

**COMMENTS**  
**“Yours, Mine, or Ours?”:**  
**Ownership and Management of Electronic**  
**Communications in**  
**Community Property Regimes**

Lillian Marie Grappe\*

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I. INTRODUCTION

What is a marriage? Traditionally speaking, we know the answer. It is college sweethearts, it is the “She said yes!” photos, it is a big white dress, it is jokes on House Hunters about the office (or is it a nursery?), it is the minivan, it is saving for college, it is spoiling the grandkids, and it is the retirement village in Florida. Initially, it does not seem like such a hard question. But that answer is growing more and more outdated. Perhaps a more realistic question is: What is a *modern* marriage? That is a query we, as a society, are currently debating as our definition of marriage continues to evolve in a world seemingly more dynamic than ever. So what does a modern marriage really look like?

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\* © 2015 Lillian Marie Grappe. Senior Articles Editor, Volume 18, *Tulane Journal of Technology and Intellectual Property*. J.D. candidate 2016, Tulane University Law School; B.A. 2009, Louisiana Tech University. The author would like to thank her family and friends for all their encouragement and support in writing this Comment. The author would also like to thank all members of Volume 18 for their hard work and dedication to the Journal.

Unfortunately sometimes the marital picture is not so idyllic. Often the marriage is dissolved before any of the “traditional” milestones can be reached.<sup>1</sup> Even the dissolution proceedings of a modern marriage look differently than they did twenty years ago. It is now commonplace for text messages, e-mails, Facebook messages, or tweets to be introduced against a spouse as evidence of infidelity, abuse, threats, or other iniquitous behavior.<sup>2</sup> This damaging electronic evidence has serious consequences at dissolution when the court distributes marital property, allocates alimony payments, and awards custody. However, such evidence may be inadmissible if the proponent spouse accessed the communications illegally.<sup>3</sup> Accessing your spouse’s electronic communications without consent is often a violation of state communication privacy statutes and, in some jurisdictions, constitutes a violation of federal law—specifically, the Electronic Communications Privacy Act (ECPA).<sup>4</sup> The federal circuits are currently split as to whether a spousal exception to the ECPA exists, and much scholarship has been devoted to addressing this lack of consensus.<sup>5</sup> While scholarship largely focuses on spousal privacy interests as recognized by the different circuits, this Comment will address spousal access to electronic communications, which are virtual property, through the lens of a more traditional property-centered approach. Specifically, this Comment will focus on whether spouses in community property regimes have a legal right to access their spouse’s electronic communications.

In community property regimes, all property—including virtual property—that is created during marriage is presumed to be community property and, thus, is jointly owned by the spouses.<sup>6</sup> Additionally, spouses may have equal management over the virtual property, meaning they may be able to access, read, print, or delete electronic communi-

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1. See *National Vital Statistics System*, CTRS. DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm) (last visited Mar. 18, 2015) (providing data for divorce dates from 2000 to 2001).

2. *The Hazards of Email, Text Messages & Social Media in a Divorce*, MCKINLEY IRVIN FAM. LAW (Sept. 16, 2013, 12:00 AM), <http://www.mckinleyirvin.com/Family-Law-Blog/2013/September/The-Hazards-of-Email-Text-Messages-038-Social-Me.aspx>.

3. *Id.*

4. *Id.*

5. Cary J. Mogerman & Stephanie L. Jones, *The New Era of Electronic Eavesdropping and Divorce: An Analysis of the Federal Law Relating to Eavesdropping and Privacy in the Internet Age*, 21 J. AM. ACAD. MATRIM. LAW. 481, 499-500 (2008).

6. Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?*, 85 TUL. L. REV. 717, 719 (2011).

cations.<sup>7</sup> Practically, this means that in community property regimes e-mails, Facebook messages, tweets, and text messages created by one spouse during marriage may be legally accessible to both spouses. This Comment addresses this question and the implications spousal access to virtual property may have in divorce proceedings.

Part II will address the prevalence of spousal electronic spying in divorce proceedings, the deleterious effects of damaging electronic communications on spouses' pecuniary and nonpecuniary interests, divergent opinions on the application of the ECPA to spousal spying, and the merits of applying a property—rather than privacy—centered approach to electronic communications. Part III will discuss ownership and management of marital property in community property regimes. Part IV will discuss the legal definition of virtual property, modern examples of virtual property creation, and the role of virtual property in the modern marriage. Part V will discuss the application of the existing community property framework—consisting of (1) classification of property as community or separate and (2) management of property as equal, sole, or joint—to electronic communications as virtual property. This Part will also provide several examples of this application. Part VI will address the interplay between community property and the ECPA, suggesting that a threshold determination of community status and spousal right of access be made before spouses are charged under the ECPA in community property jurisdictions. This final Part will also address privacy and preemption concerns.

## II. “A (CYBER) AFFAIR TO REMEMBER:” SPOUSAL ELECTRONIC SPYING AND THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

The introduction posited, “What is a modern marriage?” A better question for this Comment is “What is a modern divorce?” What type of evidence is typically introduced and how does this affect the ultimate division of assets and custody? Historically, allegations of infidelity, neglect, domestic violence, child abuse, financial mismanagement, or other moral failures were proven by witness testimony or private investigators.<sup>8</sup> However, today these allegations are often quickly proven by electronic communications, both public and private.<sup>9</sup> As one

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7. Sally Brown Richardson, *How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace*, 72 LA. L. REV. 89, 106, 111 (2011).

8. Susan L. Thomas, *Proof of Adultery As Grounds for Dissolution of Marriage*, 49 AM. JUR. *Proof of Facts* 3d 277, § 1(B), §§ 14-15 (1998).

9. *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, AM. ACAD. OF MATRIM. LAW. (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/>

journalist opined, “It used to be the tell-tale lipstick on the collar. Then there were the give-away texts that spelled the death knell for many marriages. But now one in five divorces involve the social networking site Facebook.”<sup>10</sup> In 2012, the American Academy of Matrimonial Lawyers (AAML) conducted a survey of top divorce attorneys and found that 92% of surveyed attorneys reported an increase in cases using smart phone evidence during the previous three years.<sup>11</sup> This evidence can consist of text messages, e-mails, phone numbers, call histories, GPS information, and Internet search histories.<sup>12</sup> A 2010 survey by the AAML revealed that 81% of surveyed divorce attorneys saw an increase in the use of social networking website evidence during the previous five years, Facebook being the primary source of this evidence.<sup>13</sup> Attorneys now regularly read illicit text messages into the record and display less than flattering Facebook photos on courtroom projectors.<sup>14</sup> These irrefutable displays of marital scandal render some modern divorce proceedings worthy of reality television.

These messages, photos, and other electronic communications can be extraordinarily detrimental to the party they are being offered against.<sup>15</sup> For instance, in states that provide for an equitable distribution of property at divorce, such as Texas, e-mails revealing a spouse’s adulterous actions can dramatically reduce the unfaithful spouse’s property award.<sup>16</sup> In some states, such as Louisiana, adulterous spouses

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press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-; *Lawyers Finding Divorce App in Smart Phones*, AM. ACAD. MATRIM. LAW. (Feb. 8, 2012), <http://www.aaml.org/about-the-academy/press/press-releases/divorce/lawyers-finding-divorce-app-smart-phones>; Jennifer Ludden, *CU in Court: Texts Can Be a Divorce Lawyer’s Dream*, NPR (Feb. 23, 2012, 11:01 AM), <http://www.npr.org/blogs/alltechconsidered/2012/02/24/147289250/temper-your-texts-divorce-court-makes-use-of-messages>.

10. David Gardner, *The Marriage Killer: One in Five American Divorces Now Involve Facebook*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-1334482/The-marriage-killer-One-American-divorces-involve-Facebook.html#ixzz3SPoTQ3ur> (last updated Dec. 1, 2010, 11:45 AM) (citing *Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers*, *supra* note 9).

11. *Lawyers Finding Divorce App in Smartphones*, *supra* note 9.

12. *Id.*

13. *Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers*, *supra* note 9.

