the two spouses' sole management property, transforming it into joint ownership.[88] This is because it is difficult to trace the separate property once mixing occurs.[89] Mixing typically occurs when spouses combine their wages into one joint account.[90] However, a spouse may have a claim for reimbursement if they can prove that the community estate improved the separate property of one of the spouses.[91]

C. Revenue: Separate versus Community

The Merriam-Webster dictionary defines revenue as "an increase usually measured in money that comes from labor, business, or property."[92] Community property policies and principles tend to show that spousal income or revenue should be deemed community property; this is true of Texas, typically including wages, salaries, and other types of compensation for services performed by either or both spouses during the marriage.[93]

Generally, separate property refers to the property that a spouse owned prior to the marriage; however, there are other ways property can be characterized as separate during a marriage.[94] These include: (1) revenue earned while domiciled in a non-community property state; (2) property received separately as a gift or inheritance; (3) property purchased with separate funds, or obtained in the exchange of separate property; (4) property converted and reclassified from community property to separate property through a valid agreement under the state laws in which the couple is domiciled in; and (5) property bought only with separate funds, leaving the rest of the property as community.[95]

In Texas, income earned after the divorce is property only of the person who earned it.[96] However, if the right to the payment occurs during the

87. J. Wesley Cochran, *It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas*, 58 BAYLOR L. REV. 407, 417 (2006).

88. Featherston, *supra* note 61, at 7.

89. *Id.* at 8.

90. *Id.* at 7.

91. *See* Chavez v. Chavez, 269 S.W.3d 763, 767 (Tex. App.—Dallas 2008).

92. *Revenue*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

93. Featherston, *supra* note 61, at 10; *see* Community Property, I.R.S. Pub. No. 555, Cat. No. 15103C (Mar. 2020), https://www.irs.gov/publications/p555 [https://perma.cc/8N8G-9RLW] [hereinafter IRS Publication].

94. *See* IRS Publication, *supra* note 93.

95. *See id*.

96. *See* Cochran, *supra* note 87, at 419–20.

marriage, such as an insurance policy payment owed after the divorce but signed up for during the marriage, then the payment is community property because it vested during the marriage.[97] These two conflicting logics make characterizing modern forms of contingent revenue extremely difficult.[98] Nevertheless, some forms of contingent revenue are even more problematic, as Texas law has provided conflicting results in the past, which is discussed in Section III.B.[99]

D. Division of Property at Divorce

Division of property serves as a final distribution between two prior spouses.[100] To reverse a prior award, the appellate court must find an abuse of discretion.[101] Although abuse claims are already quite difficult to prove, they are more burdensome in Texas because trial courts are given extremely broad discretion to characterize property.[102] This section will detail the challenges of equitable distribution, specifically in Texas, and demonstrate the importance of property characterization.[103]

1. Equitable Distribution

While a community property system rests on the notion that both spouses are equal in rights and ownership, the doctrine of equitable distribution says otherwise.[104] Many community property states allow for equitable distribution, including Texas.[105] Yet, some states like California, Louisiana, and New Mexico maintain that all division of property shall be distributed in equal shares.[106] States who choose equitable distribution generally do so because it "tends to compensate the economic hardship of one spouse after divorce that the recognition of half of the ownership of the

97. *See id.*; *In re* Marriage of Long, 542 S.W.2d 712, 718 (Tex. Civ. App.—Texarkana 1976, no writ).

98. *See* discussion *infra* Section III.B.

99. *See* IRS Publication, *supra* note 93.

100. *See* Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974).

101. *Id.*

102. *See* discussion *infra* Section II.D.2.

103. *See* discussion *infra* Sections II.D.1–3.

104. Helene Shapo, *"A Tale of Two Systems": Anglo-American Problems in The Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 712–13 (1993).

105. *See* TEX. FAM. CODE ANN. §§ 7.001–7.002.

106. David H. Brock, *Community Property-Division of Property Upon Divorce-Property Acquired During Marriage in a Common Law State Except by Gift, Devise, or Descent Should Be Treated as Community Property*, 14 ST. MARY'S L. J. 789, 806 n.108 (1983); *see* CAL. FAM. CODE ANN. § 2550; LA. CIV. CODE ANN. art. 2336 (2011); *see* Ruggles v. Ruggles, 860 P.2d 182, 192 (N.M. 1993) (requiring equal division of the community property).

other spouse's assets would not protect."[107] This reasoning gives a prior spouse with fewer resources an opportunity to retain interest in owning and managing the property they once owned.[108] This approach also provides resolution when alimony is prohibited, as is the case in Texas.[109]

Equitable distribution is widely criticized because of the high level of discretion given to courts when deciding which spouse is more in need.[110] The biggest critique remains the inequities the doctrine creates between spouses, leaving some with slim finances or opportunities after divorce.[111] Nevertheless, property distribution is subject to specific restrictions.[112] Trial courts can only divide community property—separate property is not subject to division.[113] More importantly, Texas law states that a court may not divide property that is so speculative as to escape adequate assessment.[114] Also, public policy prevents division that violates state or federal statutory provisions.[115]

Although it appears that the above provides bright line rules for property distribution, often times courts must still conduct an in-depth analysis to determine whether the property is in fact community property, often tasking courts to take the "equitable" approach.[116] To do this, courts may consider several factors based on each spouse's abilities or earning capacities.[117] However, allowing this analysis may inadvertently place separate property at risk of being distributed as community property.[118]

2. The Texas "Just and Right" Approach

In Texas, division of property is controlled by Texas Family Code Section 7.001, which requires that division of property at the time of divorce be "just and right."[119] Deciding what constitutes just and right, however, has

107. Boscarolli, *supra* note 39.

108. *Id.*

109. *See* Francis v. Francis, 412 S.W.2d 29, 32–33 (Tex. 1967) (There is no alimony in Texas, only limited spousal maintenance.).

110. Boscarolli, *supra* note 39.

111. *See* Janet L. Richards, *Mastering Family Law*, Carolina Academic Press 63 (2009).

112. *See id.*; Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 831 (1988).

113. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977).

114. *See* Panozzo v. Panozzo, 904 S.W.2d 780, 786 (Tex. App.—Corpus Christi 1995, no writ) (holding that the trial court abused its discretion).

115. William C. Koons & Robert E. Holmes, Jr., *Division of Property at Divorce*, 39 BAYLOR L. REV. 977, 982 (1987).

116. *Id.*

117. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981).

118. Koons & Holmes, *supra* note 115, at 989.

119. TEX. FAM. CODE ANN. § 7.001.

been largely left to the court's discretion—the only requirement is that it be equitable.[120]

Texas has implemented the following non-exclusive list of factors used in determining what is just and right: "spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property."[121]

Under the just and right standard, it is not uncommon for property to be divided unequally or for separate property to be incorrectly characterized as community property.[122] Thus, separate property that lacks evidence proving it as separate may be divided, perhaps unequally, leaving the original owner spouse with less of his or her own separate property.[123] Even with a reasonableness standard, the court maintains great discretion when deciding what is just and right.[124]

3. Characterization

As demonstrated, an equitable distribution approach can lead to inequities—such as leaving one spouse in an unfavorable position—which makes characterization of property at the time of divorce tremendously important.[125] Essentially, the trial court is tasked with deciding whether the property is separate or community property.[126] It is commonly understood that property acquired before marriage remains separate; however, what happens if consideration for such property is not paid all at once?[127]

Scholars and courts have looked to three approaches to resolve this characterization dilemma: inception-of-title, time-of-vesting, and tracing theory.[128] The inception-of-title approach places great focus on the *commencement* of the transaction.[129] Here, property is considered acquired on the date "that the *right* to interest, title[,] and possession arises"—the date of actual possession is irrelevant.[130] Application of this approach as it relates to contingent revenue, such as bonuses, is characterized at the moment a right

120. *See id.*
121. *Murff*, 615 S.W.2d at 699.
122. *See* TEX. FAM. CODE ANN. § 3.003.
123. *See id.*
124. *See Murff*, 615 S.W.2d at 699.
125. *See* Koons & Holmes, *supra* note 115, at 989.
126. *Id.*
127. *See* TEX. FAM. CODE ANN. § 3.003(a).
128. REPPY & SAMUEL, *supra* note 60, at 85–86.
129. *Id.*
130. *See* IRS Publication, *supra* note 93 (emphasis added).

