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By Harold R. Weinberg and William J. Woodward, Jr.*

Overlap and conflict are inevitable in any legal system in which a federal government and state governments both have authority to enact laws. In our federal system, the Constitution's Supremacy Clause identifies federal law as preeminent in case of conflict.1 When conflict develops and litigation is required to determine whether state or federal law controls the issue at hand, our system analyzes the problem using the term preemption as a basis for analysis.

That we must resort to litigation to resolve some preemption issues probably is inevitable under our system. Often Congress does not make clear the breadth of its legislation, and even where it attempts to do so, cases arise around the fringes of the federal legislation concerning the permissible scope of state control. On the other hand, a careful and attentive legislative process is likely to reduce the uncertainty produced by preemption issues and make unnecessary some costly litigation. Because many preemption issues are predictable, multi-faceted, and can have implications far beyond the parties to litigation, such issues should be identified and decided within the legislative process, when possible. Courts are not as well equipped institutionally as is Congress to decide the breadth and balance of state and federal law.

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1. U.S. CONST. art. VI.
This Article explores the federal legislative process that precedes judicial preemption decisions. By studying the legislative process for its sensitivity to preemption issues, possible ways to modify the process to reduce the incidence of preemption problems have been identified. This Article compares state commercial law contained in the Uniform Commercial Code (U.C.C.) and federal law contained in the Copyright Act of 1976 (Copyright Act) to examine the preemption problem.

Business planners are particularly concerned with the predictability and stability of state commercial law. State commercial law is, however, peculiarly susceptible to disruption by preemption issues. Apart from the litigation expense in resolving the preemption issues, uncertainty as to the applicable law raises the costs of contracting because lawyers attempt to comply with the competing regimes rather than risk a faulty transaction. Because uncertainty adds directly to the costs of transacting business, Congress routinely should consider the impact of its legislation on state commercial law, attempt to articulate its preemption decisions clearly, and defer to state commercial law whenever possible.

The Copyright Act is a particularly good vehicle for observing the effectiveness of the legislative process in identifying and confronting preemption questions. The Copyright Act is a recent statute, it has an extraordinarily well-documented legislative history, and it intersects two distinct bodies of state law in ways that are worthy of comparison.

Federal copyright law has a complex relationship with state intellectual property law. Historically, those who produce literary or musical creations have been protected by an array of different rules emanating from both federal and state bodies. At the state level, common law misappropriation

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3. Unless otherwise specified, citations are to the 1990 Official Text of the Uniform Commercial Code.


In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. . . . Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, . . . we hesitate to create new uncertainties, in the absence of careful legislative deliberation. . . . Thus, the prudent course is to adopt the ready made body of state law as the federal rule of decision until Congress strikes a different accommodation.

Id. at 739-40 (citation and footnotes omitted).

doctrines protected against "theft" of such intellectual property and common law copyright laws protected an author's or artist's work against unauthorized publication. At the same time, federal copyright law protected work from being copied after the time of first publication. The protection Congress or the states afford against unauthorized exploitation of authors' or artists' work is referred to as "substantive" intellectual property law in this Article. The questions as to whether the work is sufficiently original and whether the defendant's work infringed it are substantive copyright questions. There is tremendous potential for overlap between state and federal regimes for protecting these forms of intellectual property and this overlap gives rise to preemption questions.

Federal copyright law also has enjoyed a complicated relationship with state commercial law—both state and federal law have had an impact on how owners of copyrights exploit their property through exchanges. State law has controlled most rules of contracting. Thus, issues governing license formation and enforcement generally are governed by state contract law. At the same time, there has been a longstanding federal interest in avoiding confusion as to ownership of the intangible property embodied in federal copyrights. Congress has long provided for federal copyright registration and for exchanges of federal copyrights to be reflected in a federal copyright record. The regime governing exchanges involving federal copyrights is referred to as "transactional" copyright law in this Ar-

8. See American Visuals Corp. v. Holland, 239 F.2d 740, 743-44 (2d Cir. 1956).
Accordingly, we refer to a statute providing for the recordation of documents pertaining to transfers of copyright ownership as a "transactional" copyright statute. Given the superimposition of the federal filing regime over state law which governs many of the basic contract issues involved in contractually exploiting federal copyrights, this is an area where one would anticipate many preemption problems.

Federal copyright law was overhauled in 1976. Congress recognized the economic significance of the copyright industry and was aware of the negative impact on value that uncertain legal rules produce. It therefore paid close attention to several aspects of federal preemption of state substantive intellectual property law, most particularly, state common law copyright and unfair competition doctrines. In addition, the Copyright Act's legislative history suggests that federal policy makers gave some attention to the interaction of the new Copyright Act's transactional provisions with state commercial law.

The attention given to this second aspect of preemption was both cursory and uninformed in that it failed to focus on the U.C.C. and its relevance to secured transactions involving copyrights. To compound matters, the federal legislation is vague with respect to the extent federal transactional copyright law is intended to preempt state commercial law.

The consequences of this lack of legislative attention and clarity are uncertainty about the correct method for conducting secured financing involving copyrights and a cumbersome federal system that makes copyright-based secured financing very difficult. This unwieldiness and uncertainty undoubtedly has added substantial financing costs as lenders have attempted to comply with all possible governing regimes.

15. The substantive/transactional dichotomy, although useful for the purposes of this Article, is not perfect. For example, copyright law might seek to identify the "owner" of particular types of works. See 17 U.S.C. § 201 (1988). Such a provision might be labeled "substantive" because it identifies who owns the substantive rights inherent in a copyright. It also might be labeled "transactional" because it identifies the person who has the right to transfer these rights.


19. See infra notes 26-63 and accompanying text.

20. See infra notes 64-177 and accompanying text.

Two recent bankruptcy cases have brought the issues to the fore by broadly construing the Copyright Act's transactional provisions to preempt competing state commercial law contained in Article 9 of the U.C.C. The result has been a marginal gain in certainty that an unwieldy federal system is applicable and a corresponding pressure to streamline the system for conducting secured financing involving copyrights and other intellectual property.

The first part of this Article provides a brief overview of the preemption issues implicit in shared federal-state authority over substantive and transactional intellectual property law and summarizes efforts by Congress and the Supreme Court to define the respective spheres of federal and state authority. In addition, it introduces the tension between the Copyright Act's federal transactional provisions and state law in U.C.C. Article 9 applicable to secured financing employing copyrights as collateral. The first part concludes that the Copyright Act substantially altered the balance of federal and state authority over substantive copyright law and paid close attention to the preemption question inevitable in shared substantive authority. Preemption cases on the substantive side continue to arise, but their disruptive effect was reduced substantially by the legislation.

The second part of this Article identifies key differences between the transactional regime of the Copyright Act and the state law regime of Article 9. It then explores the attention given by the Copyright Office, Congress, and others to the preemptive effect of the Copyright Act. This history suggests that, at best, policy makers gave cursory attention to this preemption problem and that policy makers evidenced little, if any, awareness of Article 9.

In the third part, the vacuum left by this failure to address carefully the federal preemption of Article 9 is addressed. The absence of legislative guidance has resulted in increased financing costs for borrowers and unsatisfactory resolutions by the courts. Results like these were clearly avoidable by federal lawmakers.

Part four considers the implications of the cases and the history of the Copyright Act. The central question remains: How could a federal legislative process spanning the years 1955 to 1975 be so uninformed of Article 9 of the U.C.C., certainly the most significant development in secured financing since the 1940s? This part suggests some ways to improve the legislative process in the future in order to minimize questions concerning federal preemption of state commercial law.