14. See *The Hazards of Email, Text Messages & Social Media in a Divorce*, *supra* note 2; Ludden, *supra* note 9.

15. Jennifer Mitchell, *Sex, Lies, and Spyware: Balancing the Right to Privacy Against the Right To Know in the Marital Relationship*, 9 J.L. & FAM. STUD. 171, 183 (2007) (“[T]he outcome of these evidentiary questions can be very important in divorce litigation, potentially affecting the alimony award or custody determination.”).

16. See *Halleman v. Halleman*, 379 S.W.3d 443, 453 (Tex. App. 2012) (explaining that a wife’s adulterous e-mails contributed to her being awarded only 24% of the community assets).

are precluded from receiving alimony payments.<sup>17</sup> Perhaps because the Internet has made it easier than ever for spouses to connect with others and engage in extramarital sexual encounters, electronic evidence of affairs is commonplace today.<sup>18</sup> The modern reality is that “[v]irtually everyone who cheats will do it electronically.”<sup>19</sup>

However, damning electronic communications are not only indicative of adultery and can harm more than mere pecuniary interests.<sup>20</sup> Such evidence can also play a major role in determining a spouse’s fitness in custody disputes. For example, a wife was denied joint custody of her ten-year-old son after she posted derogatory and demeaning comments about him on Facebook.<sup>21</sup> Clearly, evidence of immoral electronic communications, which is now so readily available, has a serious impact on a spouse’s interests—both pecuniary and nonpecuniary.

So how do spouses get their hands on this incriminating, and potentially valuable, evidence? The ideal manner of obtaining this evidence is to subpoena it in discovery. In that case, courts will typically admit the damaging evidence into the record.<sup>22</sup> However, often immediately prior to or during the divorce process, spouses access these communications without their spouse’s consent in order to prove suspected indiscretions.<sup>23</sup> Spouses later attempting to offer this evidence may not be allowed to admit the evidence if they obtained it illegally.<sup>24</sup> Furthermore, illegally accessing such information may subject the spying spouse to civil penalties under state tort law and criminal penalties under state and federal wiretapping statutes.<sup>25</sup>

Such was the case in *People v. Walker*, where the husband, Leon, who was still living in the family home during the divorce proceedings, accessed his wife Clara’s private Gmail account without her permission

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17. LA. CIV. CODE ANN. art. 112 (2014); see *Lyons v. Lyons*, 33237-LA (La. App. 2 Cir. 10/10/00); 768 So. 2d 853, 858; see also *Diggs v. Diggs*, 08-1271 (La. App. 3d Cir. 04/01/09); 6 So. 3d 1030, 1033 (explaining that a wife was excused of her cruel behavior and, thus, allowed alimony payments because suggestive e-mails indicated her husband was having an affair).

18. Mitchell, *supra* note 15, at 173 (citing Marilyn Gardner, *Is It Cyber-Flirting or Cyber-Betrayal?*, CHRISTIAN SCI. MONITOR (Aug. 19, 2004), <http://www.csmonitor.com/2004/0819/p12s02-lifp.html>).

19. *Id.* (citation omitted).

20. See *The Hazards of Email, Text Messages & Social Media in a Divorce*, *supra* note 2; Ludden, *supra* note 9.

21. *Melody M. v. Robert M.*, 962 N.Y.S.2d 364, 366-67 (App. Div. 2013).

22. See *The Hazards of Email, Text Messages & Social Media in a Divorce*, *supra* note 2.

23. Kelly McClure, *Top 10 Things Every Woman (and Her Husband) Should Know Before Filing for Divorce*, 49 ADVOC. (TEX.) 55, 55 (2009).

24. *The Hazards of Email, Text Messages & Social Media in a Divorce*, *supra* note 2.

25. Electronic Communication Privacy Act, 18 U.S.C. § 2511 (2012).

in an attempt to prove her suspected infidelity.<sup>26</sup> Leon then gave the damaging e-mails to the wife's first husband, Bryan, who attached them to an emergency custody motion for their mutual child.<sup>27</sup> Pursuant to a Michigan statute, the state brought criminal charges against Leon for his unauthorized access of her password-protected e-mail account.<sup>28</sup> This scenario plays out in many divorce proceedings, and courts generally address the issue as a violation of the spouse's privacy rights or a violation of state or federal statutes.<sup>29</sup> In *Walker*, Leon argued that as a spouse of the Gmail account holder, he should be exempt from the Michigan statute barring unauthorized computer access.<sup>30</sup> The court briefly addressed whether there should be a spousal exception to the statute, but ultimately concluded there would be no basis for such an exception because the Gmail account was personal and password-protected, and a mere spousal relationship is not sufficient to allow a bypass of such privacy protections.<sup>31</sup> The court, perhaps because Leon never raised the issue, did not consider whether he had any property rights, as a husband, to the e-mails Clara was composing.<sup>32</sup> This is interesting considering that the statute Leon was charged under specifically forbids illegally accessing electronic *property*, and the court recognized that the e-mails were Clara's property: "[The] defendant acquired his wife's property, i.e., her password-protected emails containing restricted personal information or other tangible or intangible items of value."<sup>33</sup> This may be attributable to the fact that *Walker* took place in Michigan, a noncommunity property state, but more likely, it demonstrates the novelty of the property-centered analysis.<sup>34</sup>

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26. *People v. Walker*, No. 304593, 2011 WL 6786935, at \*1-2 (Mich. Ct. App. Dec. 27, 2011).

27. *Id.* at \*1.

28. *Id.* at \*2. Leon was charged under Michigan Compiled Laws statute 752.795, which provides:

A person shall not intentionally and without authorization or by exceeding valid authorization do any of the following: . . . Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire, alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network.

MICH. COMP. LAWS § 752.795 (1997); *see, e.g.*, *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1997); *Walker*, 2011 WL 6786935.

29. *Mitchell*, *supra* note 15, at 173-83.

30. *Walker*, 2011 WL 6786935, at \*4-5.

31. *Id.* at \*5.

32. *Walker*, 2011 WL 6786935.

33. *Id.* at \*9; MICH. COMP. LAWS § 752.795.

34. *Richardson*, *supra* note 7, at 92 (noting nine states in the United States operate under a community property system: Arizona, California, Idaho, Louisiana, New Mexico, Nevada,

Courts have explored spousal exceptions to electronic privacy statutes since before the enactment of the ECPA and continue to do so.<sup>35</sup> The ECPA contains both the Wiretap Act and the Stored Communications Act.<sup>36</sup> Generally, the Wiretap Act regulates and prevents interception of “real-time” communications—“such as face-to-face conversations, conversations over the telephone, . . . cell phones, text messaging, [and] e-mails”—and the Stored Communications Act regulates communications “that have been [sent], but have not been received[,] such as [unheard] voicemail messages . . . or unread e-mails.”<sup>37</sup>

The Wiretap Act punishes any person who “intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.”<sup>38</sup> Any violation of the Wiretap Act opens the procurer up to criminal sanctions and civil penalties, while also precluding the communication’s admittance into in any court proceedings.<sup>39</sup> The Stored Communications Act punishes anyone who “obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage” by intentionally accessing without authorization or in excess of authorization “a facility through which an electronic communication service is provided.”<sup>40</sup> Violation of this statute also opens the violator up to criminal sanctions and civil penalties; however, unlike the Wiretap Act, there is no provision in the statute barring the illegally obtained communications from being entered into evidence in a court proceeding.<sup>41</sup>

Accordingly, the ECPA generally provides that an individual’s interception or access of electronic communications, such as e-mails, text messages, or Facebook messages would subject them to a variety of legal sanctions.<sup>42</sup> And while definitions of what constitutes an “interception” or an “electronic communication” have become quite complex through

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Texas, Washington, and Wisconsin). Similar instances of unauthorized spousal access to electronic communications occurring in community property states have also not engendered a property-centered analysis. See *Halleman v. Halleman*, 379 S.W.3d 443 (Tex. App. 2012).

35. See, e.g., *Mogerman & Jones*, *supra* note 5, at 499; *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2002); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1997).