to receive the revenue is earned, not when such revenue is received.[131] Contingent revenue that is to be paid *over time* breeds a more complex issue.[132] For example, when a person who is employed and has a vested right to a pension becomes married, the retirement accrued before the marriage under the inception-of-title approach would be considered separate property, and the retirement accrued during the marriage would be community property, regardless of when it becomes paid.[133]

Conversely, time-of-vesting approach focuses on the *conclusion* of a transaction.[134] Characterization is determined when a title is deeded over.[135] Thus, even if a wife or husband initiated a contract while they were unmarried or had separate funds, as long as the transaction is completed during the marriage, the property is community property.[136] To avoid this, the spouse could argue that the property is separate by proving that the transaction was paid entirely with separate funds.[137] This task is often arduous for married spouses and ultimately, makes characterization of property difficult for all involved.[138] If the spouse is able to prove that part of the consideration was from separate funds, the other spouse would have no ownership interest—only a right to claim reimbursement.[139]

Tracing theory, also called the pro rata approach, enables concurrent ownership.[140] The focus here is placed on the overall consideration given.[141] In short, this approach looks to the overall percent of consideration by the community and by the spouse on his or her own.[142] However, this approach is also complicated by managerial rights and spouses' commonly mixing funds, producing heavy burdens for both spouses.[143]

III. THE DISTINCTION BETWEEN MODERN AND TRADITIONAL CONTINGENT REVENUE

This Comment proposes a distinction between two types of contingent revenue—modern and traditional—and examines the reasons they should be

131. *See id.*
132. *See id.*
133. *See id.*
134. *See* REPPY & SAMUEL, *supra* note 60, at 85–86.
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*

divided into two distinct categories.[144] Modern contingent revenue retains unique value that traditional contingent revenue simply does not.[145] Traditional contingent revenue is revenue that is to be paid in the future dependent on some event, typically contracted beforehand, such as bonuses, insurance, stock, or disability payments.[146] These types of contingent revenue do not derive from creative works.[147] In contrast, modern contingent revenue is often a means of making a living, possessing a longer life span than traditional contingent revenue as a result of creative works.[148] These striking differences explain why the common approaches to contingent revenue characterization are inapplicable to modern contingent revenue.[149]

This part will first demonstrate that applying those legal approaches results in characterization mayhem, as they are all impracticable.[150] Further, this part shows how, under Texas law, this type of revenue cannot vest during the marriage if received after divorce, ultimately placing modern contingent revenue at a high risk of being incorrectly characterized as community property.[151] This part also explains the inherent difficulty in valuating modern contingent revenue.[152] All this, especially in light of today's new wave of economy, requires there be a legal distinction between traditional and modern contingent revenue.[153] In other words, modern contingent revenue possesses features that are so unique that they demand their own category under contingent revenue.[154]

A. Characterization Mayhem

The approaches discussed in Section II.D.3 cannot be applied effectively to modern contingent revenue because of its unique and creative nature; thus, Texas must enact a new approach.[155] First, under an inception-of-title approach, characterization would be determined the moment the right to revenue is received.[156] However, under modern forms of contingent

144. *See* discussion *supra* Part I.
145. *See* discussion *infra* Section III.C.
146. *See* Loya v. Loya, 526 S.W.3d 448, 451 (Tex. 2017); Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—Eastland 1988, writ denied).
147. *See Loya*, 526 S.W.3d at 451; *Andrle*, 751 S.W.2d at 956.
148. *See* discussion *supra* Part I.
149. *See* discussion *supra* Part I.
150. *See* discussion *infra* Section III.A.
151. *See* discussion *infra* Section III.B.
152. *See* discussion *infra* Section III.C.
153. *See* discussion *infra* Section III.D.
154. *See* discussion *infra* Part IV.
155. *See* discussion *supra* Section II.D.3.
156. *See* discussion *supra* Section II.D.3.

revenue, the right to receive is not absolute.[157] At the moment one makes a patent, copyright, Instagram account/post, or YouTube account/video, it is never guaranteed that it will generate revenue.[158] That is, no right to revenue is ever proclaimed, earned, or vested.[159] Millions of online users or inventors do not receive payment for their creative efforts.[160]

Although some may argue that an inception-of-title approach for copyrights should be governed by 17 U.S.C. § 101, this cannot be so.[161] Section 101 states that a copyright occurs when it is reduced to "any tangible medium of expression."[162] Arguing for Section 101 to govern characterization of copyright revenue is misguided because the copyright itself and the revenue obtained therefrom can—and most likely will—be treated as distinct rights in courts.[163] For example, a court may hold that the copyright is separate property because it was created prior to the marriage, while also holding that the revenue created during the marriage is community property because it was created during the marriage.[164] More importantly, the statute covers only the copyright itself and not the revenue obtained from the copyright.[165] Thus, Section 101 does not support the contention that the inception-of-title approach is a just method to determine distribution of modern contingent revenue.[166]

As for patents, an inception-of-title approach is argued to be effective when the patent is reduced to practice, yet this likewise proves problematic.[167] Reduction to practice can be either actual (physical assembly) or constructive (filing for the patent).[168] Regardless of whether the patent is reduced to practice during the marriage, the patent may still produce revenue long past the marriage's dissolution due solely to factors that were *outside* the marriage.[169] Providing a non-creating spouse with copyright or patent

157. *See generally* Hopper HQ, *supra* note 9 (demonstrating a cost per social media post, which shows contingency behind social media).

158. *See id.*

159. *See* Mohsin, *supra* note 10.

160. *See generally id.* (demonstrating the vast number of users online).

161. *See* 17 U.S.C. § 101.

162. *Id.*

163. *See id.*; Kelly J. Kubasta, Tamera H. Bennett, Warren Cole, David W. Showalter, Michael Smith, & Brian L. Webb, *Identifying Intellectual Property - What Is It?*, 2020 TXCLE-AFL 33-II, 2020 WL 5608145 [hereinafter Kubasta].

164. *See* Kubasta, *supra* note 163 (demonstrating that Texas courts have held this to be the case before).

165. *See* 17 U.S.C. § 101.

166. *See id.*

167. *See Reduction to Practice*, SMITH & HOPEN, https://smithhopen.com/glossary/reduction-to-practice/ (last visited Apr. 4, 2021) (Reduction to practice can be actual or constructive, such as assembling versus filing the patent.) [perma.cc/TD8A-WEZP].

168. *See id.*

169. *See* discussion *infra* Section III.C.

revenue after the marriage dissolution when the revenue is a direct result of the creating spouse's additional efforts *after* the marriage goes against the partnership theory behind community property.[170] In effect, this approach allows the non-creating spouse to legally and unfairly reap the benefits of the creating spouse's efforts that were spent outside the partnership.[171]

Second, the time-of-vesting approach focuses on the conclusion of a transaction, such as when a title is deeded over.[172] Put differently, the focus is on when the right to property has vested completely.[173] Again, this approach by definition cannot be justly applied to modern contingent revenue because a right to obtain revenue may never occur, even if the property from which the revenue derives is already in existence.[174]

Third, the tracing theory approach compares the overall percent of consideration the community has provided to that of each spouse.[175] Although sounding ideal in nature, the tracing theory is nevertheless problematic under Texas law, primarily because Texas's managerial system can complicate whether the community property can contribute to the property or not.[176] Under Texas law, each spouse is given "sole management, control, and disposition of the community property the spouse would have if single" over several items, including revenue from separate property.[177] Therefore, giving one spouse sole management over the revenue in dispute may make it harder for the community to prove its contributions.[178] This approach is further problematic because comingling funds makes it far more difficult to know the percentage that the community contributed.[179]

B. Vested Versus Expectancy in Texas

Texas generally looks to whether the revenue vested during the marriage when dealing with future revenue.[180] Specifically, Texas law states that "[t]he court may . . . enforce an award of the right to receive installment payments or a lump-sum payment due on the maturation of an existing vested or nonvested right to be paid in the future."[181] While the statute refers to

170. *See* discussion *supra* Section II.A.
171. *See* discussion *supra* Section II.A.
172. *See* discussion *supra* Section II.D.3.
173. *See* discussion *supra* Section II.D.3.
174. *See* Hopper HQ, *supra* note 9.
175. *See* discussion *supra* Section II.D.3.
176. *See* discussion *supra* Section II.B; TEX. FAM. CODE ANN. § 3.102.
177. *See* TEX. FAM. CODE ANN. § 3.102.
178. *See* discussion *supra* Section II.B.
179. *See* discussion *supra* Section II.B.
180. *See* TEX. FAM. CODE ANN. § 9.011; discussion *supra* Section III.A.
181. *See* TEX. FAM. CODE ANN. § 9.011(a).