24. But see generally Heald, supra note 2, for a critical appraisal of judicial performance in intellectual property preemption decisions.
SUBSTANTIVE AND TRANSACTIONAL INTELLECTUAL PROPERTY LAW: THE FEDERAL AND STATE SPHERES

From the beginning, the federal government has had constitutional authority to enact laws governing copyrights and patents. At the same time, states have attempted to exercise jurisdiction over the same subject matter. State law governing misappropriation, unfair competition, or trade secrets has attempted to protect commercial products against unauthorized copying, as has federal patent law. Goods subject to federally registered trademarks were and continue to be protected by state unfair competition law. Prior to its revision in 1976, federal copyright law protected against the copying of creative work after publication; state common law offered common law copyright protection to creative work before publication.

There has been overlap of a different kind between federal transactional intellectual property regimes and state commercial law. Federal law traditionally has specified prerequisites for the effective transfer of various forms of federal intellectual property. Thus, concerns over identifying the correct location of title to this intangible property have led to federal regimes requiring the recordation of transfers in order for such transfers...

25. U.S. CONST. art. I, § 8, cl. 8 gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."


Trade secret law is dealt with in, for example, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (state trade secret law continues to protect creative products and processes that their owners can keep secret; case held that state trade secret law was not preempted by the Patent Act).


27. See 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 1.04[1] (1992) (federal trademark law is not ordinarily held to displace state unfair competition law); 1 J. THOMAS McCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 10:11 (1973) (state unfair competition law may come into play).

28. See 1 NIMMER & NIMMER, supra note 14, § 4.01[B].

29. Under the 1976 Copyright Act, common law copyright continues to exist in creative work which has not been "fixed in a tangible medium of expression." 17 U.S.C. § 101 (1988). Performances such as lectures and dance come within state protection. See 1 NIMMER & NIMMER, supra note 14, § 2.07[C] (dance and pantomimes), § 2.10[A][I] n.15 (sound recordings).

30. See infra text accompanying notes 113-43.
to be effective against most third parties. State law, on the other hand, traditionally has controlled many of the issues that might arise under agreements involved in the exchange of intellectual property.

During the Nineteenth Century, the federal filing regimes governing transfers of intellectual property became the foundation for transactions employing intellectual property as collateral for loans. Title was a central concept in these systems. One form these financing transactions took was the collateral assignment, an approach which, like the early mortgage, used an actual conveyance of title to secure the loan. In exchange for a loan, the lender would receive title to the intellectual property through a transfer recorded in the federal records. The contractual understanding was that the property would be reconveyed to the borrower once the loan was repaid as agreed. Other demands of trademark law mandated a variation on this pattern, using title in a different way. The conditional assignment was a transaction in which the trademark holder would execute a trademark assignment of title that became effective only on default, not


34. The early mortgage was considered to vest title or its equivalent in the mortgagor. The result was that mortgagors' rights to redeem the collateral were recognized only in equity at a time at which a pledgor (who was not considered to have conveyed title to the pledgee) had rights to redeem at law. See 1 Grant Gilmore, Security Interests in Personal Property § 1.1 (1965).

35. Public misunderstanding about product source was thought to result if the assignor retained its goodwill and reputation yet sold the trademark that the public associated with that reputation. This "assignment in gross" doctrine of trademark law thus invalidated a trademark if it was assigned without the underlying goodwill. Consequently, the "collateral assignment" transaction form which temporarily conveyed title but not goodwill (even though clearly intended as a financing device) would not do. The conditional assignment solved the "assignment in gross" problem if the lender acquired the goodwill as well as the trademark on default. Cf. Weinberg & Woodward, supra note 33, at 136.
before. Under either financing approach, state law controlled many underlying transactional issues, such as the existence of consideration for the exchange and capacity of the parties to contract, while federal law governed whether the transfer being attempted was effective against third parties and, of course, the substantive qualities of the property the parties were attempting to exchange.

The complex array of federal and state rules governing transactional aspects of intellectual property for financing purposes both improved and deteriorated with the widespread state enactment of the Uniform Commercial Code beginning around 1962. By reconceptualizing and unifying the law of personal property security, U.C.C.'s Article 9 made the secured lending process more efficient. On the other hand, Article 9 was structured to have widespread impact, and its drafters, while giving a deferential nod to federal transactional intellectual property law in the event of conflict, did not specify in the U.C.C. those instances in which Article 9 should be held to defer to federal law. The result was uncertainty and elevated transaction costs as many lenders attempted to comply with the federal and state systems which had become conceptually quite different. Once the U.C.C. was in place, there was an increased need for reform at the federal level, if only to clarify the appropriate spheres for these now highly dissimilar federal and state systems.

During a period of rapid enactment of Article 9 by many states, the Supreme Court decided a series of cases that underscored the unsettled relationship between state and federal substantive intellectual property law. Although the reach and relationship of state and federal regimes governing substantive intellectual property law had been subject to litigation for nearly half of this century, the problem came to a head in 1964 when the Supreme Court decided Sears, Roebuck, Inc. v. Stiffel Co.

36. See infra text accompanying notes 92-107.
37. The idea that a unitary security interest should replace the chattel mortgage, pledge, conditional sale, and assorted other devices that preceded it was in place at the start of the Article 9 drafting process in 1948. Gilmore, supra note 34, § 9.2.
38. See U.C.C. §§ 9-104(a), 9-302(3)(a).
39. Of course, state law cannot define the preemptive scope of federal law. Moreover, the ongoing nature of federal lawmaking would have soon rendered any list of federal statutes obsolete and this, in turn, would have placed unrealistic revision demands on the uniform state legislation. Comments to the U.C.C. sections did, however, broadly state some principles the drafters hoped would govern decisions. See U.C.C. §§ 9-104 cmt. 1, 9-302 cmt. 8.
40. See infra text accompanying notes 100-02.
41. Beginning with International News Serv. v. Associated Press, 248 U.S. 215 (1918), the Supreme Court considered the appropriate spheres of operation for federal and state laws protecting intellectual property. In that case, International News Service had taken Associated Press's uncopyrighted stories and news for transmission to the West Coast. Over dissents by Justices Holmes and Brandeis, the Court held that a state could offer Associated Press protection through unfair competition law notwithstanding the fact that "news" could not be copyrighted. Id. at 236-38.
42. 376 U.S. 225 (1964).
and Compco Corp. v. Day-Brite Lighting, Inc.\textsuperscript{43} In both cases, the Court held that federal patent law\textsuperscript{44} preempted state tort law that protected manufactured goods from being copied. The analysis in neither case proceeded from the Congressional intent expressed in words of the patent statute;\textsuperscript{45} rather, the Court developed its preemption analysis from underlying federal intellectual property policy.\textsuperscript{46} The cases underscored the uncertain role of state law in the intellectual property area.

The uncertainty that Sears and Compco represented for the scope of state substantive intellectual property law paralleled the enactment of Article 9 and the uncertain status of state transactional intellectual property law. Both of those developments coincided with the development of the Copyright Act.\textsuperscript{47} Congress thus had the opportunity to clarify, with its new legislation, the relationship of both federal substantive and transactional copyright law with respect to both state intellectual property and commercial law.