36. 18 U.S.C. §§ 2510-2522, 2701-2712 (2012).

37. *Id.*; *Mogerman & Jones*, *supra* note 5, at 482-83.

38. 18 U.S.C. § 2511.

39. *Id.* §§ 2511(4), 2515, 2520.

40. *Id.* § 2701(a).

41. *Id.* § 2701(b); see *Mogerman & Jones*, *supra* note 5, at 485.

42. See 18 U.S.C. §§ 2510, 2701.

case law, the basic premise that unauthorized access of incoming electronic communications violates the ECPA will suffice for the purposes of this Comment.<sup>43</sup>

While the ECPA provides that “any person” may violate the statute, there is debate as to whether there is a spousal exception to the Wiretap Act—namely, whether a spouse who intercepts their spouse’s electronic communications is immune from criminal and civil penalties and whether evidence of that intercepted communication may be admitted into evidence.<sup>44</sup> Currently, the federal circuits are split on this issue.<sup>45</sup> This split generally results from two schools of thought on the interspousal exception: one focusing on the original purpose of the ECPA and one recognizing the lower expectation of privacy within the “marital home, and the other demanding a literal reading of the statute and consideration of its legislative history.

The United States Court of Appeals for the Fifth Circuit belongs to the first camp and continues to maintain that spouses are completely exempt from punishment under the Wiretap Act.<sup>46</sup> Some commentators believe that the United States Court of Appeals for the Second Circuit may acknowledge an interspousal exception in certain instances; however, the Second Circuit has not held so explicitly.<sup>47</sup> The Fifth Circuit, and arguably the Second Circuit, believe that an exception should apply because Congress made no indication that the statute should apply to married couples, and “[t]he major purpose [in enacting the Wiretap Act was] to combat organized crime.”<sup>48</sup> Additionally, they argue that the privacy expectation is lower between spouses within the “marital home” and, thus, it should not be subject to the same rigor as the third party intrusions targeted by the Wiretap Act.<sup>49</sup> They argue that, in some instances, spousal intrusion is a domestic matter more suitable for the

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43. For a more detailed discussion of the statutory definitions of “interception” and “electronic communications” and resulting case law, see Mogerma & Jones, *supra* note 5, at 488-94.

44. 18 U.S.C. § 2511(1); Mogerma & Jones, *supra* note 5, at 499.

45. Mogerma & Jones, *supra* note 5, at 499.

46. *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1974); Mogerma & Jones, *supra* note 5, at 499; *see also* Lyon, *supra* note 4, at 880.

47. *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (“[We do not] suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute.”); Mogerma & Jones, *supra* note 5, at 500.

48. *Simpson*, 490 F.2d at 806 (quoting S. REP. NO. 90-1097, *as reprinted in* 1968 U.S.C.A.N. 2112, 2157).

49. *Id.* at 807-09.



states, rather than a criminal matter to be handled by the federal government.<sup>50</sup>

The United States Courts of Appeals for the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits belong to the second school of thought and have held that there is no interspousal exemption for the Wiretap Act.<sup>51</sup> They argue that the clear language of the statute and Congress's silence as to the existence of a spousal exception indicates one was not intended.<sup>52</sup> They also argue that the Wiretap Act protects the privacy of *all* persons against intrusion from *all* persons, regardless of their marital status.<sup>53</sup> The remaining circuits (the United States Courts of Appeals for the First, Third, Seventh, and Ninth Circuits) have not made an explicit holding on the existence or nonexistence of an interspousal exception.<sup>54</sup> Currently, no circuit has held that an interspousal exception applies or does not apply to the Stored Communications Act.<sup>55</sup>

The privacy-based analysis used by the circuits is the same analysis used by commentators and scholars on the issue of spousal spying.<sup>56</sup> Few scholars, if any, besides Professor Sally Richardson—whose work will be discussed later—have examined the problem of unauthorized spousal access to electronic communications through a property-centered approach. However, a recent article by Jennifer Arner, *Looking Forward by Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-Mail*, analyzes the United States Supreme Court's recent decision and posits that the Court, in Fourth Amendment cases, may now be willing to analyze electronic communications, like e-mail, under a more property-centered approach, rather than the usual privacy-centered approach.<sup>57</sup> Arner argues this

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50. *Id.* at 805.

51. *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Mogerman & Jones*, *supra* note 5, at 499; *see also* *Lyon*, *supra* note 4, at 880.

52. *Glazner*, 347 F.3d at 1215-16; *Heggy*, 944 F.2d at 1540-41; *Kempf*, 868 F.2d at 973; *Pritchard*, 732 F.2d at 373-74; *Jones*, 542 F.2d at 671, 673.

53. *Glazner*, 347 F.3d at 1215-16; *Heggy*, 944 F.2d at 1540-41; *Kempf*, 868 F.2d at 973; *Pritchard*, 732 F.2d at 373-74; *Jones*, 542 F.2d at 670 (emphasis added).

54. *Mogerman & Jones*, *supra* note 5, at 499.

55. *Id.* at 500.

56. *Lyon*, *supra* note 4, at 877-78; Laura W. Morgan & Lewis B. Reich, *The Individual's Right of Privacy in a Marriage*, 23 J. AM. ACAD. MATRIM. LAW. 111, 113 (2010); *Mogerman & Jones*, *supra* note 5, at 499; L. Kathryn Hedrick & Mark Gruber, *Cybersex and Divorce: Interception of and Access to E-Mail and Other Electronic Communications in the Marital Home*, 17 J. AM. ACAD. MATRIM. LAW. 1, 2 (2001); Andru E. Wall, *Prying Eyes: The Legal Consequences of Reading Your Spouse's Electronic Mail*, 30 FAM. L.Q. 743, 744 (1996).

57. Jennifer Arner, *Looking Forward by Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-mail*, 24 GEO. MASON U. CIV. RTS.

approach should be applied to electronic communications under the ECPA.<sup>58</sup> She reasons that “[a]s technology continues along its trajectory of rapid growth and change,” a property-centered approach to the Fourth Amendment might prove more reliable when it comes to e-mail and other intangible data than the previously used subjective reasonable expectation of privacy test.<sup>59</sup> Arner reasons that the Court’s focus on Jones’s right to exclude the officers from intruding on his property is the superior approach to the problems currently present in the ECPA.<sup>60</sup> Arner notes that real property rights, including the right to exclude others, have already been recognized for particular types of electronic content and intangible intrusions on these electronic spaces have been found actionable.<sup>61</sup> Arner explains that while e-mails and other electronic communications are not explicitly mentioned as property protected under the Fourth Amendment, they have become such an integral part of our daily life that they are as equally deserving of protection as our “persons, houses, papers, and effects.”<sup>62</sup> Arner explains:

[A]pplying Fourth Amendment protections to electronic spaces that meet common sense criteria would result in bright line protections, giving the courts reliable standards and the general public assurances e-mail communications will remain protected in the manner that they would expect privacy in other personal effects. Scalia’s application of tandem running approaches in *Jones* indicates that the Court may indeed move in this direction.<sup>63</sup>

Arner argues such a property-centered approach to e-mails under the ECPA is appropriate because e-mails should be recognized as property because the right to exclude exists, and reading another’s e-mails is sufficiently tangible to be considered intrusive and, thus, should constitute a trespass.<sup>64</sup>

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L.J. 349, 352 (2014). In *United States v. Jones*, the Supreme Court held that attaching a GPS tracking device to the vehicle of the defendant, and the later use of the GPS device to track the defendant’s movements was a search and, thus, was a violation of the defendant’s Fourth Amendment rights absent a warrant. 132 S. Ct. 945, 949 (2012). The Court emphasized that the attaching of the device was a physical trespass onto the private property of the defendant. *Id.* The Court also focused on the Fourth Amendment’s connection to property rights and common law trespass. *Id.*

58. Arner, *supra* note 57, at 370-71.

59. *Id.* at 369-70.

60. *Id.*

61. *Id.*

62. See U.S. CONST. amend. IV; Arner, *supra* note 57, at 370-71.

63. Arner, *supra* note 57, at 371.

64. *Id.* at 374-76.