nonvested income, it has only been applied to retirement funds.[182] Nevertheless, the statute may still serve as a legal route for modern contingent revenue, which could be disastrous for the creating spouse.[183] However, the statute conflicts with Texas law, making courts hesitant to characterize speculative future income as community property.[184]

Texas case law has generally stated that if the property is not vested within the marriage, it is too speculative to characterize and should not be considered part of the community.[185] However, in *Rodrigue v. Rodrigue* and some Texas cases, modern contingent revenue has been characterized as community property, thus demonstrating the dangers of Texas law as it is today and the need to give modern contingent revenue its own category.[186] Characterization of property in this manner conflicts with standard principles of Texas law.[187]

For example, in *Cunningham v. Cunningham*, the court held that there was no community interest in the renewal of life insurance policies written by the plaintiff's husband.[188] The court reasoned that commission on insurance contracts are not part of the community because such plans could be subject to cancellation either by the parties held to the contract or by reason of non-payment.[189] The court ultimately held that an interest in commission was a mere expectancy, demonstrating that when a third party can prevent proceeds from existing, such property interest is solely a mere expectancy.[190] A mere expectancy possesses the very speculative nature Texas courts try to avoid when dividing property.[191] Thus, Texas case law is clear that in order to be characterized as community property, the property right must be vested during the marriage and cannot be simply an

182. *See id.*; Cochran, *supra* note 87, at 420; Schneider v. Schneider, 5 S.W.3d 925, 930 (Tex. App.—Austin 1999, no pet.) (unmatured retirement fund's characterization is based on mathematical equations in Texas, which would be inapplicable to modern contingent revenue for its lack of valuation at the time of divorce); *see* discussion *supra* Section III.C.

183. *See* TEX. FAM. CODE ANN. § 9.011(a).

184. *See generally* Butler v. Butler, 975 S.W.2d 765, 768 (Tex. App.—Corpus Christi 1998, no pet.) (holding husband's future income from psychological counseling business was not community property); Cochran, *supra* note 87, at 451.

185. Cochran, *supra* note 87, at 420.

186. Miner v. Miner, No. 13-01-659-CV, 2002 LEXIS 5841, at *5–*7 (Tex. App.—Corpus Christi Aug. 8, 2002, no pet.); Kennard v. McCray, 648 S.W.2d 743, 745–46 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

187. Cochran, *supra* note 87, at 460; *see* Cunningham v. Cunningham, 183 S.W.2d 985, 986 (Tex. App.—Dallas 1944, no writ) (holding that service commissions on insurance contracts are not community property); Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—Eastland 1988, writ denied) (holding that future post-divorce payments under a vested disability insurance policy was community property).

188. *Cunningham*, 183 S.W.2d at 986.

189. *Id.*

190. *Id.*

191. *See* Cochran, *supra* note 87, at 420.

expectancy.[192]

To drive this point further, *Andrle v. Andrle* depicts Texas's legal principle of awarding future payments or revenue only when such right has become vested during the marriage.[193] The court in *Andrle* held that a wife was entitled to her husband's disability payments under a policy entered during their marriage.[194] Essentially, the court reasoned that insurance proceeds under a policy, even if set to be paid out after the divorce, are valid because such payments are guaranteed income.[195] Here, the insurance policy provided a vested right, which allowed the prior spouse to reach the contingent revenue after the divorce.[196]

This vested right principle follows the same trend and reasoning behind traditional contingent revenue, as discussed in Section II.D.3.[197] However, modern contingent revenue is different; applying the same traditional contingent revenue standard to modern contingent revenue is inequitable.[198] Third-party activity is required for modern contingent revenue—much like *Cunningham* discussed—because without the third party, there is no buyer or revenue.[199] With revenue derived from copyrights, patents, and social media, for example, there must be an audience willing to either become buyers or help the creative owner meet the threshold of obtaining the contingent revenue (such as getting enough views or likes per social media post).[200] Fundamentally, the crucial need for a third party makes the right to modern contingent revenue a mere expectancy rather than a vested right.[201]

The manner in which technology has advanced communication and audience interests makes modern contingent revenue difficult to evaluate and basing a livelihood on this type of revenue extremely risky.[202] This risk of having no guaranteed income is another reason modern contingent revenue is a mere expectancy.[203] A mere expectancy, being speculative in nature, is unfavorable to Texas courts, and yet cases have still characterized future income as community property (despite conflicting with Texas principles), highlighting the necessity for a change in the law regarding modern

192. *See* TEX. FAM. CODE ANN. § 9.011.
193. *See* Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—Eastland 1988, writ denied).
194. *See id.*
195. *See id.*
196. *See id.*
197. *See* discussion *supra* Section II.D.3.
198. *See* discussion *supra* Section III.A.
199. *See* Cunningham v. Cunningham, 183 S.W.2d 985, 986 (Tex. App.—Dallas 1944, no writ).
200. *See generally* Hopper HQ, *supra* note 9 (demonstrating cost per social media post, which shows the crucial need for a direct third-party).
201. *See Cunningham*, 183 S.W.2d at 986.
202. *See* discussion *supra* Section I.
203. *See Cunningham*, 183 S.W.2d at 986.

contingent revenue.[204]

It is worth reiterating that while the Texas Family Code permits unvested contingent revenue to be awarded, this has only been applied to retirement benefits.[205] Under the just and right standard, however, nothing stops the courts from allowing the spouse to reach this type of revenue, despite the community's termination.[206] This, coupled with the way modern revenue is being earned, demonstrates the crucial need for a distinction between modern and traditional contingent revenue.

C. Valuation Difficulty

Modern society has completely transformed its methods of communication, having an irreversible effect on how interests fluctuate today.[207] A creative work today may become popular several years after its creation, either due to a change in circumstance, a specific trend, or simply because it may be revived due to modern technology.[208]

Consider the popular '80s hair tie that has recently been brought back to life, the scrunchie.[209] Originally created in the 1960s, the scrunchie did not become a hit until the 1980s and died out by the early 2000s.[210] However, the scrunchie was suddenly revived in 2017, when it appeared at New York Fashion Week.[211] YouTube videos may also be revived many years later in a similar fashion, often resulting in modern contingent revenue.[212] For example, the most popular YouTube video at the time of writing, "Baby Shark Dance," first released in Germany in 2007, did not become a YouTube hit until 2017.[213] It would have been impossible to accurately valuate the scrunchie or the "Baby Shark Dance" video when either was first released. It

204. Cochran, *supra* note 87, at 420.

205. TEX. FAM. CODE ANN. § 9.011.

206. *See* discussion *supra* Section II.D.2.

207. *See* discussion *supra* Section I.

208. *See generally* TFL, *Scrunchies Are at the Center of a New Design Patent Lawsuit*, TFL (Aug. 29, 2019), https://www.thefashionlaw.com/scrunchies-are-at-the-center-of-a-new-design-patent-infringement-lawsuit/ (demonstrating revival of a product) [perma.cc/KPM8-BXEQ].

209. *See id.*

210. *See id.*

211. *See id.*; PureWow, *Everything You Need to Know About the History of the Scrunchie*, YAHOO (Aug. 28, 2019), https://www.yahoo.com/lifestyle/everything-know-history-scrunchie-130900489.html [https://perma.cc/ZLJ7-PHUW].

212. *See* J. Clement, *Most Popular YouTube Videos Based on Total Global Views as of November 2020*, STATISTA (Nov. 4, 2020), https://www.statista.com/statistics/249396/top-youtube-videos-views/ [https://perma.cc/N5Q7-VFKR].

213. *See* CBC Radio, *The Long, Complicated History of Baby Shark — and The Artist Fighting for Credit*, CBC RADIO (Apr. 16, 2019), https://www.cbc.ca/radio/q/thursday-january-24-2019-steffi-didomenicantonio-johnny-only-and-more-1.4989911/the-long-complicated-history-of-baby-shark-and-the-artist-fighting-for-credit-1.4989936 [https://perma.cc/4LLK-465Y].

is thus increasingly difficult to predict the value of creative works now and far into the future. As the law is today, courts could possibly undermine the impact modern contingent revenue may have on the creator's future livelihood, leaving the door open for irreparable harm.