The Copyright Act was a major effort to bring domestic copyright law into conformity with that of other industrial countries.\textsuperscript{48} A primary thrust of the new statute was to move the advent of federal protection to the point at which the work was “fixed in a tangible medium of expression.”\textsuperscript{49} This change extended the temporal scope of federal copyright law to a much earlier point in the creative process because most creative work would be “fixed in a tangible medium of expression” long before publication,\textsuperscript{50} the event that formerly commenced federal copyright protection.\textsuperscript{51}

The proposed federal copyright law with its extended reach raised the questions of whether states could offer concurrent state copyright pro-

45. Sears, 376 U.S. at 231; Compco, 376 U.S. at 237.
46. See James M. Treccce, Patent Policy and Preemption: The Stiffel and Compco Cases, 32 U. CHI. L. REV. 80, 81, 84 (1964); see also Heald, supra note 2, at 967.
47. See infra text following note 61.
50. Publication had to be with a notice of copyright affixed to each published copy. Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (current version at 17 U.S.C. §§ 401-06 (1988)).
51. For example, under the old law, unpublished works such as drafts of a book or dailies of a movie would be protected by common law copyright and were not subject to federal copyright protection. The only exception was for certain unpublished works which could be registered. Copyright Act of 1909, ch. 320, §§ 9, 11, 35 Stat. 1075, 1077-78 (current version at 17 U.S.C. §§ 407, 410, 411 (1988)). Under the new law, because each of these were “fixed in a tangible medium of expression,” they would be protected by federal copyright. In short, the new law moved the advent of federal protection to a much earlier point in the creative process. See generally 1 NIMMER & NIMMER, supra note 14, § 4.01 (discussing the significance of publication).
tection and whether states could offer concurrent non-copyright protection. In both instances it was necessary to specify a test to carry out the policy decisions. After intensive study, Congress enacted a statute focusing on these preemption issues. Consistent with prior law, Congress decided against permitting concurrent state copyright protection for intellectual property. As before, federal protection would commence later than state protection. The test used to define the point in time at which state copyright protection would end and federal protection would begin was a physical one—"fixed in a tangible medium of expression." Given the decision that concurrent copyright protection is impermissible, the second preemption problem entailed specifying a test that would discriminate between permissible state intellectual property protection and impermissible state copyright protection. The test Congress settled on asks whether the state protection is the "equivalent" of federal protection. What the statute did not, and probably could not, make clear, however,

52. Goldstein describes three conditions that must be met for state law to be preempted:

First, the state right in question must be "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." Second, the right must be in a work of authorship that is fixed in a tangible medium of expression. Third, the work of authorship must come within the subject matter of copyright as specified by sections 102 and 103.


55. Captioned "preemption with respect to other laws," the provision provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right . . . in any such work under the common law or statutes of any State.

Copyright Act § 301(a), 17 U.S.C. § 301(a) (1988) (emphasis added).

56. Id.
is what constituted the forbidden "equivalent" state protection. This determination has been left up to the courts to decide.57

Despite the need for litigation to further define the appropriate relationship of state and federal substantive copyright protection, the statute must be counted a relative success.58 The physical test devised to solve the temporal preemption problem is one that is relatively easy to administer.59

In articulating the equivalency test, Congress took pains to resolve in advance preemption issues that would surely arise under the new statute.60

By addressing the preemption issues for the competing regimes of federal and state substantive copyright law, Congress attempted to reduce litigation concerning its own general preemptive intent on issues that had consumed resources before the Copyright Act. Indeed, there was awareness that uncertainty with respect to applicable state or federal substantive copyright law was costly and, as a result, Congress made substantial efforts in the legislative process to reduce that uncertainty.61


58. Congress certainly did not achieve perfect success. Cases have been decided under its "equivalency" test, for example, which have been the subject of scholarly criticism. See generally Heald, supra note 2, at 990-1002 (discussing the difficulty of applying the equivalency test).

59. See Cable News Network, Inc. v. Video Monitoring Servs. of Am., Inc., 940 F.2d 1471, 1480-81 (11th Cir. 1991) (court held that no injunction could be issued barring taping of an, as of yet, unmade program as it was not "fixed"); National Football League v. Cousin Hugo's, Inc., 600 F. Supp. 84, 87 (E.D. Mo. 1984) (live shows become fixed when they air); Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987) (players' performances are "fixed in a tangible medium" when they are videotaped).

60. Section 301(b) of the statute provides that works not fixed in a tangible medium of expression and works not coming within the subject matter of §§ 102 and 103 are not preempted. 17 U.S.C. § 301(b) (1988 & Supp. III 1991). The 1976 House Report gives as illustrations a "choreography that has never been filmed or notated, an extemporaneous speech," or works communicated solely through conversations or live broadcasts. In addition, the Report specified that: The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.


Given its attention to matters of substantive preemption, one would have thought that Congress also would provide clear answers to key questions regarding transactional preemption. If federal copyright law is to govern some aspects of secured transactions employing copyrights as collateral, which aspects are to be governed and to what extent? How does the federal regime mesh with state law that otherwise governs these transactions? Uncertainty on such issues injects risk into each secured transaction involving copyrights and, as such, adds non-productive costs into such transactions.

Ultimately Congress enacted provisions relevant to financing transactions that employ copyrights as collateral. The next part of this Article discusses the development of these provisions. Unlike its efforts in addressing substantive preemption, Congress' action with regard to transactional preemption increased rather than reduced uncertainty with regard to federal transactional preemption.

**CONGRESS, THE COPYRIGHT ACT, AND THE U.C.C.**

Congress ultimately enacted transactional provisions in the Copyright Act which are very different from those contained in Article 9 of the U.C.C. These provisions resemble state commercial law which rapidly was being replaced by the modern personal property security system of Article 9. After briefly comparing the two systems, this part of the Article discusses the process by which the federal transactional copyright provisions evolved and the lack of attention given by Congress to their preemptive scope.

**WORLDS APART: THE COPYRIGHT ACT AND ARTICLE 9 OF THE U.C.C.**

The Copyright Act contains two transactional provisions that are particularly important to secured transactions employing copyrights as collateral. The first is definitional. Section 101 defines "transfer of copyright ownership" very broadly to include, *inter alia*, assignments, mortgages, or any other alienation or hypothecation. This definition is related to section

62. It probably would be unprecedented for Congress to attempt to control all aspects of secured transactions involving federal intellectual property collateral. As suggested earlier, state law probably will control many important contract matters such as contract formation and capacity to contract, however extensive the desired federal preemption may be. If there is room for state commercial principles to operate, there will be a need for clarification of the extent.

63. The definition reads:

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

205 which provides for the permissive recordation of any document "pertaining to copyright" including "[a]ny transfer of copyright ownership." Recordation provides all persons with constructive notice of the facts stated in the recorded instrument provided that two requirements are satisfied. First, the recorded document must identify specifically the copyrighted work to which it pertains in order to facilitate third party searches under the work's title or registration number. Second, the work must be federally registered, a process different from recordation which, among other things, establishes a public record of the registrant's claim of copyright ownership. Thus, sections 101 and 205 of the Copyright Act es-

64. The provision reads:

(a) CONDITIONS FOR RECORDATION.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

(b) CERTIFICATION OF RECORDATION.—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—

(1) The document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such a manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(e) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if—

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.


65. In addition, a signed writing is a prerequisite to recordation in the Copyright Office whether or not the filing will provide constructive notice. See supra note 64.


67. Registration also is a prerequisite to filing an infringement suit and obtaining certain remedies for infringement and establishes the prima facie validity of the copyright. 17 U.S.C. §§ 408-412 (1988).
establish a framework for locating the title to or other interests in copyrighted works.

Section 205 also provides rules establishing the priority of conflicting transfers of ownership of the same copyrighted work. Assuming that all transfers comply with the dual requirements for giving constructive notice, the transfer of copyright ownership executed first prevails if it is recorded within a specified grace period after the transfer is made. Even if the first transfer is not recorded within the grace period, the first transfer may still have priority if its recordation occurs before recordation of the transfer executed second in time. Otherwise, the transfer executed second in time prevails if it is recorded first and taken in good faith, for valuable consideration, and without notice of the earlier transfer.