While Arner's article addresses the ECPA broadly, her property-centered approach is applicable to the problem of spousal spying. If electronic communications should be treated as property and, thus, subject to traditional laws governing property, they should also be subject to marital property laws. Specifically, might one spouse's unauthorized access of their partner's e-mail, text messages, or social media postings be better understood and administered under theories of community property?

### III. "I GOT YOU (AND YOURS, AND MINE), BABE:" COMMUNITY PROPERTY REGIMES

There are two different marital property systems in the United States: community property and equitable division.<sup>65</sup> The majority of states are equitable division states, meaning the title on the property determines ownership during the marriage and property is divided equitably at divorce.<sup>66</sup> However, there are nine states, some of them the most populous in the nation, that operate under community property or similar regimes.<sup>67</sup> In community property jurisdictions, both spouses own the marital property—termed the “community”—jointly and equally regardless of the name on the title.<sup>68</sup>

Community property regimes recognize that there are two categories of marital property: community property and separate property.<sup>69</sup> Generally, the law presumes that any property that is created or acquired during the marriage is community property.<sup>70</sup> Essentially, both spouses share in property produced via their individual “effort, skill, or industry.”<sup>71</sup> This includes the spouses' salary, tangible property purchases made by a spouse, investment profits attributable to a spouse's effort, and even intellectual property created by one spouse during the

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65. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 (2004).

66. *Id.*

67. *Id.* Eight states are community property jurisdictions: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. Richardson, *supra* note 7, at 92. While Wisconsin is not a community property jurisdiction, its Marital Property Act also gives spouses a “present, undivided interest in all marital property” and, thus, for the purposes of this Comment, will be included in the discussion of community property jurisdictions. *Id.* (citing WIS. STAT. ANN. § 766.31 (2015)).

68. Frantz & Dagan, *supra* note 65, at 124-25.

69. Richardson, *supra* note 6, at 722.

70. *Id.* at 723.

71. *Id.* at 725 (citing LA. CIV. CODE ANN. art. 2338; IDAHO CODE ANN. § 32-906(1); WIS. STAT. ANN. § 766.31(4)).

marriage.<sup>72</sup> This presumption of community property can be rebutted by demonstrating that the property is separate.<sup>73</sup> Separate property is defined as property created or acquired outside of the marriage.<sup>74</sup> Most jurisdictions recognize separate property as property acquired before the marriage, property acquired with other separate property, and property acquired via inheritance or donation to only one spouse.<sup>75</sup> Property's classification as either community or separate affects what spouses may do with that property during marriage and how that property will be divided at death or divorce.<sup>76</sup>

The theory behind community property is that the spouses form a marital unit.<sup>77</sup> The underlying premise is that the spouses each contribute equally to the marriage in their own way and, thus, should share equally in the community property.<sup>78</sup> Just as the spouses jointly own the property under this equality principle, spouses often have equal access to and control over the property, termed "management."<sup>79</sup> When property is determined to be community, it falls under one of the three community property management schemes:

One system requires spouses to act jointly regarding community property, and is customarily referred to as joint management. Another system, known as sole management, gives one spouse the sole power to manage particular community assets. The third system, called equal management, gives either spouse, acting alone, the power to manage the community.<sup>80</sup>

These management schemes apply during the marriage and during divorce proceedings.<sup>81</sup> All community property regimes use a combination of these management schemes, in which different types of

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72. *Id.* at 725-26, 742.

73. WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 65 (7th ed. 2009) (citing *Lynam v. Vorwerk*, 110 P. 355, 356 (Cal. Ct. App. 1910)). It befalls the litigant asserting separate ownership to prove the property is not community. *Id.* at 67.

74. Richardson, *supra* note 6, at 724 (citing LA. CIV. CODE ANN. art. 2341).

75. *Id.*

76. Richardson, *supra* note 7, at 115-16.

77. REPPY & SAMUEL, *supra* note 73, at 8.

78. *Id.*; Frantz & Dagan, *supra* note 65, at 125; Margaret Berger Strickland, *What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989, 995 (2005).

79. REPPY & SAMUEL, *supra* note 73, at 257.

80. J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 94, 106 (1993); see also Richardson, *supra* note 7, at 105-07. When property is classified as separate, it is managed by the spouse who owns it and, accordingly, these community property management schemes do not apply. *Id.* at 105 n.63 (citing ARIZ. REV. STAT. ANN. § 25-214(A); IDAHO CODE ANN. § 32-904; WASH. REV. CODE ANN. § 26.16.010).

81. Oldham, *supra* note 80, at 101.

property fall under one scheme or another.<sup>82</sup> However, equal management is the default arrangement in most community property jurisdictions.<sup>83</sup> Accordingly, in most instances both spouses have “the full power to manage, control, dispose of, and encumber community property.”<sup>84</sup> For example, if a married couple buys an iPad with community funds and it is subject to equal management, both spouses could then use or sell the iPad without obtaining the other’s consent.<sup>85</sup> While equal management is the default scheme, jurisdictions make a variety of exceptions for certain types of property—making them subject to either joint or sole management.<sup>86</sup> As of yet, states and courts have not addressed which management scheme should apply to virtual property, and thus, electronic communications, or how these management schemes might interact with the ECPA.<sup>87</sup>

#### IV. “P.S. I LOVE YOU:” VIRTUAL PROPERTY

In order to understand how virtual property should be administered in community property regimes, it must first be defined. Scholars have developed working definitions of virtual property.<sup>88</sup> Most recently, Professor Joshua A.T. Fairfield defined virtual property as “code that mimics the properties of real-space objects. It is rivalrous, connected, and persistent.”<sup>89</sup> Fairfield explained that virtual property is “rivalrous” because, like physical property, the owner can exclude others from using it.<sup>90</sup> It is “interconnected” because multiple people can experience virtual property and interact with it, given the owner permits such interaction.<sup>91</sup> And finally, virtual property is “persistent” because “it does not fade after each use,” but continues to exist.<sup>92</sup> Fairfield noted that because virtual property has these features, it is similar to traditional tangible property.<sup>93</sup> In fact, scholars recognize that virtual property mimics physical property in every way except that it is actually intangible—floating in the ether.<sup>94</sup>

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82. Richardson, *supra* note 7, at 106-07.

83. *Id.* at 106.

84. *Id.*

85. *See id.*

86. *Id.*

87. *See id.* at 113 n.106.

88. Richardson, *supra* note 6, at 747-48.

89. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1063 (2005).

90. *Id.* at 1053-54.

91. *Id.* at 1054.

92. *Id.*

93. *Id.* at 1053-54.

94. *See, e.g.,* Richardson, *supra* note 6, at 748.

Fairfield then gave several examples of modern virtual property: URLs, e-mail accounts, online accounts, websites, chat rooms, and bank accounts.<sup>95</sup> Professor Richardson expanded on this list by indicating that e-mails, as well as e-mail accounts, are virtual property.<sup>96</sup> Professor Richardson also noted that Facebook and other social media accounts would be considered virtual property.<sup>97</sup> However, neither of these scholars has addressed the burgeoning new market of chatting applications available on smartphones and computers.<sup>98</sup> Just a few of these include Apple iMessage, WhatsApp, GroupMe, Snapchat, Google Hangouts, Viber, Facebook Messenger, and Skype. All of these systems are accessible on smartphones via applications and many can be accessed remotely on a computer via an Internet connection.<sup>99</sup> Essentially, they operate like an e-mail, which is a “non-interactive communication of text, data images, or voice messages between a sender and designated recipients by systems utilizing telecommunications links”<sup>100</sup> and sent via an account. The only distinction between these messages and e-mails is that the messages operate instantly in a chatting scenario. Additionally, these types of communications also fit within Fairfield’s definition of virtual property.<sup>101</sup> Messages sent via these applications are (1) rivalrous, because the account owners can exclude others from using their messaging accounts, (2) interconnected, because multiple people can experience the messaging account with the owner’s permission, and (3) persistent, because sent messages do not disappear when the application is closed.<sup>102</sup> Accordingly, these messaging accounts and the messages they produce should be classified as virtual property.