Without a true valuation, the revenue obtained from modern creative works is more contingent than ever, yet another example of a mere expectancy.[214] Moreover, the life span of audience interest may be shorter due to the instantaneous manner in which online content or products are created.[215] Take for instance, 3D printing of meat products.[216] KFC is currently using patented technology to reproduce their famous chicken.[217] This new product will likely go one of two ways—either it will be a huge success, perhaps due to its simplicity or cost-cutting, or it will flop because no one wants to eat lab-grown chicken.[218] It is entirely possible that society completely rejects the notion of consuming meat from a machine.[219] The patent's success depends heavily upon audience interest, making its contingent revenue a mere expectancy.[220] This example demonstrates the difficulty in valuating modern contingent revenue at any given moment.[221]

The needs and interests of consumers across the nation are continually and rapidly changing, making revenue from creative works heavily trend-based.[222] This difficulty in characterization demonstrates that traditional methods used by courts are outdated and should not be used to determine property distribution of revenue from creative works at the time of divorce. In contrast, traditional contingent revenue does not share this valuation difficulty.[223] Typical forms of this type of revenue, such as bonuses, disability, insurance, and retirement funds, are usually contracted out beforehand and specify the exact amount of funds given.[224] With modern contingent revenue, it is never guaranteed that the payment will come, nor is

214. Lea C. Noelke & Andrea St. Leger, *Intellectual Property Issues in Divorce*, NOELKE MAPLES ST. LEGER BRYANT, LLP, 16, https://nmsb-law.com/wp-content/uploads/2016/10/NMSB_Intellectual PropertyinDivorce.pdf [https://perma.cc/G225-58M7] (last visited Apr. 4, 2021).

215. *See* Clement, *supra* note 212.

216. Anne Stych, *KFC Developing 3D-Printed Chicken Nuggets*, BUSI. J. (July 24, 2020, 9:46 AM), https://www.bizjournals.com/bizwomen/news/latest-news/2020/07/kfc-developing-3d-printed-chicken-nuggets.html?page=all..https://www.bizjournals.com/bizwomen/news/latest-news/2020/07/kfc-developing-3d-printed-chicken-nuggets.html?page=all [https://perma.cc/2HQR-7ATG].

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

222. *See* discussion *supra* Part I.

223. *See* Loya v. Loya, 526 S.W.3d 448, 451 (Tex. 2017).

224. *See id.* (IP works may also have a "contracted" life span but are still far greater than traditional contingent revenue); *see* Noelke & St. Leger, *supra* note 214.

it certain how much a product or social media post can generate in terms of revenue, especially at the time of divorce.[225] The law must change to provide a just solution for creative works and give way for modern contingent revenue.

D. New Wave of Economy

With the advancements in technology, creative efforts have surpassed the cap of IP, depicting a new, far more creative economy.[226] The rise of social media has already facilitated substantial change in other areas of law, such as constitutional rights (i.e., freedom of speech).[227] More relevantly, social media has given users an expansive medium that advertises creative efforts by the push of a button, instantaneously accessible to an audience of billions of people through which they have an opportunity to create a unique form of revenue.[228] Such revenue exceeds traditional forms of revenue by allowing high earning capacity in a simple, instantaneous, and flexible fashion, adding greater possibilities for contingent revenue long past divorce.[229] The revenue that flows from social media is such that it is even being used as a source of primary income, something that traditional revenue has virtually never been used for.[230] Furthermore, barriers to entry for social media revenue are substantially lower, allowing for an influx of users to capitalize on this system.[231] The current legal theories applied to modern contingent revenue are not adequate to protect creators, their efforts, or their livelihoods.[232]

Currently, YouTube and Instagram provide large revenue streams for millions of users, many of whom rely on these platforms as their sole source of income.[233] Consequently, it is fairly common for users to quit their prior roles in society and dedicate themselves to these social media platforms full-time.[234] Therefore, because modern contingent revenue has the ability to provide a critical component of one's life—their livelihood—it warrants

225. *See* discussion *supra* Part I.

226. *See* Mohsin, *supra* note 10.

227. *See* Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the Era of New Media*, 53 TEX. TECH L. REV. 273, 290 (2021).

228. *See id.* at 277.

229. Lin, *supra* note 11.

230. *See* discussion *supra* Part I.

231. Best, *supra* note 227, at 296–98.

232. *See* discussion *supra* Section III.A–B.

233. *See* Mohsin, *supra* note 10; Maheshwari, *supra* note 11; Madeline Berg & Abram Brown, *The Highest-Paid YouTube Stars of 2020*, FORBES (Dec. 18, 2020), https://www.forbes.com/sites/maddieberg/2020/12/18/the-highest-paid-youtube-stars-of-2020/ [https://perma.cc/ER8L-WTSS].

234. *See* Maheshwari, *supra* note 11.

distinction from traditional contingent revenue.[235]

Social media has also made it easier for people to create their own IP.[236] For example, Kim Kardashian told David Letterman that "Today, you can launch a whole brand [online]," which she has successfully done with her Skims shapewear line.[237] With social media and the methods of communication today, it is much easier for people to make revenue from both online content and IP property.[238] Therefore, both entrepreneurship, which may require IP, and the ability to obtain modern contingent revenue are now driven by social media.[239]

Ordinary users can now land advertising deals with some of the largest companies in the nation.[240] With these, every post by the user, whether ordinary or celebrity, creates an employee relationship with the company, resulting in direct revenue for the social media user.[241] This relationship is contingent upon the user's posting; thus, the law should treat the revenue flowing from it as a mere expectancy rather than a vested right.[242]

In 2020, the top two earners on Instagram, Dwayne "The Rock" Johnson and Kylie Jenner, each made roughly $1,000,000 per post.[243] While one may argue that the issue of contingent revenue from social media is an issue of celebrityhood, social media's power to connect users instantaneously has provided similar opportunities for ordinary users as well.[244] For example, David Dobrik and Addison Rae, whose careers originated wholly on social media, each earn nearly $70,000 per post.[245] Also, Ryan Kaji, first known for reviewing toys on YouTube, made it onto Forbes's 2020 list of highest-paid YouTubers at the age of only nine and now earns a yearly income of $29.5 million from his channel.[246] These are just a few examples of everyday people who now make a very comfortable living from their self-made YouTube channels.[247]

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235. *See* discussion *supra* Parts I, V (Texas law has not recognized goodwill in this setting); Nail v. Nail, 486 S.W.2d 761 (Tex. 1972).
236. *See My Next Guest*, *supra* note 3.
237. *See id.* (Skims is currently trademarked).
238. *See id.*
239. *See* Maheshwari, *supra* note 11.
240. *See id.*
241. *See id.*
242. *See* discussion *supra* Section III.B.
243. Hopper HQ, *supra* note 9.
244. *See id.*
245. *Id.*
246. Berg & Brown, *supra* note 233.
247. *See id.*

These examples demonstrate that the level of contingency in this type of revenue is high, as it is based on user interaction and attention.[248] They further depict how virtually anyone can begin making money online, giving rise to the new wave of economy that society is experiencing.[249] Valuation has become difficult as a result, and common approaches to contingent revenue are rendered inapplicable.[250] Therefore, this characterization mayhem, high contingency of revenue, and new form of economy all demand a distinction between modern and traditional contingent revenue.

IV. MODERN CONTINGENT REVENUE MUST BE SEPARATE

As demonstrated in Part III, it is imperative that the law recognize the distinction between traditional and modern contingent revenue.[251] However, this distinction then begs the question—how should the law treat this newly coined modern contingent revenue? [252]

This part will examine why the law must declare this type of revenue as separate property.[253] Specifically, this part will detail how human creativity, principles of IP law, avoidance of disproportionate awards, the right to divorce, and an analogy to oil and gas in Texas require the Texas legislature to characterize this type of property as separate.[254] By characterizing modern contingent revenue as separate property at the outset, we are preventing divorce courts from dividing such property and avoiding unfair results.[255]

A. Human Creativity: A Legal Right

At the heart of this issue, the law must protect the creative nature behind modern contingent revenue, an element that traditional contingent revenue simply does not embody.[256] The creative component held by this new type of revenue gives it a much longer possible life span in terms of revenue longevity.[257] Conversely, the revenue life span for traditional contingent revenue is generally shorter and more definite, as it is typically contracted-out beforehand.[258] Although the life span may be cut short as a result of audience

248. *See* Hopper HQ, *supra* note 9.
249. *See My Next Guest*, *supra* note 3.
250. *See* discussion *supra* Section III.A.
251. *See* discussion *supra* Part III.
252. *See* discussion *infra* Parts I, V.
253. *See* discussion *infra* Section IV.A–E.
254. *See* discussion *infra* Section IV.A–E.
255. *See* discussion *supra* Section II.D (only community property is subject to division).
256. *See* discussion *supra* Part III.
257. *See* discussion *supra* Section III.C.
258. *See* discussion *supra* Section III.C.

interest for modern contingent revenue, a revival of such creative work can also revive the contingent revenue that flows from it.[259] However, revival or lack thereof should not limit the creative value behind modern contingent revenue.