The requirement that filed documents specifically identify copyrighted works contemplates discrete filings for individual transactions involving specified works. This feature and the grace periods are qualities that make section 205 comparable to the transaction filing systems found in many states prior to their replacement by the notice filing system of Article 9 of the U.C.C. In a transaction filing system, one gives public notice of

68. Section 205 also has a priority rule applicable to conflicting transfers of copyright ownership and nonexclusive licenses. See supra note 64. Nonexclusive licenses are not included in the § 101 definition of "transfer of copyright ownership" and, therefore, are not governed by the § 205 priority rule described in the text. See supra note 63.

69. Recordation must be within one month if the transfer was executed within the United States or within two months if it was executed outside the United States. See supra note 64.

70. The subsequent transferee does not have to record during the grace period following execution of the subsequent transfer. See supra note 64.

71. A binding promise to pay royalties is sufficient in lieu of other consideration. See supra note 62. See generally supra note 14, § 10.07[A][2], [3] (concerning the notice, good faith, and consideration requirements).


73. See generally Weinberg & Woodward, supra note 33, at 74-78 (discussing notice and transaction filing systems). The fact that § 205 permits the filing of documents "pertaining to a copyright" suggests the possibility of "notice filing" under which constructive notice could be given of transactions that may take place in the future. See infra text accompanying notes 75-76. Current copyright regulations also are suggestive of notice filing. They state that a document pertains to copyright if it has a "direct or indirect relationship" to copyright including "ownership, division, allocation, licensing, [or] transfer . . . of rights under a copyright." The "relationship may be past, present, future, or potential." 37 C.F.R. § 201.4(a)(2) (1991). Nonetheless, the requirements of specific identification and registration represent stringent limitations on the role notice filing can play under the 1976 Copyright Act. Because of them, a filing in the Copyright Office cannot provide notice of an interest in future or potential copyrights.

As a transaction filing statute, § 205's lineage clearly is traceable to its immediate predecessor. The 1909 Copyright Act provided:

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration,
the current state of affairs. This means that only executed transactions are recorded, typically by filing a copy of the transaction document itself.\textsuperscript{74} Such a system requires grace periods because the transaction document cannot simultaneously be executed and filed. Meaningful filings with respect to transactions that are merely contemplated, to property not already in existence, or to loans that might, but will not necessarily, be advanced are conceptually impossible.

In contrast, under a notice filing system as contained in Article 9 of the U.C.C., one gives notice that something either may have happened or might happen in the future.\textsuperscript{75} The filing system does not purport to describe the current situation; rather, the notice system contemplates that the searcher will follow-up through further research outside of the file.\textsuperscript{76} Because a notice filing system speaks in terms of possible rather than executed transactions, a single filing can give notice of multiple past or future transactions. Grace periods are not essential under a notice filing system because a financing statement can be filed before an actual transaction is executed or before the debtor acquires the property which is the subject of the transaction.

Section 205’s transaction filing rule applicable to competing transfers is different conceptually from Article 9’s, even though both tend to prefer the first filer.\textsuperscript{77} The copyright rule, however, differs from the Article 9 approach in other basic respects as well. Section 205 bluntly applies to priority between conflicting transfers, which presumably encompasses the many and diverse types of transfers as defined in section 101 and includes assignments, exclusive licenses, mortgages, and hypothecations.\textsuperscript{78} In addition, to resolve a particular priority dispute, section 205 makes relevant the question of whether the transferee took without notice, in good faith, and for valuable consideration.\textsuperscript{79}

By contrast, Article 9 provides greater specificity concerning the identity of the parties governed by its priority rules. It contains numerous priority rules tailored to various priority disputes that might arise.\textsuperscript{80} Under these rules, notice, good faith, or valuable consideration may or may not be without notice, whose assignment has been duly recorded.


74. See 1 GILMORE, supra note 34, § 15.2.
75. U.C.C. § 9-208.
76. See 1 GILMORE, supra note 34, § 15.2.
77. The U.C.C. generally provides that the first party to file a financing statement or otherwise perfect his or her security interest will have priority over others. See, e.g., U.C.C. §§ 9-301(1)(b), 9-312(5)(a). But see id. § 9-312(3), (4).
78. See supra note 63 for the definition of "transfer of copyright ownership."
79. See supra note 64 for the text of § 205.
80. U.C.C. §§ 9-301 to 9-318.
relevant depending upon the nature of the priority dispute.\textsuperscript{81} For example, Article 9 contains a simple priority rule providing that a perfected security interest is superior to the rights of a person who becomes a lien creditor after the security interest is perfected.\textsuperscript{82} Definitions carefully identify each class of claimants subject to the priority rule.\textsuperscript{83}

If one simply places Article 9 and the federal priority rule side-by-side, it seems apparent that much greater thought went into the former. Indeed, section 205 bears a closer resemblance to its predecessor in the 1909 Copyright Act\textsuperscript{84} and outmoded state commercial law replaced by Article 9 than it does to modern financing principles.

Another important conceptual difference between Article 9 and the Copyright Act revolves around the notion of ownership. Under Article 9, a secured creditor obtains a "security interest" which is an interest in personalty securing payment of an obligation.\textsuperscript{85} Article 9 contemplates that, prior to the debtor's default, a security interest is not the equivalent of title to the collateral.\textsuperscript{86} Status as a secured party does not make a creditor the owner of collateral and does not automatically entitle the creditor to sell the collateral.\textsuperscript{87} It is questionable whether this status confers upon a secured party the right to sue third party tortfeasors, such as copyright infringers, who reduce the value of collateral.\textsuperscript{88}

Under the Copyright Act, in contrast, one who takes by a transaction within the definition of "transfer of copyright ownership" is considered an owner.\textsuperscript{89} This status entitles the transferee, to the extent of the right transferred, to all of the protection and remedies made available by the

\textsuperscript{82} U.C.C. §§ 9-301(1)(b), 9-302(1).
\textsuperscript{83} Id. §§ 1-201(37), 9-105(1)(m), 9-301(3).
\textsuperscript{84} See supra notes 64 & 73.
\textsuperscript{85} U.C.C. § 1-201(37).
\textsuperscript{86} Id. § 9-202.
\textsuperscript{87} See id. §§ 1-201(37), 9-202, 9-501, 9-504, 9-505.
Copyright Act to a copyright owner. These include the right to resell and standing to sue for infringement in the transferee's own name. If, as legislative history indicates and as courts have held, an agreement creating an Article 9 security interest falls within the federal definition of "transfer of copyright ownership," it follows that under the Copyright Act the secured party, qua transferee, would enjoy these rights and remedies.

Do the conceptual and other differences between the Copyright Act of 1976 and Article 9 represent intentional decisions on the part of Congress? Did Congress intend sections 101 and 205 of the Copyright Act to occupy the entire field to which Article 9 otherwise would apply? If not, what degree of preemption was intended? One would hope to find answers to questions such as these in the Copyright Act's legislative history to which we now turn.