These various methods of electronic communication are used by almost everyone on a regular basis. They are used between colleagues,

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95. Fairfield, *supra* note 89, at 1055-58.

96. Richardson, *supra* note 6, at 754-55.

97. *Id.* at 755.

98. Richardson, *supra* note 6; Fairfield, *supra* note 89.

99. *Pros and Cons of Messaging Apps*, BUFFALO NEWS (Mar. 17, 2014, 12:01 AM), <http://www.buffalonews.com/business/money-smart/pros-and-cons-of-messaging-apps-20140317>.

100. Brian G. Gilpin, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMPUTER & INFO. L. 697, 719 n.187 (1995).

101. See Fairfield, *supra* note 89, at 1063.

102. See *id.* at 1053-54. While the premise behind Snapchat is that the sent photo automatically disappears after the receiver views it for a few seconds, forensic examiners maintain that the photos actually remain hidden inside the device. See Alyson Shontell, *Actually, Snapchat Doesn't Delete Your Private Pictures and Someone Found a Way To Resurface Them*, BUS. INSIDER (May 9, 2013, 11:48 AM), <http://www.businessinsider.com/snapchat-doesnt-delete-your-private-pictures-2013-5>.

friends, spouses, parents and children, and, unfortunately, paramours. Thus, they can reveal a wealth of information about a person's activities that may prove highly valuable in a divorce proceeding. Yet, community property regimes have yet to address exactly what access rights spouses have in this virtual property created during marriage.<sup>103</sup> However, a recognized right of access to a spouse's e-mail can prove extremely valuable in divorce proceedings. It could negate the illegality of a spouse's intrusive actions of reading e-mails, messages, or social media communications without consent. This would allow information of both pecuniary and nonpecuniary value, which otherwise may have been excluded due to its illegal obtainment, into the divorce proceedings. A spouse who discovered an affair by reading their spouse's iMessages without their consent, would still be allowed to use those messages in court. This could lead to the discovering spouse being released from alimony payments or attaining full custody of the children. But before such a right of access determination can be made, courts must address the classification and management of virtual property.

#### V. "WE'VE GOT MAIL!": COMMUNITY PROPERTY AND ELECTRONIC COMMUNICATIONS

Scholars maintain that virtual property should be treated similarly to traditional types of property in the community system.<sup>104</sup> Professor Richardson explained that the nature of virtual property does not require the community property system treat it differently from other real and personal property:

[V]irtual property resembles more traditional forms of property in every way, except that it is inherently intangible. Most scholars, though not all, view the intangibility of virtual property as an inconsequential difference. Many emerging forms of property, such as intellectual property, are intangible by their very nature, yet individuals are still assigned property rights in such forms of property. Intangibility may make comprehension of virtual property harder for the human mind, but such difficulty in understanding does not strip virtual property of its underlying classification as property.<sup>105</sup>

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103. Richardson, *supra* note 6, at 758.

104. *Id.*

105. *Id.* at 748-49. E-mail and other electronic communications are not purely intangible items. See Justin Atwater, *Who Owns E-Mail? Do You Have the Right To Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 410. Traditionally, we think of electronic communications as existing intangibly; however, they take up physical space on a server and may be reduced to a physical form via printing. See *id.* Typically intangible property, such as goodwill, culture, or ideas, is not capable of such physicality. See *id.*

As Professor Richardson has noted, the idea that intangible property can be treated in the same manner as some tangible property is elucidated in some community property states treatment of intellectual property.<sup>106</sup> The Fifth Circuit, applying Louisiana civil and community property laws, determined that the wife of the famous “Blue Dog” artist, George Rodrigue, had an ownership interest in her husband’s copyright over his famous paintings.<sup>107</sup> The court analyzed the nature of copyright law and then applied the existing community property framework to the copyrighted art, determining that while the artist husband and holder of the copyright had sole managerial control over the artwork, the wife was entitled to economic benefits from the copyrighted works that were created during marriage.<sup>108</sup> Essentially, the court applied the traditional community property framework to intangible property.<sup>109</sup>

While ownership and management of virtual property has not yet been addressed in community property systems, at least one probate court and a handful of states legislatures have begun addressing the question of virtual property rights. Perhaps the most publicized case regarding virtual property rights involved the 2004 combat death of twenty-year-old marine, Justin Ellsworth.<sup>110</sup> Ellsworth died intestate and his father argued, based on the theory that e-mails are personal property, that he should inherit Ellsworth’s Yahoo! e-mail account, which contained all Ellsworth’s communications with family and friends while he was in Iraq.<sup>111</sup> Yahoo! refused to release Ellsworth’s e-mails because doing so conflicted with the Yahoo! Terms of Service privacy agreement denying access to survivors.<sup>112</sup> However, the Michigan probate court issued a court order forcing Yahoo! to release the contents of Ellsworth’s e-mail account to his father.<sup>113</sup> While the probate court did not provide much legal discussion on their decision, and many scholars maintain Ellsworth’s father triumphed because he had “natural justice” on his side,

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106. Richardson, *supra* note 6, at 745-46.

107. *Id.* at 744-45 (citing *Rodrigue v. Rodrigue*, 218 F.3d 432, 434-38 (5th Cir. 2000)).

108. *Id.* at 745-46 (discussing *Rodrigue*, 218 F.3d at 435).

109. Other courts have applied community property laws to intangible intellectual property in a similar manner. *See id.* at 746 n.163, 743-44 (citing *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App. 2003)); *In re Marriage of Worth*, 241 Cal. Rptr. 135 (Ct. App. 1987)).

110. *In re Ellsworth*, No. 2005-296, 651 DE (Mich. Prob. Ct. 2005).

111. *Id.*

112. *Id.*

113. *Id.*



the case illustrates the growing uncertainty in the disposition of digital assets and virtual property and the need for a legal framework.<sup>114</sup>

Several state legislatures have begun addressing virtual assets by considering and enacting specific statutes enumerating survivor access to a deceased's social networking accounts based on the theory that digital assets are probate property.<sup>115</sup> Oklahoma enacted such a statute providing, "The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any *social networking website*, any microblogging or short message service website or any e-mail service websites."<sup>116</sup> This law presupposes that the social networking site is the property of the creator regardless of what the terms of service might dictate.<sup>117</sup> Idaho, a community property state, adopted a statute almost identical to the Oklahoma statute, and several other states have similar statutes treating virtual accounts as the property of the deceased and encouraging survivor access.<sup>118</sup>

Commentary, *Ellsworth*, and emerging probate statutes indicate that the legal community is recognizing virtual assets as just another form of property to be distributed in a manner similar to other types of real and personal property. Accordingly, virtual property should be put through the extant community property framework. As Professor Richardson has posited, current community property classification and management rules should be applied to virtual property on a case-by-case basis.<sup>119</sup> Courts should simply analyze how a particular piece of virtual property operates and then apply the existing classification and management rules in accordance with the property's nature.<sup>120</sup>

When initially classifying an electronic communication, the question is one of timing. When was the electronic account generating the communications created and when was the actual communication sent?<sup>121</sup> While there are a myriad of different electronic communication

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114. *Id.*; Kristina Sherry, What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem, 40 PEPP. L. REV. 185, 214 (2013).

115. Sherry, *supra* note 114, at 215-16; Atwater, *supra* note 105, at 401-02.

116. Sherry, *supra* note 114, at 216 (quoting OKLA. STAT. ANN. tit. 58, § 269 (West 2012) (internal quotation marks omitted)).