As Judge Stewart Dalzell acknowledged in *ACLU v. Reno*, the internet is "the most participatory form of mass speech yet developed . . . [its content] is as diverse as human thought."[260] It is human thought that drives creativity and encourages others to follow the same lead, and with the help of the internet, mass speech now facilitates creative works and contingent revenue.[261] However, allowing a non-creating spouse a share of a work's contingent revenue would be to allow some form of restrictive control for the artist, which would go against legal principles of protecting creativity in order to promote it.[262] At the very least, an artist's profits serve as a driving force to continue creating.[263]

The creative nature from which modern contingent revenue flows displays the "emotional lifeblood of entrepreneurship."[264] For example, Judge Türkel of the Israeli Supreme Court explained that copyright creators enjoy a right to a set of moral and economic rights in their work because such works are "children of [the authors' spirits]."[265] Türkel believes that a violation of these legal principles would be a violation of "the human-moral duty."[266] Author Roberta Kwall further criticizes the United States' failure to protect creativity by stating:

> [scholars] do not sufficiently account for the inspiration dimension of authorship. Indeed, the very act of authorship entails an infusion of the creator's mind, heart and soul into her work. Many authors of creative works maintain a certain type of relationship with their artistic "children." This relationship is unique among other types of human production given the highly personalized and intrinsic nature of creative authorship.[267]

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259. *See* discussion *supra* Section III.C.

260. Am. C.L. Union v. Reno, 929 F. Supp. 824, 842–43 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997).

261. *See* discussion *supra* Part I, Section III.D.

262. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

263. *See generally* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 569 (1994) (demonstrating a court's attempt to protect a creator's market).

264. Andrew J. Sherman, *The Legal Aspects of Protecting Ideas and Creativity*, KAUFMAN ENTREPRENEURS (June 1, 2003), https://www.entrepreneurship.org/articles/2003/06/the-legal-aspects-of-protecting-ideas-and-creativity [https://perma.cc/M3GV-8MAZ].

265. *See* Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1531–32 (2011).

266. *See id.*

267. ROBERTA KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 2 (2009) (Roberta Rosenthal Kwall is the Raymond P. Niro Professor of Intellectual Property Law at DePaul University College of Law and also serves as the Founding Director of the Center for Intellectual Property Law & Information Technology).

Kwall explains that creative efforts hold a unique value, far higher than that of ordinary real or personal property.[268] By referring to a person's work as their children, such reference embodies the concept that the work serves as an extension of their identity and holds more value than an ordinary tangible item.[269] The value of a person's creative work is equivalent to something far greater—their own child.[270] Consequently, by protecting modern contingent revenue from the non-creating spouse, the law protects not only the work, but also the artists themselves and their creative intellect.[271] At minimum, "the act of creative authorship implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way, embodying the author's intrinsic dimension of creativity."[272] In a practical sense, by appreciating the nature behind human creativity as it relates to creative works, one can more fully understand the need for higher legal protection of these works and their revenue, enabling society to offer a sense of moral right protection.[273]

On the other hand, arguing that IP laws are a high enough standard of legal protection for modern contingent revenue misses its unique distinction entirely.[274] IP laws are but the tipping point of the discussion, as social media surpasses their cap and understanding.[275] While the same foundational principles should be applied to online creativity—seeking to protect and promote creativity—more laws are needed for adequate protection.[276]

As Section IV.B discusses, IP laws are simply not enough when it comes to divorce distribution.[277] Our modern society demands a higher level of protection than IP laws can provide simply because the digital era has transformed the method in which human creativity is expressed, communicated, and disseminated.[278]

Professor Litman at the University of Michigan Law School notes that the digital era and its advancing technologies have made it easier for artists to protect their works.[279] The online world allows artists to find replicas of their work, control who sees their work, and to some extent control who can

268. *See id.*
269. *See id.*
270. *See id.*
271. *See id.*
272. *Id.*
273. *See id*.
274. *See* discussion *supra* Section III.C.
275. *See* discussion *supra* Part I.
276. *See* discussion *infra* Section IV.B.
277. *See* discussion *infra* Section IV.B.
278. *See* discussion *supra* Part I.
279. JESSICA LITMAN, DIGITAL COPYRIGHT 185 (2001).

share their work.[280] However, even if evolving technology has produced the means for creativity protection, it is problematic to allow divorce courts to contradict them. Ultimately, as the online world provides the means for artist protection, artists should expect the courts to provide the same level of protection to the revenue flowing from their work when characterizing property at the time of divorce.[281]

Human creativity must be protected at all costs; it is crucial to evolution and progress in our society.[282] The technology Professor Litman refers to could not have been accomplished without human creativity, demonstrating the critically important and incredibly powerful role human creativity plays in our society.[283] Therefore, allowing the non-creating spouse to reap the benefits of modern contingent revenue would be to prevent recognition of the work's unique value and remove integrity from the work itself.[284]

B. Intellectual Property Is Fueled by Creativity

Human creativity is the very backbone of development and progress in society, progress that typically manifests itself in the form of new inventions, businesses, or even markets.[285] IP law serves as the guardian that protects the work that goes into creating these inventions or businesses.[286] Without it, society risks losing the incentives that come from expending creative effort—the value of creativity plummets, and society's progress halts.[287] While IP protection does not go far enough, its principles still support the belief that modern contingent revenue must remain separate in character.[288]

There are four types of IP; however, this Comment focuses only on copyrights and patents, as they are the most commonly litigated of the four during divorces.[289] The popularity of various platforms now creates "additional areas to explore for potential [IP] value."[290] In general, IP law provides for a set of legal rights for an expressed idea—it creates a property

280. *See id*.
281. *See* discussion *infra* Part V.
282. *See* discussion *supra* Part I.
283. *See* LITMAN, *supra* note 279.
284. *See generally* KWALL, *supra* note 267 (demonstrating that protecting creators protects integrity of the work).
285. *See generally My Next Guest*, *supra* note 3 (demonstrating how creative efforts online can create businesses and personal wealth).
286. *See* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 569 (1994).
287. *See id*.
288. Kubasta, *supra* note 163.
289. Brian Porter & Scott Weingust, *Valuing Intellectual Property in the Context of a Divorce Proceeding*, STOUT (Sept. 1, 2014), https://www.stout.com/en/insights/article/valuing-intellectual-property-context-divorce-proceeding [https://perma.cc/XPQ5-GA5D].
290. Kubasta, *supra* note 163.

right based on the fruits of mental labor.[291] Thus, the general principle or theory behind IP rests on the belief that individuals will apply more energy in creative pursuits if the fruits of those efforts could result in substantial financial gain.[292] IP law supports the goal of protecting creativity, and while this section focuses solely on copyrights and patents, the same principles—protecting creativity and avoiding joint ownership past divorce—should be applied to all modern contingent revenue due to its unique creativity and place in society today, which many base their livelihoods on.[293]

1. Copyrights

In 1976, Congress passed the Copyright Act in direct response to the advancements in technology and as a means to promote the progression of science and useful art.[294] The Act provides copyright protection for original works fixed in a tangible medium.[295] In *Rodrigue*, the Fifth Circuit established that the Copyright Act does not preempt state law, including a state's option to elect a community property system.[296] The court in *Rodrigue* held that the author-spouse owned managerial control of the copyright, but ultimately the economic benefits of the work belonged to both spouses as part of the community.[297] Specifically, the Fifth Circuit held:

> that the only ownership rights that the Act grants exclusively to the author are the rights to (1) reproduce, (2) prepare derivative works, (3) distribute copies, (4) perform, and (5) display the work. Among the "bundle" of rights comprising full ownership of property generally, the preemptive effect of federal copyright law extends only to this explicitly enumerated, lesser-included quintet.[298]

This list does not include the right to enjoy the profits of the copyright, enabling the community to reach such profits—including contingent revenue—as held by the *Rodrigue* court.[299] Many discern that this exclusion is intentional and demonstrates Congress's purposeful intent to avoid preemption; however, nothing in the Act or other legislation has explicitly

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291. Alsenz v. Alsenz, 101 S.W.3d 648, 653 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

292. Ann Bartow, *Intellectual Property and Domestic Relations: Issues to Consider When There Is an Artist, Author, Inventor, or Celebrity in the Family*, 35 FAM. L.Q. 383, 383–84 (2001).