LEGISLATIVE HISTORY: MISSED OPPORTUNITIES

The Copyright Act was the product of twenty years of study, negotiation, drafting, and lobbying. The extensive legislative history of that process may be divided into two phases. The first phase is non-congressional and began in 1955. During this phase (Phase I), the Register of Copyrights made extensive use of experts and representatives of the various interests that would be affected by copyright law revision. These persons negotiated and agreed upon revised statutory language, much of which was accepted by Congress. Phase I, which culminated in 1965 with the introduction of revision legislation, clearly is the most revealing with regard to the secured transactions content of section 101's definition of "transfer of copyright ownership" and section 205's constructive notice and priority rules. The second phase of the Copyright Act's legislative history (Phase

90. Id. § 201(d)(2).
91. See id. § 501(b). For more information concerning the right to resell, see 3 Nimmer & Nimmer, supra note 14, § 10.01[c][4].
94. See generally id. § 1.42; Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857 (1987). Within the sphere of copyright legislation, it may be typical for Congress to obtain the prior "consent" of legitimate interest groups that would be affected by substantive changes in the law. See Thomas P. Olson, The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act, 36 J. Copyright Soc'y USA 109, 111, 120 (1989).
95. See supra note 63 for text of § 101.
97. See supra note 64 for text of § 205.
98. See 1 Abrams, supra note 93, § 1.45; Litman, supra note 94, at 880-81, 883.
II) is congressional. It began with hearings on the revision legislation and culminated in the Copyright Act's passage.\textsuperscript{99}

The Phase I years, 1955 to 1965, are significant not only for federal copyright law revision, but also are important with regard to the widespread enactment of the U.C.C. by the states. By 1955, only one state had enacted the U.C.C.\textsuperscript{100} By the end of 1965, it was enacted in forty-two states plus the District of Columbia and the Virgin Islands.\textsuperscript{101} New York and California, probably the two most important states with regard to the copyright intensive publishing and entertainment industries, respectively enacted the U.C.C. in 1962 and 1963.\textsuperscript{102}

The development of the U.C.C. and its many state enactments during the Phase I years were well publicized. The American Law Institute and the National Conference of Commissioners on Uniform State Laws frequently published drafts, official texts, or other materials concerning the U.C.C. from 1955 to 1965.\textsuperscript{103} Many of these materials found their way into law school and bar association libraries and into the libraries of some individual lawyers.\textsuperscript{104} There also was an abundance of materials concerning the U.C.C. published by other authors during this period. These materials included state legislative reports and a multitude of books, pamphlets, law review articles and bar association reports.\textsuperscript{105} No doubt there were also countless seminars, programs, and continuing legal education courses to acquaint the Bar with the new U.C.C., including its revolutionary Article 9.

Thus, the ten-year Phase I period for copyright revision coincided with the culmination of the process of the U.C.C.'s development and enactment. Indeed, many would count the arrival of the U.C.C. and its innovative Article 9 as easily the most significant development in commercial law

\textsuperscript{99} See infra text accompanying notes 157-77.
\textsuperscript{100} Pennsylvania was the only state to enact the U.C.C. by 1955. 1 U.L.A. 37 (Master ed. 1968).
\textsuperscript{101} Id. at 1-2.
\textsuperscript{103} The American Law Institute and the National Conference of Commissioners on Uniform State Laws began publishing materials concerning what became the Uniform Commercial Code in the early 1940s. There were frequent publications through 1965 and thereafter as well. See generally MITCHEL J. EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY 1-6 (1972) (listing publications related to the drafting history of the U.C.C. from 1941 through 1970).
\textsuperscript{104} See WHITE & SUMMERS, supra note 102, at 10-11.
\textsuperscript{105} These included an extensive set of hearings, studies, and reports from legislative committees, commissions, or other bodies in California and New York. See generally EZER, supra note 103, at 6-16 (listing historical publications by state). Some examples include the following: COMMISSION ON UNIFORM STATE LAWS, CALIFORNIA ANNOTATIONS TO THE PROPOSED CODE (1960); UNIFORM COMMERCIAL CODE (Calif. Legis. Council Office compilation 1965); NEW YORK LAW REVISION COMMISSION, A STUDY OF THE UNIFORM COMMERCIAL CODE (1955).
during the 1950s and 1960s. Consequently, if sections 101 and 205 of the Copyright Act were intended to encompass secured transactions involving copyrights, one might expect to find in the history of Phase I some reflection of state law developments relating to the advent of Article 9. As it turns out, there is clear evidence in the Phase I materials that sections 101 and 205 were intended to encompass secured transactions involving copyrights. Incredibly, given the time during which Phase I took place, Article 9 is never expressly mentioned.

Early in Phase I there was a clarion call for encompassing secured transactions within a revised federal copyright law. In 1956, a committee of the American Bar Association Section of Patent and Trademark Law published a draft report (A.B.A. Report) outlining concepts and principles for copyright law revision. The committee's members were leaders of the copyright bar with long years of practical and legislative experience in copyright affairs. The A.B.A. Report advocated that "a single system of protection and enforcement, under federal law exclusively," should be provided for works copyrightable under federal law. The proposed system would extend to "transactions where the ... property is mortgaged or otherwise given as security or collateral, and the foreclosure of such liens." The A.B.A. Report noted that the large investments being made in these properties required security arrangements for creditors who finance "through mortgage, security, lien or collateral transactions." It was thought that a "single federal system for the handling, protection, and necessary foreclosures which may arise" would facilitate this financing.

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106. See generally White & Summers, supra note 102, at 4-6 (discussing the history and success of the U.C.C.).

107. The converse question would go to the impact of federal copyright law revision on Article 9. It appears that there was no impact. Article 9 commentary contains references to the 1909 Copyright Act and fails to recognize the enactment of the 1976 Copyright Act. See U.C.C. §§ 9-104 cmt. 1, 9-302 cmt. 8.

108. Report of Committee No. 15, Program for Revision of the Copyright Law, 1957 A.B.A. Sec. of Pat., Trademark and Copyright L. 51-69 [hereinafter A.B.A. Report]. The report was presented for informational purposes to the Section on Patent, Trademark and Copyright Law. See id. at 57. The chairman of the committee authoring the report, Edward A. Sargoy, continued to express views concerning secured transactions involving copyrights through the end of Phase I of the copyright law revision history. See infra notes 114, 128, 140, 147.


110. Id. at 59.

111. Id.

112. Id. at 61.

113. Id. at 62. The report was concerned particularly with foreclosures, it having previously been held in Republic Pictures Corp. v. Security First Nat'l Bank of Los Angeles, 197 F.2d 767, 770 (9th Cir. 1952), that the foreclosure of a federal statutory copyright was not cognizable in federal court. See A.B.A. Report, supra note 108, at 62 n.5. This raised the specter of foreclosures under the law of the then 48 states which might be inadequate or nonexistent.

The A.B.A. Report also advocated a central location such as the Copyright Office for examining, registering, recording, conveyancing, and searching of copyrights. It was thought...
A majority of the A.B.A. committee members participated in a series of studies concerning the general revision of the copyright laws (Copyright Studies) conducted under the auspices of the Library of Congress and the Copyright Office. Published in 1960, the studies were designed to review the 1909 Copyright Act and problems it raised and to analyze alternative solutions. The studies were submitted to an advisory panel of experts including law teachers and counsel to authors, publishers and other major industry groups having a significant stake in copyright law revision. The panelists were thought to be broadly representative of the various interested industry and scholarly groups. After revision in light of the panelists' comments, the studies were made available to other interested persons who were given the opportunity to submit their views. Comments by the panelists and other persons were published along with the studies.

The Copyright Studies viewed determination of the ownership of copyrighted works as a central use for the records available in the Copyright Office. An effective and exclusive federal recording system was thought desirable to enable copyright owners to give meaningful constructive notice of their interests and to furnish prospective purchasers with a means to ascertain title. The 1909 Copyright Act's transaction recording system was viewed as inadequate to the task.

this would enhance the availability of information concerning a work's nature, term of protection, and title. See id. at 59, 63-64. The report's authors saw a need for "powerful incentives" to induce the deposit and registration of works. Id. at 64. The Copyright Act's prerequisites to obtaining constructive notice through recordation are traceable to this concern. See infra text accompanying notes 121-46.