117. *Id.*

118. *Id.* at 217 (discussing IDAHO CODE ANN. § 15-5-424(3)(z) (West 2012)). Indiana, Connecticut, and Rhode Island are among states enacting survivor access or ownership statutes for online accounts. *See id.*

119. Richardson, *supra* note 7, at 105.

120. *Id.*

121. *See* Richardson, *supra* note 6, at 765.

services, e-mail provides a good example for classification analysis because it involves both a licensed account and individual communications. The e-mail account and the individual e-mails sent from it and to it must be treated differently as they create separate property interests. When an e-mail account is obtained, the user does not receive an ownership interest in the account, but rather a license to use the account's software.<sup>122</sup> However, the account user has a full ownership interest in the content of the e-mails, "including any text, data, information, images, photographs, music, sound, video, or other material" uploaded, transmitted, or stored via the account.<sup>123</sup> If the spouse entered into a contract with an e-mail account service—such as Gmail—before the marriage, the account is the separate property of the creating spouse.<sup>124</sup> Additionally, any e-mails sent before the marriage will be separate property.<sup>125</sup> If the account was created during the marriage, it will be presumed to be community property.<sup>126</sup> This is known as the acquisition presumption.<sup>127</sup> Any e-mails sent during the marriage, regardless of when the account was created, will be presumed community.<sup>128</sup>

Accordingly, in order to prove that a spying spouse illegally accessed their e-mail account or e-mails, the complaining spouse will

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122. *Id.* at 754-55 (citing *Google Terms of Service*, GOOGLE, <http://www.google.com/accounts/TOS?hl=en> (last visited Mar. 27, 2015)).

123. *Id.* at 755; *Google Terms of Service*, *supra* note 122. Facebook and Twitter accounts operate in a similar manner with the account being only licensed to the user but the content being owned by the user. See *About Intellectual Property*, FACEBOOK, <http://www.facebook.com/help/399224883474207> (last visited Mar. 27, 2015); *Statement of Rights and Responsibilities*, FACEBOOK § 2, <http://www.facebook.com/legal/terms> (last visited Mar. 27, 2015); *Terms of Service*, TWITTER § 5-6, <http://twitter.com/tos> (last visited Mar. 27, 2015) [hereinafter *Twitter Terms of Service*]. Messaging applications also license their software to the device holder while the content ownership is retained by the user. See *iCloud Terms and Conditions*, APPLE § V(H)(1), VI(B), <https://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited Mar. 27, 2015); *Licensed Application End User License Agreement*, VIBER § 5.2, 1, <http://www.viber.com/eula> (last visited Mar. 27, 2015); *Terms of Service*, GROUPME, <https://groupme.com/terms> (last visited Mar. 27, 2015); *Terms of Use*, SNAPCHAT, <https://www.snapchat.com/terms> (last visited Mar. 27, 2015).

124. Richardson, *supra* note 6, at 765.

125. *Id.*

126. See Richardson, *supra* note 7, at 93.

127. REPPY & SAMUEL, *supra* note 73, at 65-66 n.1(a). This acquisition presumption is applied in about ninety percent of cases. See *id.* Moreover, sometimes courts apply stricter presumptions. See *id.* at 65-66. The possession presumption maintains that all property in the spouses' possession during the marriage is presumed to be community, regardless of when it was acquired. See *id.* at 66 n.1(c). The universal presumption maintains that all property owned by either spouse is presumed to be community property, regardless of its possession status or date of acquisition. See *id.* at 66 n.1(d). No state consistently applies one presumption over another. *Id.* at 66 n.2.

128. Richardson, *supra* note 6, at 765.

have to prove that the account and e-mails were not community property though they were created during the marriage. The complaining spouse could do this by demonstrating that either the e-mail account or the individual e-mails were separate property.<sup>129</sup> Because property that is acquired with separate funds retains the separate classification, the complaining spouse could rebut the community presumption if he or she demonstrated that the e-mail account was acquired with separate funds.<sup>130</sup> While most e-mail accounts are free, there are some e-mail services that charge a monthly fee for their services in exchange for greater privacy protections or enhanced organizational and storage features.<sup>131</sup> This analysis would similarly apply to instant messaging applications purchased with separate funds.<sup>132</sup> Here, however, such an analysis of *ownership* interests in these virtual accounts may not be appropriate because the account software is owned by the company providing the account and is only *licensed* to the user.<sup>133</sup> Accordingly, community property management rules for items registered in only one spouse's name would better apply and will be discussed later in this Comment.<sup>134</sup>

In regards to rebutting the community presumption for the individual communications themselves, the complaining spouse could attempt to prove to the court that the individual e-mails, Facebook postings, tweets, or application-based instant messages were part of a collection. While individual "e-mails are not generally regarded as a collective unit" in the way a blog diary—which is comparable to a book—might be, a train of related e-mails could perhaps be considered a collection.<sup>135</sup> Under this rationale, if the first e-mail of the related train was sent before the marriage, the entire collection would be considered separate property.<sup>136</sup> However, generally unrelated e-mails are analyzed as creating individual property interests—comparable to letters—and the

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129. *Id.* at 766.

130. *Cf.* REPPY & SAMUEL, *supra* note 73, at 159-60 (providing that this analysis might entail a detailed tracing of the funds to ensure their separate nature).

131. *See Google Apps for Work*, GOOGLE, <https://www.google.com/work/apps/business/pricing.html> (last visited Mar. 16, 2015); *Office 365 Home*, MICROSOFT, [http://www.microsoft.com/store/msusa/en\\_US/pdp/Office-365-Home/productID.286395000](http://www.microsoft.com/store/msusa/en_US/pdp/Office-365-Home/productID.286395000) (last visited Mar. 16, 2015); *Why Pay for Email*, RUNBOX, <https://runbox.com/why-runbox/why-pay-for-email/> (last visited Mar. 16, 2015).

132. Similar to e-mail, most instant messaging applications are free. However, there are some applications that combine various messaging platforms into a single account and are downloadable from iTunes for a fee. *See, e.g., BeejiveIM with Push*, iTUNES, <https://itunes.apple.com/US/app/id291720439?mt=8> (last visited Mar. 16, 2015).

133. *See* Richardson, *supra* note 7, at 111.

134. *Id.* at 112-13.

135. Richardson, *supra* note 6, at 765 n.256.

136. *Id.*

time of their sending determines their status as community or separate property.<sup>137</sup> This analysis largely deals with communications the spouse created. But what about e-mails and messages received by a spouse?

Received e-mails might be considered as the receiving spouse's separate property if they are viewed as donations to the individual spouse<sup>138</sup> or profits of the spouse's separate e-mail account.<sup>139</sup> This analysis depends on the spouse's solicitations of the e-mails. If the received e-mail was directly attributable to the spouse's industry or effort, meaning the spouse engaged in a significant reciprocal dialogue in order to receive the e-mail, it would likely still be considered community property because community effort was exerted in obtaining the e-mails.<sup>140</sup> However, if a third party sent the spouse an e-mail that was not the result of that spouse's significant prompting, such as advertisements or spam, then such an e-mail may be considered a donation to the individual spouse.<sup>141</sup> Donations given to a spouse individually are considered separate property.<sup>142</sup> Additionally, if the e-mail account is determined to be the spouse's separate property, the e-mails sent to the account could be considered profits of the account.<sup>143</sup> "Profits are things created by property without a spouse exerting any effort, skill, or industry and without diminishing the substance of the underlying thing."<sup>144</sup> Unsolicited e-mails are derived from the account without diminishing the value of the underlying thing (the account).<sup>145</sup> In some jurisdictions, profits from separate property are separate, in other jurisdictions, profits created during the marriage are community regardless of the nature of the underlying property.<sup>146</sup> In any event, these unsolicited e-mails are not the sort of communications that would likely be the source of a dispute in a divorce proceeding. There, the e-mails at issue would likely be the result of a reciprocal exchange between a spouse and another person indicating an adulterous relationship or some other iniquity. Such a reciprocal, effortful communication would bar any received e-mails from being considered donations or separate profits.

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137. *See id.* at 765.

138. *See id.* at 767.

139. *See id.* at 766.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 767.

144. *Id.*

145. *See id.*

146. *Id.* at 729-30, 767.

