Are Selfies Subject to Equitable Distribution?

by David B. Bice and D. Travis Bice

Most divorces require the painstaking inventory, valuation, and classification of real and personal property known as equitable distribution. However, this tedious endeavor rarely includes attention for one kind of intangible personal property: intellectual property. Even so, surely inventors, artists, and business owners need divorces as well. The questions become: When should a piece of art work or a patented invention be subject to equitable distribution? What should a Virginia attorney know when equitable distribution could include items such as family photographs, children's macaroni artwork, or even selfies taken by one spouse and sent to the other, or to a paramour?

Intellectual property can include trademarks, trade secrets, copyrights and patents. Since business entities, rather than spouses, are likely to own trademarks and trade secrets, a Virginia attorney is more likely to encounter copyrights and patents in equitable distribution.

Patents are awarded under Title 35 of the United States Code through the United States Patent and Trademark Office, following an examination for novelty and usefulness. 35 U.S.C. §101. Although unreported, the Court of Appeals has dealt with the equitable distribution of a patent. *Zalusky v. Zalusky*, No. 0199-02-4, 2002 WL 31553133 (Va. Ct. App. Nov. 19, 2002).

In *Zalusky*, the Court of Appeals reversed the trial court's apparent ruling that a patent acquired post-separation by the wife was separate property. *Id.* at *1-2. Instead, due to the husband's creation of several prototypes and completion of applications for provisional patents for the device in the wife's name, the Court of Appeals found that some portion of the proceeds from the sale of the patent should be classified as marital property. *Id.* at *2.

Important to note, the Court of Appeals held that the proceeds from the sale of the patent were part marital, not that the patent itself was marital. The importance of this distinction becomes more apparent when examining copyrights.

Unlike patents, under 17 U.S.C. §102, copyrights vest initially in the author of an original work of authorship once fixed in any tangible medium of expression. Works of authorship include several categories, such as pictorial works, audiovisual works, and sound recordings. *Id.* For example, a husband takes a photograph of himself using his phone, otherwise known as a "selfie." He has a copyright in that photograph the moment it is taken, as it has not become "fixed in a tangible medium of expression." 17 U.S.C. §101

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The other requirement of a copyright "originality" merely requires that the author employ a minimal degree of creativity and have independently created the work, so a simple selfie would be "original" enough. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991) (holding that arranging numbers and names in a telephone directory according to alphabetical order was not original). To whom does the ownership of the copyright vest?

According to 17 U.S.C. §201(a), the author or co-authors are initially vested with such ownership, which intuitively makes sense, but what if the author is married at the time? Unfortunately, this scenario has not been addressed by the Virginia appellate courts. Therefore, looking to other jurisdictions, some persuasive authority may be helpful to a Virginia attorney.

In *re Marriage of Worth*, the California Court of Appeals found that several books written by the husband during the marriage were community property, disagreeing with the husband's argument that 17 U.S.C. §201 vests initial ownership in the author. 195 Cal.App.3d 768 (1987). However, in *Rodrigue v. Rodrigue*, the Court of Appeals for the Fifth Circuit reversed the trial court's finding that paintings made by the husband during the marriage were his separate property completely. 218 F.3d 432, 435 (5th Cir. 2000). Instead of holding that the copyright was a part of community property, the Court distinguished between the managerial control of the copyright found in 17 U.S.C. §106, which remained the husband's separate property, and the economic benefits derived from such copyrighted works, which were community property. *Id.* Central to this holding was that 17 U.S.C. §201, which initially vests ownership in the author, preempts state community property law with regard to the exclusive rights found in 17 U.S.C. §106. *Id.* A Virginia attorney will notice how this mirrors the distinction found in *Zalusky*.

In *Berry v. Berry*, the Hawaii Supreme Court agreed with *Rodrigue* over *Worth*, citing more specifically that 17 U.S.C. §201(e) also prevents involuntary transfer following initial vesting of ownership. 277 P.3d 968, 981-88 (Haw. 2012). This section against involuntary transfer of copyright ownership is simi-

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larly found within 35 U.S.C. §261 with regard to patents, specifically requiring assignment to occur "by an instrument in writing." Therefore, the exclusive patent rights within 35 U.S.C. §§271 and 281 likely cannot be found to be marital property by operation of law, but such economic rights likely can be, as was the case in *Zalusky*.

Therefore, when beginning discovery in a divorce case, a Virginia attorney would be wise to inquire about potential intellectual property produced during the marriage. The economic benefits derived from such intellectual property, such as royalties or license agreements, are likely to be marital in nature. However, the exclusive rights, such as to prevent reproduction of copyrighted works, are likely to be separate.

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