114. See A.B.A. Report, supra note 108, at 52-53, 55, 69. There were 34 studies in all. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 147-48 (Comm. Print 1961) [hereinafter Register's Report]. Study 17 on the registration of copyrights and Study 19 on the recordation of copyright assignments and licenses, both completed in 1958 and published in 1960, are the most important for purposes of this Article. See SEN. COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SEN. COMM. ON THE JUDICIARY, STUDIES 17-19, IX (Comm. Print 1960) [hereinafter Copyright Studies]. Members of the A.B.A. Committee who participated in the study included the chairman of the committee, Edward A. Sargoy, who served as a commentator and the vice chair, Harry G. Henn, who authored one of the studies. See A.B.A. Report, supra note 108, at 54, 69; Copyright Studies, supra, at 133-34.

115. See Register's Report, supra note 114, at X.
116. See id. at III, X-XI; Copyright Studies, supra note 114, at v.
117. See Copyright Studies, supra note 114, at v.
118. Id. at 43-45.
119. Id. at 111-12.
120. See id. at 44 n.87. The Copyright Studies cited an article by Leon Kaplan, Literary and Artistic Property (Including Copyright) as Security: Problems Facing the Lender, 19 LAW & CONTEMP. PROBS. 254 (1954), suggesting the inadequacy of the existing transaction recording system. The article concluded that "as collateral, copyright . . . does not fit conventional notions developed in the law of security." Id. at 274.
To develop a better filing system, the Copyright Studies suggested that recodination systems outside the copyright field could serve as models for a revised law, especially recording systems for interests in intangibles. Remarkably, however, the Copyright Studies failed to recognize the possible relevance of Article 9 and, instead, looked to real property recording systems or pre-U.C.C. chattel mortgage or conditional sales statutes as prototypes for its transaction filing system. Transactions in which copyrights were employed as collateral continued to be referred to as mortgages which, for purposes of recodination, were thought to be much more like absolute assignments of title than as creating the bundle of rights referred to by Article 9 as a security interest.

The Copyright Studies and associated panelists and commentators missed other opportunities to bring Article 9 into the copyright law revision process. Consideration was given to replacing the 1909 Copyright Act's priority rule with one under which notice would be irrelevant to priority determinations. Article 9 contained a pure race priority rule under which notice is irrelevant, but there is no mention of it in the studies. Instead, the idea of dispensing with notice was apparently drawn from the Mexican copyright statute. It also was suggested that a broad range of transactions involving copyrights be recordable, including mortgages, pledges, "or other alienation or disposition" of copyright. The latter would surely cover the Article 9 security interest, but it was not mentioned.

After reviewing the Copyright Studies and panelists' comments, the Register of Copyrights published a report and tentative recommendations (Register's Report) in 1961. The Register's Report recognized that records of copyright ownership are particularly important because copyrights are

121. See Copyright Studies, supra note 114, at 65. This study presciently suggested that consideration be given to "possibilities which may lie ahead in the use of machine methods for ... recordation and search." Id.
122. See id. at 72, 121.
123. Id. at 121.
124. Id. at 115, 132. Undoubtedly, an important reason for the use of the term mortgage was that the then effective 1909 Copyright Act (§§ 42, 44) provided that copyrights could be mortgaged and contained a priority rule applicable to mortgages. See supra note 73 for the text of § 44.
125. The 1909 Copyright Act provided that a prior unrecorded assignment shall be void as against subsequent purchasers or mortgagees for valuable consideration without notice provided the subsequent transaction was recorded. Copyright Act of 1909, ch. 320, § 44, 35 Stat. 1075; see supra note 73 for the text of § 44.
127. The Mexican statute dealt with the priority of assignees. See Copyright Studies, supra note 114, at 119-20.
128. Id. at 133 (Edward A. Sargoy, commentator).
129. Register's Report, supra note 114, at XI.
intangibles not capable of physical possession. The Register believed that a new copyright recordation system "should embrace all instruments by which the ownership of copyright is transferred in whole or in part" and permit the filing of instruments that have an effect on the "status" of a copyright. The Register's Report tentatively recommended that recording be permitted for exclusive licenses, mortgages, "and all other transfers of any exclusive right under a copyright." Recording of assignments or other documents pertaining to a copyright would give constructive notice of the information stated in the document.

The Register's Report did not recognize Article 9, its very different notice filing approach, or its most basic ideas about the nature of secured financing. Indeed, the report specifically disapproved of the filing of "blanket assignments" covering all the copyrights owned by a particular person. The Register believed that constructive notice should be confined to works specifically identified in the recorded document. The fact that Article 9 permitted broad "blanket" filings was apparently not considered. The Register tentatively proposed that the priority rule in a revised copyright act retain grace periods, ignoring that Article 9's different system could minimize their use.

In 1963, the House Committee on the Judiciary published the transcript of four meetings convened by the Register for discussion of the Register's Report and comments on its tentative recommendations (1963 Discussion and Comments). Once again, copyright revision and Article 9 missed connection. There was discussion of whether short form disclosures might be

130. Id. at 95. The report stated that registration enables users of the recording system to trace title back to the initial registrant. Id. at 72. The Register noted that the intangible nature of copyrights makes a recording system necessary to enable transferees to give constructive notice of their rights to third persons and to enable third persons to determine the identity of a copyright's current owner. Id.

131. Id. at 95. The Register believed that in addition to instruments which transfer ownership, the system also should permit filing with constructive notice of documents that have a bearing on the "status" of a copyright including nonexclusive licenses, powers of attorney, employment contracts, publishing agreements, changes in the title or names of works, and court decrees. See id. at 94-96.

132. Id. at 98.

133. Id.

134. This Article 9 approach was well in place by the publication of the Register's Report in 1961. See 1958 Official Text, supra note 126, § 9-402.

135. Register's Report, supra note 114, at 96.

136. Id.

137. The tentatively recommended grace periods were shorter than those provided in the 1909 Copyright Act. See id at 98.

138. See 1958 Official Text, supra note 126, § 9-312(5); Weinberg & Woodward, supra note 33, at 86-87.

139. STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION; PART 2; DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1963) [hereinafter 1963 Discussion and Comments].
filed instead of the actual transaction documents. This was thought desirable to avoid excessive disclosure of intimate transaction terms. Short form filings were likened to the practice under real estate law, not to the filing of financing statements under Article 9.\textsuperscript{140} It was urged that the revised statute provide for the recordation of "the broadest possible types of grants" including mortgages, pledges, or other alienation or dispositions, but there was no mention of the recordation of financing statements or security agreements.\textsuperscript{141}

The 1963 Discussion and Comments also illuminates the origins of the Copyright Act's requirement that a work be registered before constructive notice results from the filing of a document concerning the work in the Copyright Office.\textsuperscript{142} The linkage of registration with the giving of constructive notice through recording creates difficulties for secured creditors because registration is impractical for some works.\textsuperscript{143} This linkage is not inevitable. Registration and recording serve different functions. A registration system provides a copyright owner with a permanent official record of its claim, the existence of the work at a particular time, and the facts supporting the claim.\textsuperscript{144} For persons who wish to use copyrighted materials, registration provides public information concerning the existence and scope of the claim, its duration, and its initial ownership.\textsuperscript{145} In other words, registration is very relevant to substantive copyright law matters. The purpose of recording, on the other hand, is to provide constructive notice of transactions affecting a copyright.\textsuperscript{146} It is a transactional provision.


\textsuperscript{141} 1963 Discussion and Comments, supra note 139, at 160, 306, 360.