As this analysis reveals, and Professor Richardson posited, determining virtual property's classification as either community or separate involves a fact intensive analysis of the characteristics of the property.<sup>147</sup> The timing of the communication, the manner of procuring the communication, and the relationship between the sender and the receiver are all relevant inquiries. After the court makes a classification determination, it can address the issue of access to electronic communications and the accounts producing them. This involves a determination of which management scheme governs the virtual property.<sup>148</sup>

To begin, if the electronic communications are deemed to be separate property of a spouse, that spouse has the sole right to manage them.<sup>149</sup> Accordingly, the nonowning spouse could not access the electronic communications. However, if the electronic communications are considered community property, we turn to the three management schemes to determine access. While, Professor Richardson's articles do not directly address spousal access to virtual property communications, they do address the general application of management schemes to community property, and managerial control necessarily involves access to the property at issue.<sup>150</sup>

The default management scheme in almost every community property regime is equal management, wherein "either spouse, acting alone, has the full power to manage, control, dispose of, and encumber community property."<sup>151</sup> Equal management can be described as a "Mr. or Mrs." arrangement. Theoretically, this means that the default rule in most jurisdictions is that spouses have a right to independently access electronic communications and the accounts they are stored in without obtaining consent from the account-holding spouse.<sup>152</sup> However, community property states provide several exceptions for when equal management is not appropriate, either because a spouse has sole managerial control over a piece of community property or both spouses must act with mutual consent in managing a particular piece of property.<sup>153</sup>

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147. Cf. Richardson, *supra* note 7, at 105.

148. *Id.* at 105-06.

149. *See id.* at 105 n.63.

150. Professor Richardson noted in a footnote that access to a Twitter account was not an "inconsequential question." *See id.* at 125 n.106.

151. *Id.* at 106.

152. *See id.* at 125 n.106.

153. *Id.* at 106-07.

Usually, sole management results when there is documented evidence of one spouse's sole *ownership* of the property.<sup>154</sup> However, spouses can have sole managerial authority over a piece of property though it is community and, thus, jointly *owned* by the spouses.<sup>155</sup> Courts could look at sole account registration as a type of sole ownership, although many sites actually retain ownership of their accounts and merely provide users with licenses to use them.<sup>156</sup> Thus, the managerial rules of registration, which apply when jointly owned property is registered in only one spouse's name, might prove a better analysis tool.<sup>157</sup> This registration rule could potentially apply to e-mail, social media, and instant messaging accounts, which are generally licensed to only one spouse.<sup>158</sup> However, it is unclear whether the registration rule—which generally applies to movables that the law specifically mandates be registered in one name—would apply to virtual accounts causing them to come under sole management of the registering spouse.<sup>159</sup> While starting an account requires registration, it is not legally mandated, and some states insist registration be mandated by law in order to apply the registration rule to management schemes.<sup>160</sup> However, assuming the registration rule does apply and the account is registered in only one spouse's name, that account would be under sole management of the registered spouse and would preclude unauthorized access from the nonregistered spouse. Another difficulty is that not all accounts have the same registration rules. Different social networking services have different registration and access rules regarding multiperson use.<sup>161</sup> Facebook's terms of service effectively prevent spousal sharing of an account and access to a spouse's separate account.<sup>162</sup> Despite this, Mr. and Mrs. accounts are a common occurrence. Conversely, Twitter allows multiple users to access a single account and puts the burden on the registered user to protect their password and, thus, account from outsider access.<sup>163</sup>

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154. *Id.* at 111.

155. *See id.* at 107.

156. *Id.* at 111-12.

157. *Id.* at 107-08, 112.

158. *See id.* at 112.

159. *Id.*

160. *Id.*

161. *Id.* at 119.

162. *See Statement of Rights and Responsibilities, supra* note 123, § 4 (mandating that a user cannot transfer his account to anyone, share his password with others, or allow others to access their account without Facebook's written permission).

163. *Twitter Terms of Service, supra* note 123.

Another consideration when only one spouse registers for the account is whether privity of contract applies. If only one spouse registers, i.e., agrees to the licensure contract with the third party account provider, can the noncontracting spouse affect the legal relationship between the contracting parties?<sup>164</sup> Scholars debate whether privity of contract affects the management of community property and to what extent it affects couples' legal rights.<sup>165</sup> Furthermore, if privity of contract does effectuate sole management of a virtual account, it remains unclear whether the concept prevents *access* to the account, as access may not necessarily affect the legal relationship between the contracting parties.<sup>166</sup> This ambiguity is especially present in accounts that allow multiuser access, such as Twitter.<sup>167</sup>

The final management scheme that would affect virtual property is joint management. Joint management, typically thought of as a "Mr. *and* Mrs." arrangement, requires consent of both spouses in order to take certain actions.<sup>168</sup> Joint management may be invoked when the spouses are both named in the document describing ownership of a piece of property.<sup>169</sup> Initially, it would seem like this scheme might apply if the online e-mail, social media, or messaging account was registered in both spouse's names, such as "joeandjanesmith@gmail.com" or a Twitter account named "@TheSmiths."<sup>170</sup> However, joint management may not apply to virtual accounts because states' joint management rules are usually only applied to real property, rather than intangible personal property.<sup>171</sup> Additionally, joint management generally applies to spousal actions of selling, encumbering, or otherwise conveying certain property, rather than merely accessing the property.<sup>172</sup> Accessing an online account is not analogous to deleting the account.<sup>173</sup>

Essentially, courts should analyze the characteristics of a particular e-mail, social media, or messaging account in order to determine whether the nonaccount holding spouse has access rights.<sup>174</sup> Assuming the account is community property, i.e., created during the marriage without the use of separate funds, the court should decide if there are any reasons

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164. See Richardson, *supra* note 7, at 108.

165. See *id.*

166. *Id.* at 112.

167. *Id.*

168. *Id.* at 106.

169. *Id.* at 107.

170. *Id.* at 112-13.

171. *Id.* at 113.

172. *Id.*

173. *Id.*

174. *Id.* at 114-15.

to rebut the presumption of equal management and access, i.e., whether due to the nature of the account, sole or joint management is more appropriate.<sup>175</sup>

This analysis addresses the managerial control spouses exert over a particular e-mail account—particularly whether they can access the account. However, theoretically, spouses may also have managerial control over the individual e-mails or messages themselves.<sup>176</sup> For instance, although a court determines that an instant messaging account is solely managed by the account-holding spouse and thus is separate property, the individual messages, which create a distinct property interest, may still technically be community property presumed to be under equal management. Practically, however, if the spouse does not have a right to access the account, any reading of the community e-mails done on the account would still be in contravention of the messaging accounts sole management. In order for the spouse to view the individual messages within the account, he or she would either have to solicit the account-holding spouse for their production or obtain a court order compelling their production.<sup>177</sup> This is analogous to a traditional discovery request used in divorce proceedings. The interplay between account management and individual message management is likely not to arise unless the account holding spouse printed off their messages and the spying spouse discovered the print outs. Such a scenario seems unlikely and would not involve the kind of unauthorized “spying” at issue in this Comment.<sup>178</sup>

Applying the traditional community property analysis to virtual property would render a great deal of electronic communications subject to equal management, and thus, provide spouses with presumptive access to these communications. A traditional Gmail account set up by a spouse after marriage would be presumed to be community property. The account would be licensed to the creating spouse, but the court would require the nonaccount-holding spouse to prove equal management was not appropriate due to registration laws, privity of contract, or account

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175. *Id.* at 115.

176. *Id.* at 113 (stating that a user may have an ownership interest in uploaded content).

177. See Scott M. Brown, *Checkmate! Developing Strategies for Meeting the Challenges of Complex Custody and Property Cases and Tackling Spouse Maintenance in Other Areas*, in STRATEGIES FOR FAMILY LAW IN TEXAS, 2013: LEADING LAWYERS ON HANDLING NEGOTIATIONS, MANAGING CLIENT EXPECTATIONS, AND NAVIGATING RECENT TRENDS (2013), 2013 WL 4384702, at \*9 (Sept. 2013).

178. Additionally, even if some sort of illegal action was involved in the discovery of these e-mail print outs and the court had to determine the spouse’s right to view them, the court would simply apply the traditional community property classification and management framework to the printed e-mails.



denomination invoking joint management—all of which have yet to be established as applying to virtual property in community regimes. Accordingly, as the law currently stands, it appears that in a great deal of instances, spouses may have a legal right to access each other’s private electronic communications.