293. *See* discussion *infra* Part V.

294. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

295. *See* 17 U.S.C. § 102.

296. *See* Rodrigue v. Rodrigue, 55 F. Supp. 2d 534 (E.D. La. 1999), rev'd 218 F.3d 432, 439 (5th Cir. 2000).

297. *See id.*

298. *See id.*; Kubasta, *supra* note 163.

299. *See Rodrigue*, 218 F.3d at 439.

said so.[300] While this Comment does not outright argue that the Copyright Act preempts state law, it is important to undergo a statutory interpretation analysis to better understand the difficulty surrounding valuation.[301]

The Copyright Act is intended to protect the creator of the copyright.[302] Although Congress's intent cannot be assumed by what they left out, whether intentionally or not, statutory interpretations are forced to rely on what is explicitly written.[303] Thus, under 17 U.S.C. § 201(a), the author or owner of the copyright is the creator, meaning it does not include spouses, despite Congress's knowledge of community property systems prior to 1967, when the Act was passed.[304] In addition, there is no legislative history demonstrating that Congress sought to include community property principles into the Act.[305] Simply put, when Congress stated that "Copyright work . . . vests initially in the author," they did not intend for automatic joint ownership.[306] Thus, the claim that copyright law provides a basis for Congress's support of community property—as it relates to modern contingent revenue—is entirely unfounded.[307]

However, there is an exception to joint ownership in which, under the Copyright Act, a copyright may be owned jointly by two or more parties only with the creator's consent.[308] Even then, courts have required the second party to contribute to the work.[309] Owners of a copyright may also transfer the work either voluntarily or through an operation of law, such as through the terms of a will.[310] Initially, however, the ownership of the work in either case still vests in the creator of the work, allowing the person to bear the fruits of their own work alone; it remains the creator's decision whether they choose to share ownership.[311]

While *Rodrigue* explained that revenue, including contingent revenue, from a copyrighted work is not an expressed right, the Act's own language explicitly provides for the term despite its concrete absence.[312] The five expressed rights given to the creator show that each right provides an opening

300. Kubasta, *supra* note 163.
301. *See* 17 U.S.C. § 201(a).
302. *See id.*
303. *See id.*
304. *See* Cochran, *supra* note 87, at 428.
305. *See id.* at 429.
306. *See id.* at 428; 17 U.S.C. § 201(a).
307. *See generally* Kubasta, *supra* note 163 (demonstrating Congress' lack of explicit support for community property regarding contingent modern revenue).
308. *See* 17 U.S.C. § 201(a).
309. *See* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070–71 (7th Cir. 1994).
310. *See* 17 U.S.C. § 201(d)–(e).
311. *See id.* § 201(a).
312. *See id.* § 106.

or opportunity for financial gain; thus, revenue is implicitly included under the five expressed rights.[313]

More importantly, the Fifth Circuit "failed to clearly state whether [the husband's] ownership interest was separate property or community property."[314] Moreover, while the court mentions that the non-creating spouse was entitled to income from derivatives after divorce, the court also stated the following:

> The exclusive right of the author-spouse to the abusus of the copyright, like that of the naked owner of property burdened by a usufruct, is nevertheless subject to the continuing fructus rights of the community so long as the copyright remains vested in the author-spouse, unless partition should modify the situation.[315]

The above demonstrates conflicts with the court's holding regarding derivative works.[316] The above could mean either that the partition of the community may eliminate the non-creating spouse's right to fruits of the copyright, or that the partition of the community could remove the copyright from the creating spouse.[317] This simple avoidance or oversight by the Fifth Circuit to provide a clear holding has led to difficulty in fully understanding *Rodrigue*, especially considering the evolution of modern contingent revenue.[318]

The holding's uncertainty has also led to several scholars' expressing strong disapproval.[319] Professor Ciolino at the Loyola University New Orleans College of Law argues that the essence of copyright law—to encourage creativity—heavily conflicts with allowing a non-creating spouse to gain an ownership interest from community property.[320] Others have gone as far as to say that "[t]he court is clearly asserting a biased policy towards community property while overlooking the primary objectives of the Copyright Act."[321] Therefore, the Copyright Act's own language and intent demonstrates a strong stance against automatic joint ownership or granting

313. *See id.*

314. Cochran, *supra* note 87, at 442.

315. Rodrigue v. Rodrigue, 55 F. Supp. 2d 534 (E.D. La. 1999), rev'd, 218 F.3d 432, 437 (5th Cir. 2000). Abusus refers to the right to consume, destroy, or transfer property, whereas usufruct refers to the right to use the property, and fructus refers to the fruits (profits) of the property. *See id.*

316. Cochran, *supra* note 87, at 443.

317. *Id.*

318. *See Rodrigue*, 218 F.3d at 435–36 (5th Cir. 2000).

319. Ishaq Kundawala, *Rodrigue v. Rodrigue: The Fifth Circuit Aligns with Worth-Accepting Copyright as Community Property*, 3 TUL. J. TECH. & INTELL. PROP. 165, 173 (2001).

320. Dane S. Ciolino, *How Copyrights Became Community Property (Sort of): Through the Rodrigue v. Rodrigue Looking Glass*, 47 LOY. L. REV. 631, 638–39 (2001).

321. *See* Kundawala, *supra* note 319, at 173.

of rights without the explicit approval of the creator.[322] Ultimately, the Fifth Circuit's holding demonstrates a need for bright-line legislation regarding modern contingent revenue.

2. Patents

A patent is "a grant of a property right by the government to the inventor to exclude others from making, using, selling or importing into the U.S. the patented invention."[323] The patent right works for the owner indirectly rather than directly, focusing on what others cannot do instead of what the owner can do regarding the patent.[324] Therefore, automatic joint ownership over patents, such as in community property distribution, is inconsistent with patent law, as the very essence of patent law rests in the right to exclude others.[325]

The fact that patent law seeks to exclude others unveils the value of sole ownership and gets to the very nature of IP protection—to protect the creative efforts of the creator.[326] Accordingly, a patent grant is only given to the inventor, in effect ensuring distance from community property principles.[327]

Much like copyrights, patents are first awarded exclusively to the creator.[328] A patent will be null and void if awarded to anyone besides the creator, again demonstrating strict efforts to protect the concept of originality and the creator as sole owner, rather than promoting automatic joint ownership.[329] Similar to copyrights, specific requirements must be met in order to validate joint ownership, rather than outright granting ownership as equitable distribution in Texas enables.[330] Therefore, should an invention be comprised of two creators, patent law requires that both creators submit a joint patent application for approval.[331] Even then, the additional owners must show significant contribution to the entire invention.[332] Smaller contributions will be seen only as support, not part of the invention or creating process.[333] Therefore, this requirement also validates and establishes protection for the true inventor and serves as a means to avoid exploitation of one's own

322. *See* 17 U.S.C. §§ 201–205.
323. Kubasta, *supra* note 163; *see* 35 U.S.C. § 101.
324. Kubasta, *supra* note 163.
325. *See id.*
326. *See id.*
327. *See* 35 U.S.C. § 261.
328. *See id.*; 17 U.S.C. § 201.
329. *See* Solomon v. Kimberly-Clark Corp., 216 F.3d 1372, 1381 (Fed. Cir. 2000).
330. *See* 35 U.S.C. § 116.
331. *Id.*
332. *See* Hess v. Advanced Cardiovascular Sys. Inc., 106 F.3d 976, 981 (Fed. Cir. 1997).
333. *See id.*

work.[334]

Under the Doctrine of Equivalents, patent law further mirrors the overall creativity protection principles of IP law.[335] In *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co*., the Supreme Court explained that, under the doctrine, "a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention."[336] This doctrine shows that the Supreme Court understands the risk of interfering with originality and creativity, and thus has chosen to affirmatively protect.[337]

Thus, while patents and copyrights may have differing aspects or purposes, they both effectively avoid automatic joint ownership by protecting the creator, their originality, and avoiding exploitation of one's work.[338] Ultimately, allowing the prior spouse of a creator to reap the benefits of a patent or copyright after divorce would be a direct bastardization of the Supreme Court's goal in protecting creativity and originality. Not only must this effect be avoided as it relates to IP, but also as it relates to all types of modern contingent revenue.[339] In sum, because IP is birthed in creativity, these same legal principles must be applied to modern contingent revenue to avoid automatic joint ownership at the time of divorce.