\textsuperscript{142} This question was at issue in Official Unsecured Creditors' Comm. v. Zenith Prods., Inc. (In re AEG Acquisition Corp.), 127 B.R. 34 (Bankr. C.D. Calif. 1991), discussed infra notes 224-43 and accompanying text.

\textsuperscript{143} See generally William W. Chip, Note, \textit{Transfers of Copyrights for Security Under the New Copyright Act}, 88 \textit{Yale L.J.} 125, 130-35 (1978) (highlighting examples of impracticability of registration as a prerequisite for constructive notice). The Copyright Act's registration requirement was a departure from the 1909 Copyright Act under which filing in the Copyright Office would give constructive notice of a transaction involving an unregistered work. The Copyright Act of 1909, ch. 320, §§ 9-10, 35 Stat. 1075, 1077-84. See generally 2 \textit{Nimmer}, supra note 14, §§ 7.16[E], 10.07[A] n.4 (noting differences between current and 1909 Acts with respect to requirements for constructive notice). Such filings were thought to "complicate" the record. See Copyright Studies, supra note 114, at 32-35.

\textsuperscript{144} \textit{RALPH S. BROWN} \& \textit{ROBERT C. DENICOLA}, \textit{CASES ON COPYRIGHT} 46-47 (5th ed. 1990).

\textsuperscript{145} Id. at 47. The fact that copyrights are intangible personalty not capable of being reduced to possession also was advanced as a reason for the desirability of registration. See Copyright Studies, supra note 114, at 40.

\textsuperscript{146} Recordation of a document also may facilitate the giving of actual notice because record searchers may see the filed document. See Weinberg & Woodward, supra note 33, at 63 n.3.
Despite these differences in function, it may seem logical to condition constructive notice through recording upon registration of the transferred work because registration "officially defines" the copyright which is the subject of the transfer. Under this reasoning, an unregistered copyright would be too ill-defined for constructive notice to attach to the filing of a transfer document. The statement contained in the 1963 Discussion and Comments that registration provides the "basic instrument which shows what is being transferred" suggests that this logic was behind the registration requirement.\textsuperscript{147} Conditioning constructive notice through recording upon registration probably also was viewed as a means to encourage the registration of copyrighted works.\textsuperscript{148}

Subsequently during Phase I, there was some concern expressed that the linkage of registration with recording was impractical.\textsuperscript{149} The linkage,

\begin{quote}
\textsuperscript{147} 1963 Discussion and Comments, supra note 139, at 161 (Edward A. Sargoy, commentator). Discussion accompanying a preliminary draft for a revised copyright statute prepared by the Copyright Office also indicates that the need for a "complete record" was a reason for the registration requirement. STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., \textit{2d Sess., Copyright Law Revision; Part 3; Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 301} (Comm. Print 1964) [hereinafter 1964 Preliminary Draft]. Related justifications subsequently offered during Phase I of the revision process were that registration would establish the basis of the copyright covered by the recorded document and would enable record searchers to trace title from the original copyright owner. See \textit{House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision; Part 6; Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 7778} (Comm. Print 1965) [hereinafter Register's 1965 Supplementary Report].

\textsuperscript{148} The 1963 Discussion and Comments, supra note 139, at 161, also suggests this justification for linking registration with recordation. At the time of this publication, it was still contemplated that there would be a dual system of copyright law comprised of federal legislation and state common law. See Register's Report, supra note 114, at 43. It was contemplated that an unpublished work might be registered to gain benefits available under the federal copyright statute. See \textit{id.} at 42-43. Common law would protect copyrights in unpublished works until publication or voluntary registration. Case law concerning when publication occurred made it possible for the proprietors of many works, some of which were commercially valuable, to rely on common law copyright protection. These works were not registered, and many transfers of common law rights were not recorded in the federal copyright records or anywhere else. See Copyright Studies, supra note 114, at 27; see also 1964 Preliminary Draft, supra note 147, at 310. The 1963 Discussion and Comments, supra note 139, suggests that a system conditioning recording upon registration would provide an incentive for owners to register their works. This would tend to move works into the federal system with its concomitant benefits of registration. \textit{id.} at 161. The need for incentives to bring works into the federal statutory copyright system was significantly reduced when the 1964 Preliminary Draft, supra note 147, made most unpublished works automatically subject to federal statutory copyright protection. \textit{id.} at 1, 18. To "complete the record" and probably also to encourage registration, the 1964 Preliminary Draft made registration a condition of obtaining constructive notice through recording. See \textit{id.} at 17. It also provided other incentives to register, e.g., registration was made a prerequisite to instituting a suit for copyright infringement. See \textit{id.} at 27-28. Registration was important to the Library of Congress because an applicant for registration generally was required to deposit a copy of the work. See \textit{id.} at 25-26.

\textsuperscript{149} See 1964 Preliminary Draft, supra note 147, at 305 (Goldberg).
\end{quote}
however, ultimately was included in the Copyright Act. During Phase I, the registration requirement was not contrasted with Article 9. Had it been, the contrast would have been clear. Article 9 makes it possible as a matter of state law for a security interest to be perfected the moment the debtor obtains rights in the collateral. Neither the collateral nor the debtor's rights therein are required by Article 9 to meet any standard of formality, completeness, or concreteness before a security interest could attach or be perfected by the filing of a financing statement.

Concerns about practicability also were voiced with regard to the related requirement for constructive notice through recording—that recording be sufficiently specific that the encumbrance of the copyrighted work would be revealed through a reasonable search by title. This requirement, which ultimately was included in the Copyright Act, creates difficulties for secured creditors because works may not yet exist or, if they do exist, may be untitled. This description requirement also inhibits a legally sufficient filing against all of a particular owner's works, and may necessitate costly multiple filings. Article 9's more liberal requirements for the description of collateral and its validation of the after-acquired property clause were not considered during Phase I.

150. The Copyright Act provides that recording "gives all persons constructive notice of the facts stated in the recorded document, but only if... registration has been made for the work." 17 U.S.C. § 205(c)(2) (1988) (emphasis added). See supra note 64 for text of § 205.

151. U.C.C. § 9-305.

152. The debtor was required to have "rights in the collateral." See 1962 Official Text, supra note 140, § 9-204(1). The nature of the debtor's rights requisite to attachment of a security interest to general intangibles such as copyrights was not specified. Article 9, however, provided some special rules concerning when the debtor obtained rights in certain forms of personality sufficient for a security interest to attach. For example, a security interest could not attach to a contract right until the contract was made. See id. § 9-204(2). Eventually these special rules were entirely eliminated because, among other reasons, they were superfluous and confusing. Am. Law Inst. & Nat'l Conference of Comm'rs on Uniform State Laws, 1972 Official Text and Comments of Article 9 Secured Transactions and Conforming Amendments to Related Sections with Supplementary Text Showing Additions and Deletions and Statement of Reasons for Changes Made 200 (1972).

153. 1964 Preliminary Draft, supra note 147, at 17, 301-03.

154. See 17 U.S.C. § 205(c)(1) (1988) (requiring that the work be "specifically identified" so that after indexing it would be revealed by a reasonable search under its title or registration number). The provision is quoted supra note 64.

155. A blanket assignment not meeting registration or description requirements was recordable under the 1964 Preliminary Draft, but the recordation would not provide constructive notice. 1964 Preliminary Draft, supra note 147, at 310-11. The same results are reached under the Copyright Act. See 17 U.S.C. §§ 205(a), (c) (1988), quoted supra note 64.