For instance, applying this community property approach to *Walker* would yield a different result.<sup>179</sup> If the case occurred in a community property state, Leon may have had a legal right to access the account.<sup>180</sup> Depending on when and how his wife acquired it, and in whose name she acquired it, the account may have been community property subject to equal management, meaning equal access. In such a situation, Leon could not be charged with illegally accessing the account because he had managerial control over it as part of the community.

Often times, such spying spouses are charged under the ECPA in community property states.<sup>181</sup> How should this traditional community property analysis of virtual property interact with the ECPA specifically?

#### VI. “SOMETHING BORROWED:” COMMUNITY PROPERTY AND THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

To begin, as Jennifer Arner posited, there is some indication that the Supreme Court is moving away from its traditional privacy-centered approach to governmental “spying” under the Fourth Amendment in favor of a property-centered trespass analysis.<sup>182</sup> Arner suggested that a similar approach should be taken to Fourth Amendment searches of electronic communications under the ECPA, which criminalizes the intentional interception of electronic communications.<sup>183</sup> This Comment argues that nongovernmental spying under the ECPA should also be addressed through a property analysis. Such an approach would prove more reliable in its administration than the amorphous reasonable expectation of privacy test that the circuits currently employ.<sup>184</sup> If a property-centered approach is applied to the ECPA, concrete laws governing marital property, rather than a subjective analysis of a spouse’s expectation of privacy, will determine spouses’ ability to access each

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179. See *People v. Walker*, No. 304593, 2011 WL 6786935 (Mich. Ct. App. Dec. 27, 2011).

180. See *id.*

181. See, e.g., *LaRocca v. LaRocca*, No. 13-4748, 2015 WL 349315, at \*1 (E.D. La. Jan. 23, 2015); *Collins v. Collins*, 904 S.W.2d 792, 796-99 (Tex. App. 1995), writ denied, 923 S.W.2d 569 (Tex. 1996).

182. Arner, *supra* note 57, at 352; see *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

183. 18 U.S.C. § 2511 (2012); Arner, *supra* note 57, at 352.

184. Arner, *supra* note 57, at 369-70.

other's electronic communications.<sup>185</sup> As technology continues to progress and less and less of our virtual selves remain private, the bright-line rules property and community property laws can provide become increasingly attractive.<sup>186</sup>

Under the property-centered approach, any instance of spousal spying brought under the ECPA would first be subject to a community property classification and management determination. If the ECPA is intended to protect the privacy of electronic communications, but no privacy interest exists in the communications due to the "intercepting" party's dual ownership and equal management over the communication, the ECPA should not apply.<sup>187</sup> In fact a spouse could not be accused of "intercepting" a communication under the Wiretap Act that he or she had a legal right to access. Interception is statutorily defined as "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."<sup>188</sup> That communication, although addressed to spouse *A*, may also be the property of spouse *B* and subject to his or her management and access. Because a spouse cannot illegally acquire that which he or she already owns and possess, if the message is community property and subject to spouse *B*'s management, spouse *B* cannot intercept it. In such a scenario there would be no violation of the ECPA. Similarly, a spouse who has the legal right to access a stored electronic communication, such as unread e-mails, could not violate the Stored Communication Act because he does not access the communication "without authorization."<sup>189</sup> A spouse having equal management over a community messaging account has full authorization to access that account.<sup>190</sup>

Accordingly, the community property analysis would operate as a threshold determination. If the e-mail or messaging account is community property and subject to equal management by the spouses, the ECPA would not apply. If the account is determined to be community but subject to sole management by the account-holding

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185. *Simpson v. Simpson*, 490 F.2d 803, 807-09 (5th Cir. 1974).

186. *See Arner*, *supra* note 57, at 366.

187. S. REP. NO. 90-1097, tit. III, at 31 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

188. 18 U.S.C. § 2510(4).

189. *Id.* § 2701(a)(1)-(2); Christopher Brett Jaeger & Gregory D. Smith, *Computer and Electronic Snooping: Opportunities To Violate State and Federal Law*, 34 AM. J. TRIAL ADVOC. 473, 499-500 (2011) (explaining that if spouses have full access to a family computer, "a spouse who accesses files or e-mails on the hard drive does not violate the Stored Communications Act" because they both have full authorization to access the computer's contents).

190. *See Richardson*, *supra* note 7, at 113 ("[A]pplying an equal management scheme . . . means that both spouses should be able to access the account . . . without the approval of the other spouse.").

spouse or joint management by both spouses and the nonaccount-holding spouse accessed the account without authorization, the ECPA would apply to the spying spouse. Additionally, if the account is one spouse's separate property, a spying spouse would also be subject to punishment under the ECPA.

While adding this threshold evaluation to the ECPA in community property states may initially seem like a further complication of an already thorny federal statute, it may actually prove a more reliable and predictable analysis. Applying community property management rules to electronic communications would address the Fifth Circuit's concerns about punishing snooping spouses in the same manner as outside intruders.<sup>191</sup> In *Simpson v. Simpson*, the court was concerned with the federal government intruding into domestic disputes generally left to the providence of the states.<sup>192</sup> By applying state community property law, at least in cases arising in community property regimes, the court's fears of federal interventionism would be assuaged.

Of course, there is concern that applying the community property rules would result in the elimination of spouses' privacy in their electronic communications. However, just because presumptions of community property and equal management exist does not mean the presumptions are irrefutable. In fact, spouses will have strong arguments that the accounts are not subject to equal management if they are registered only in their names. In this way, the type of online account that the creating spouse selects will play a large role in governing the level of privacy they receive in their electronic communications. A spouse need only select an account or application that charges a fee for its use and then pay that fee with separate funds in order to preclude spousal access. Furthermore, as always, spouses could elect to opt out of the traditional community property rules by entering into pre or postnuptial agreements.<sup>193</sup> In short, there will be ample ways for individuals to protect themselves from spousal intrusion if they so chose.

Finally, will the ECPA preempt traditional community property law? This issue has not yet been addressed. While the ECPA contains no express preemption clause, there is a possibility that it might impliedly preempt state community property laws.<sup>194</sup> Federal law will preempt

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191. See *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir. 1974).

192. *Id.* at 807; see also *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2d Cir. 1977) (noting that the particular wiretap involved a "mere marital dispute," and thus was a matter better left to the state).

193. REPPY & SAMUEL, *supra* note 73, at 25.

194. *Id.* at 462-64.

where the state law would cause “major damage” to a “clear and substantial” federal interest, i.e., where the community system conflicts with the application of federal law.<sup>195</sup> The government could argue that the community system would supplant their goal of protecting the privacy interests of all individuals and, thus, constitutes a threat to a substantial federal interest. However, because the government has not attempted to challenge the Fifth Circuit’s spousal exception to the ECPA in thirty-five years, it is unlikely they view the availability of spousal access to electronic communications as doing severe damage to a substantial government interest.<sup>196</sup> Thus, the application of community property to electronic communications will likely not be preempted by the ECPA.

## VII. CONCLUSION

This Comment began by pondering what makes a *modern* marriage. The reality is that modern marriages are evolving, growing less and less similar to our traditional conception of the private sanctuary behind the white picket fence. Like the rest of our lives, marriages have been profoundly impacted by the development of the Internet and its propensity to both build and destroy human relationships. This interplay of the “something old”—namely, the marital union—and the “something new”—electronic communications—has given courts pause. However, in community property regimes, the existing legal framework is more than capable of addressing these modern issues. The ancient community property system, originating thousands of years ago,<sup>197</sup> has continued to survive precisely because of its adaptability. Courts should no longer ignore community property interests in the virtual world, but embrace community property law’s time-proven and reliable rationales in tackling the difficult ownership and access issues presented by electronic communications. Community property in the virtual world: a perfect marriage.

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195. *Id.* at 463. The Supreme Court has explained that there is a strong presumption against federal preemption in state domestic relations laws. *Id.* (citing *United States v. Yazell*, 382 U.S. 341 (1966)).

196. *See Simpson*, 490 F.2d 803.

197. Richardson, *supra* note 6, at 722 n.17.