C. Disproportionate Awards

A colossal effect of the just and right method is disproportionate awards.[340] Classifying modern contingent revenue as community property would allow for the possibility of disproportionate awards, shedding more light on the dangers of the law as it stands today.[341] This effect could be devastating for those using a majority of their modern contingent revenue to continue producing creative works.[342]

Specifically, the just and right method lets the courts decide which spouse is less fortunate.[343] Once identified, this approach justifies giving such

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334. *See id.*

335. *See* Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 21 (1997).

336. *Id.* (citing Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 609 (1950)).

337. *See Graver*, 339 U.S. 605 at 608; Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 733 (2002).

338. *See* 35 U.S.C. § 261; 17 U.S.C. § 201.

339. *See supra* Part IV.

340. *See* discussion *supra* Section II.D.2; TEX. FAM. CODE ANN. § 8.051 (Texas's only form of spousal maintenance is limited to three years, unless some form of mental disability is present).

341. *See* Loaiza v. Loaiza 130 S.W.3d 894, 904 (Tex. App.—Fort Worth 2004, no pet.).

342. *See id.*

343. *See* discussion *supra* Section II.D.2.

spouse a higher percentage of the award, sometimes even resulting in a bigger share of the modern contingent revenue, a disproportionate award.[344] Advocates of this approach argue that disproportionate awards are necessary for non-creating spouses whom relied on their former spouse's income.[345] While true in some occasions, such approach advocates for high inequities and promotes lack of ambition. It opens a large window for abuse of the law and manipulation of the system, and gives the non-creating spouse control over the creating spouse.[346] While abuse of the law is inevitable, it is the law's job to provide solutions that safeguard such abuse.

Unlike other community property states, Texas has a long held strict policy against alimony.[347] Many courts rely on disproportionate awards to off-set this Texas policy.[348] For example, in *Pape v. Pape*, the court reasoned that courts are allowed to favor one spouse at the time of divorce distribution, if necessary.[349] Disproportionate awards, however, go against the basic principles of community property systems, which seek to reward in equal halves.[350]

Further, resorting to disproportionate awards because of a restrictive set of laws demonstrates that disproportionate awards function as disguised alimony. Ironically, the court in *Pape* made note that alimony on top of division of property would be "manifestly unjust and oppressive."[351] Yet, courts have followed *Pape* to justify favoring one spouse in light of strong disapproval of alimony.[352]

Although the effect of disproportionate awards in regard to traditional contingent revenue is not long-lasting due to the inherent end-date of the revenue, its effect on modern contingent revenue is quite different.[353] Modern contingent revenue can be perpetual, and awarding such property to an ex-spouse could have the same effect of disguised alimony through way of disproportionate awards.[354] The non-creating spouse could be tempted to solely rely on the creator spouse's efforts due to modern contingent revenue's newfound profitability.[355] Of course, there is nothing wrong with this decision within the context of marriage; however, once the marriage has

344. *See* discussion *supra* Section II.D.2.
345. *See* Cochran, *supra* note 87, at 461.
346. *See* discussion *supra* Section II.D.2.
347. *See* Pape v. Pape, 35 S.W. 479, 480 (Tex. App. 1896, writ dism'd).
348. *See id.*
349. *Id.*
350. *See* discussion *supra* Section II.A.
351. *See Pape*, 35 S.W. at 481.
352. *See id.*
353. *See* discussion *supra* Part III.
354. *See* discussion *supra* Section III.C.
355. *See* discussion *supra* Part I.

dissolved, allowing the non-creating spouse to continue benefiting from such marriage decision ignores the right to divorce.

D. Freedom to Divorce

The decision to divorce rests on the desire to remove oneself from the partnership, and for those in community property states, it is the desire to end the community.[356] On its face, divorce seems corollary to the right to marry, and numerous cases suggest there is a fundamental right to divorce to some degree.[357] Logically, it would be absurd for a state to force a perpetual relationship with a former spouse, yet due to modern contingent revenue's possible longevity, characterizing it as community property could cause this very result.[358] Traditional contingent revenue, in contrast, would not have this effect because it often has a shorter life span or a definite end-date, which is generally not the case with modern contingent revenue.[359]

In America, divorce is somewhat of a broken record, having long been part of American tradition.[360] Early sentiments of divorce are closely associated with our history's revolutionary disposition.[361] Thomas Jefferson "related the concepts of independence and happiness with divorce some years before he presented a similar argument for terminating America's connection with England in the Declaration of Independence."[362] Our nation had no intention of preserving lifelong ties with England, and the same approach should be taken with divorce today.[363] Separate spouses should not be kept tied to one another post-divorce, and certainly should not be forced to share their livelihoods.

According to the Restatement (Second) of Conflict of Laws, "[t]he local law of the forum determines the right to a divorce, not because it is the place

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356. *See* discussion *supra* Section II.A.

357. Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 172 (2013)*; see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) (reminding that "[w]ithout those peripheral rights the specific rights would be less secure"); *see also* Zablocki v. Redhail, 434 U.S. 374 (1978) (securing as fundamental the right to marry, and possibly remarry); United States v. Kras, 409 U.S. 434, 444–45 (1973) (distinguishing divorce from bankruptcy, particularly noting that "[t]he Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected activities."); Boddie v. Connecticut, 401 U.S. 371 n.20 (1971).

358. *See* Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970) ("We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists.").

359. *See* discussion *supra* Part III.

360. *See* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 5, 11 (1991) ("Before migrating to the colonies in 1620, many Separatists embraced Martin Luther's and John Calvin's belief that marriage and divorce were civil concerns.").

361. *See id*. at 31.

362. *See id.*

363. *See id.*

where the action is brought but because of the peculiar interest which a state has in the marriage status of its domiciliaries."[364] Texas has long demonstrated a desire for spouses to go their separate ways without strings attached—its position on alimony being proof of this notion.[365] The right to divorce is strong in Texas, and to allow long, continual ties to a spouse after the community is dissolved goes against both Texas's stance on and our country's historical definition of divorce.[366]

Applying traditional methods to modern contingent revenue raises two additional issues. First, because of how modern contingent revenue has revolutionized the way people make their livelihoods, allowing a prior spouse to reach this type of revenue is equivalent to allowing such spouse to a share in their ex-spouse's income for the remainder of their employment. Second, such result mirrors inheritance or survivorship law in Texas.[367] Subjecting this revenue to distribution conflates the death of the marriage with the death of the spouse, working to remove the concept of divorce entirely.[368] Therefore, it is critically important that the Texas legislature characterize modern contingent revenue as separate property to prevent the possibility of an absurd length of support for the non-creating spouse.[369]

E. Oil and Gas Exception

Income generated from separate property obtained during the marriage is generally characterized as community property.[370] Texas law, however, carves out a big exception for revenue generated through oil and gas—any royalties obtained from mineral rights are always deemed separate property.[371] Under Texas law, extraction of oil and gas serves as "piecemeal sales of the separate property."[372] In other words, because the royalties are payment from the extraction of separate property, the royalties will also be considered separate property.[373]

In *Alsenz v. Alsenz*, the petitioner analogized contingent revenue or royalties from a patent to the oil and gas exception because a patent, like oil and gas, diminishes over time.[374] The Fifth Court of Appeals in Texas agreed

364. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971).
365. *See* Pape v. Pape, 35 S.W. 479, 480 (Tex. App. 1896, writ dism'd).
366. *See id.*
367. *See* TEX. EST. CODE § 201.002.
368. *See id.*
369. *See* discussion *infra* Part V.
370. *See* discussion *supra* Section II.C.
371. *See* Norris v. Vaughn, 260 S.W.2d 676, 679 (Tex. 1953).
372. *Id.*
373. *Id.*
374. Alsenz v. Alsenz, 101 S.W.3d 648, 653 (Tex. App.—Houston [1st Dist.] 2003).

in part, saying "[t]he income stream will greatly diminish because competing products may arise or new technology may supplant Richard's inventions."[375] Nevertheless, the court reasoned that because the patent does not become fully depleted like land, the oil and gas exception did not apply.[376]

However, the *Alsenz* court missed the entire crux regarding oil and gas royalties.[377] In a practical sense, oil and gas royalties are *substitutes* for the asset, as the value of the oil and gas stems solely from the royalties.[378] The same can be said of patents.[379] Patents are useless to society if not for the revenue derived from its use, which the *Alsenz* court failed to recognize.[380]

This same logic should apply to modern contingent revenue as a whole—it serves as a substitute for the asset itself.[381] While valuation is difficult for modern contingent revenue at the outset, its only available value lies in the revenue it can provide, even if contingent in nature.[382] Thus, both oil and gas royalties and modern contingent revenue serve as substitutes for the actual asset or property.[383] This defining trait must affect modern contingent revenue's place in a community property system.[384]

Moreover, with the inevitable depletion of oil and gas on one's land, its royalties are also a mere expectancy that require third-party action, making the revenue uncertain.[385] As discussed in Section III.B, modern contingent revenue is quite similar—it is a mere expectancy with the requirement of third-party action.[386] Because modern contingent revenue behaves the same way as revenue derived from oil and gas, the law should likewise treat it the same. It is time the law adapt to this new form of economy and create a similar exception for modern contingent revenue.[387]

V. LEGISLATIVE PROPOSAL

This proposal is not targeted at removing the harmony of a prior partnership or employing punitive effects against non-creating spouses.[388]

375. *Id.*
376. *Id.*
377. Kristen B. Prout, *Intellectual Property Distribution in Divorce Settlements*, 18 QUINNIPIAC PROB. L.J. 160, 171 (2004).
378. *Id.*
379. *Id.* at 161.
380. *See id.* at 171.
381. *See id.*
382. *See* discussion *supra* Section III.C.
383. *See* Prout, *supra* note 377.
384. *See* discussion *infra* Part V.
385. *See* discussion *supra* Section III.B.
386. *See* discussion *supra* Section III.B.
387. *See* discussion *infra* Part V.
388. *See* discussion *supra* Part II.

This proposal does, however, seek to provide a legal distinction between two types of revenue—one that courts have experience with, and another that courts have yet to even recognize.[389]

This proposal is founded on the two arguments established in Parts III and IV: (1) that modern contingent revenue is legally distinct from traditional contingent revenue because of its difficulty in valuation and society's shift to be more dependent on contingent types of revenue; and (2) that modern contingent revenue must be considered separate to protect and promote creativity, affirm IP principles, avoid disproportionate awards, and respect a person's choice to divorce.[390] The proposed legislation will effectuate a sense of predictability, certainty, and understanding to this new type of revenue, protecting the creative soul of our society.[391] Not only will this proposal protect creative efforts, it will further induce them.[392]

A. A New Presumption

Texas's community property presumption is high—only rebuttable by clear and convincing evidence, and unfortunately the definition of neither community property nor separate property provides a bright-line rule for how modern contingent revenue should be characterized.[393] To make matters worse, the current Texas case law only provides more confusion and inconsistency.[394]

This Comment seeks to avoid this confusion by proposing a specific presumption as it relates to modern contingent revenue.[395] The proposal will codify the following language into the Texas Family Code:

> MODERN CONTINGENT REVENUE CHARACTERIZATION AT DIVORCE:
>
> Revenue that is to be or can be received after the dissolution of a marriage, by separation or divorce, which derives from a creative work is deemed separate property of the creating spouse.[396] The creating spouse will be identified by legal title to the creative, revenue-producing work, and should both spouses be on title, the award will be in equal halves.[397] Creative works that may produce this type of revenue include, but are not limited to, social

389. *See* discussion *supra* Part III.
390. *See* discussion *supra* Parts III, IV.
391. *See* discussion *infra* Sections V.A–B.
392. *See* discussion *infra* Sections V.A–B.
393. *See* TEX. CONST. art. XVI, § 15.
394. *See* discussion *supra* Sections III.A–B.
395. *See* discussion *supra* Part I.
396. *See* discussion *supra* Part I.
397. *See* discussion *supra* Section II.A.

media works and intellectual property.[398]

Revenue that is to be paid out in the future, is dependent on some event occurring, and does not derive from a creative work, such as retirement, bonuses, and disability payments, is considered traditional contingent revenue and is excluded from this section.[399]

This proposal's revised presumption is narrowly tailored to today's new wave of economy.[400] The presumption is able to adapt, however, to future developments because it is limited only by the "creative component" language.[401] That is, as modern contingent revenue becomes even more relevant, the definition of creative works will reflect society's needs at the time.[402] The courts will be left to decide what other types of work are deemed creative as our society continues to modernize itself.[403] With the rate of technology today, modern contingent revenue will likely grow beyond social media and IP, further necessitating rules regarding this unique type of revenue.[404]

This distinction between traditional and modern contingent revenue will give Texas courtrooms some much needed predictability.[405] Furthermore, placing the presumption in favor of the creating spouse as separate property at the outset prevents courts from employing discretion on property characterization, even under a just and right standard.[406] Most importantly, this proposal will better set the parameters for the world of modern contingent revenue, and in doing so, will protect the livelihoods of all those primarily relying on this type of revenue.[407]

B. Reverse Burden

To respect the principles of community property and advocate for a partnership theory, this Comment also proposes a reverse burden shift.[408] Currently, the burden is on the creating spouse to prove their property is separate.[409] This proposal reverses that burden, requiring the non-creating

398. *See* discussion *supra* Parts I, III; author's proposed legislation.
399. *See* discussion *supra* Part III; author's proposed legislation.
400. *See* discussion *supra* Part I; *see* discussion *supra* Section III.D.
401. *See* discussion *supra* Section III.D.
402. *See* discussion *supra* Section III.D.
403. *See* discussion *supra* Section III.D.
404. *See* discussion *supra* Part I; *see* discussion *supra* Sections III.C–D.
405. *See* discussion *supra* Part III.
406. *See* discussion *supra* Part IV (only community property is subject to division).
407. *See* discussion *supra* Part I.
408. *See* discussion *supra* Part I.
409. *See* discussion *supra* Section II.A.3.

spouse to demonstrate that they *materially* aided in producing the creative work that the contingent revenue derived from.[410] A claim that community funds were used for the creative work does not constitute material help—such a claim is only valid for reimbursement claims and not a right to ongoing contingent revenue.[411]

VI. CONCLUSION

Workplaces today are undergoing a dramatic transformation, forcing our society to reevaluate the way it sees revenue.[412] Gone are the days of standard nine-to-five jobs, and with them so go the streams of constant and predictable revenue.[413] People are instead taking risks by relying on the internet and mass communication to fuel their livelihoods.[414] This change has left Texas law in the dust, failing to adapt to this new aspect of society.[415] This failure is accompanied by an avoidance to address this issue head on.[416] There is minimal protection for those investing their livelihoods in modern contingent revenue at the time of divorce.

Instead of running from the issue, Texas law should spearhead its solution.[417] Texas law should first recognize the distinction between modern contingent revenue and traditional contingent revenue.[418] This Comment calls on the Texas legislature to hold this unique form of revenue as separate property at the time of divorce, giving post-divorce protection to those individuals that seek to retain creative control of their works.[419] Though imperfect, this Comment's proposal serves as the first step to highlighting this issue, as it will only compound as technology advances.[420] This issue must be quickly dealt with to provide the justice creative individuals deserve, which can only be done by avoiding joint ownership long past divorce.[421]

As a society, we must let our laws grow and try to keep pace with the passage of time, lest, as here, former spouses may be financially chained to their partners indefinitely.

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410. *See generally* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070−71 (7th Cir. 1994); Hess v. Advanced Cardiovascular Sys. Inc., 106 F.3d 976, 980−81 (Fed. Cir.1997) (depicting intellectual property law's favoring of requiring that contributors materially help with the creation).

411. *See* Cameron v. Cameron, 641 S.W.2d 210, 216 (Tex. 1982).

412. *See* discussion *supra* Part I; *see* discussion *supra* Sections III.C–D.

413. *See* discussion *supra* Part I; *see* discussion *supra* Sections III.C–D.

414. *See* discussion *supra* Part I; *see* discussion *supra* Sections III.C–D.

415. *See* discussion *supra* Part I.

416. *See* discussion *supra* Part I.

417. *See* discussion *supra* Part V.

418. *See* discussion *supra* Part III.

419. *See* discussion *supra* Part V.

420. *See* discussion *supra* Part V.

421. *See* discussion *supra* Part IV.