156. Under Article 9, a description of personality is sufficient whether or not it is specific, if it reasonably identifies the personality. See 1962 Official Text, supra note 140, § 9-110. A financing statement is sufficient if it contains a statement indicating the types or describing the items of collateral. See id. § 9-402(1). Article 9 validates after-acquired property clauses. See id. § 9-204(3).
The 1963 Discussion and Comments was followed by a preliminary draft of a new copyright statute prepared by the Copyright Office accompanied by transcripts of meetings in which an advisory group of specialists discussed the draft statute (1964 Preliminary Draft). The draft statute is significant because of the opportunities it missed to discuss Article 9 or the draft statute’s preemptive scope. There was, for example, some discussion of eliminating grace periods, that is, moving to a priority rule under which filings would be effective when made and not relate back to an earlier point in time. One commentator disliked grace periods because often a transferee could not wait for the period to expire before making payment for the transfer. But payment during the grace period exposed the transferee to the risk that an earlier executed transfer to a different transferee would be recorded before the period expired. Real estate recording statutes, not Article 9, were cited as examples of statutes under which filings were effective when made.

Another commentator wanted to be sure that under the new copyright statute a filing in the Copyright Office would override registration or recording requirements under state statutes. This query practically in-

157. 1964 Preliminary Draft, supra note 147, at III. It also included comments by letter.
158. Some aspects of the 1964 Preliminary Draft are discussed supra notes 136-38, 141, 143, 145 and accompanying text. In addition to the developments mentioned in the text, the 1964 Preliminary Draft indicates that “transfers of copyright ownership” would be defined “elsewhere” to include “mortgages or discharge thereof.” See 1964 Preliminary Draft, supra note 147, at 16 n.13.
159. 1964 Preliminary Draft, supra note 147, at 301-02, 306; see also Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. of the Judiciary, 90th Cong., 1st Sess. 1233 (1967) [hereinafter Hearings on S. 597]. Many commentators assumed grace periods were desirable, and focused on their appropriate length. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION; PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 260-61 (Comm. Print 1964); Hearings on S. 597, supra, at 1233. Ultimately, it was determined that the grace period should be one month for a transfer executed in the United States and two months for a transfer executed outside the United States. See 17 U.S.C. § 205(d) (1988), quoted supra note 64. These grace periods were thought to “represent a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bona fide transferee to rely on the record at any particular time.” MCCLELLAN, SENATE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION; REPORT TOGETHER WITH ADDITIONAL AND MINORITY VIEWS TO ACCOMPANY S.1361, S. REP. No. 983, 93d Cong., 2d Sess. 163 (1974).
160. Real estate law also was cited for the proposition that failure by a filing officer to reveal a person’s interest in property to a title searcher does not defeat the rights of the person whose interests was not revealed. 1964 Preliminary Draft, supra note 147, at 308. Article 9 did not expressly deal with the issue. See 1962 Official Text, supra note 140, § 9-407.
161. 1964 Preliminary Draft, supra note 147, at 303. The proposed language was “[r]ecordation of a document in the Copyright Office shall be deemed to give all persons constructive notice of the facts stated in the recorded document. . . .” Id. at 17 (emphasis
quires as to what will be the preemptive effect of the proposed statute on state transactional law. We find no response to this concern in the record. The draft statute's wording regarding constructive notice was adopted in substantially the same form by the Copyright Act.\textsuperscript{162}

The first copyright law revision bill, introduced in Congress during July, 1964,\textsuperscript{163} contained a definition of "transfer of copyright ownership."\textsuperscript{164} A House Committee print contained discussions and comments concerning the bill 1964 \textit{Discussion and Comments}.\textsuperscript{165} One commentator, Edward A. Sargoy, may have recognized that the state law of personal property security was moving rapidly to a security interest concept under which creditors did not encumber collateral by taking title or by employing the old forms of secured transactions.\textsuperscript{166} Although Sargoy did not mention Article 9 by name or use its terminology, this is the closest explicit recognition of Article 9 anywhere in the Copyright Act's legislative history. Sargoy commented as follows:

Hypothecation was probably intended to be covered under transfer of ownership of copyright. . . . Since there are variations among the states as to whether, how, and when legal title passes in the course of hypothecations, it would be preferable that the definition of "transfer of copyright ownership" . . . expressly include any form of hypothecation, a very important factor in copyright. "Hypothecation" added). The commentator wondered:

whether you had given any thought to these State statutes which, purely as a matter of hampering the exercise of rights under a copyright throughout the State, impose registration requirements that duplicate what has already been filed in the Copyright Office. Have you given any thought here to a provision within the power of Congress (and Congress certainly does have the power) to provide that once this information is filed in the Copyright Office, it need not be filed anywhere else in the United States? You say here it is constructive notice, but you don't spell that out. I had assumed that when you refer to recordation as providing constructive notice, you mean constructive notice to all citizens of the fifty States, as well as to the citizens of the United States. I just think that might be spelled out clearly.

\textit{Id.} at 303.

\textsuperscript{162} See 17 U.S.C. § 205 (1988), quoted \textit{supra} note 64.


\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess.; Copyright Law Revision; Part 5; Revision Bill with Discussions and Comments} (Comm. Print 1965) [hereinafter \textit{1964 Discussion and Comments}] (referring to § 54 of the bill). Previously, the 1964 \textit{Preliminary Draft} had stated in a footnote that "transfers of copyright ownership would be defined elsewhere to include transfers made by means of assignments or exclusive licenses, mortgages or discharges thereof, trust indentures, corporate mergers, or decrees of distribution, but not including non-exclusive licenses." 1964 \textit{Preliminary Draft}, \textit{supra} note 147, at 16 n.13.

\textsuperscript{166} Edward A. Sargoy was the chair of the committee authoring the \textit{A.B.A. Report} that nine years earlier contained the call for improving the federal copyright law's application to secured financing. \textit{See supra} text accompanying notes 109-13.
is a broader term and would be preferable to the much more limited word "mortgage."”

That Sargoy was thinking about secured transactions is reinforced by his next sentence where he suggested consideration be given to a federal system of foreclosure rather than depending on "varying and diverse systems of state foreclosure."”

The 1964 revision bill was modified in light of the discussion and comments and a new bill was introduced in February, 1965. The term hypothecation was included in this bill’s definition of “transfer of copyright ownership,” which is identical to the definition finally enacted in the Copyright Act. In his report concerning the bill (Register’s 1965 Supplementary Report), the Register of Copyrights explained that this definition was intended to “dispel any doubts as to whether mortgages or other hypothecations . . . come within the definition of a 'transfer of copyright ownership.'”

In addition to marking the end of work on the inclusive definition of “transfer of copyright ownership” now contained in Copyright Act, the year 1965 also marks the substantial completion of section 205’s constructive notice provision. Work on the section’s priority provisions substantially was completed the following year. Coincidentally, 1965 was the year Grant Gilmore published his ground-breaking two volume treatise on personal property security law.

167. 1964 Discussion and Comments, supra note 164, at 306. Prior to this comment, a representative from the Copyright Office participating in a meeting concerning the 1964 revision bill had indicated that the word conveyance included mortgages or mortgage discharges. See id. at 144. Ultimately the term mortgage was added to the definition. See 17 U.S.C. § 101 (1988).

168. 1964 Discussion and Comments, supra note 164, at 306. This suggestion was renewed at Hearings on S. 597, supra note 159, at 1233. Concern for the lack of federal foreclosure procedures was initially expressed in the A.B.A. Report, supra note 108. The suggestion that the copyright statute should establish a federal foreclosure system was not legislatively acted upon because it was believed that "the benefits of such a system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established." ROBERT W. KASTENMEIR, COPYRIGHT LAW REVISION; REPORT TO ACCOMPANY H.R. 4347, H.R. REP. NO. 2237, 89TH CONG., 2D SESS., 118 (1966). MCCLELLAN, SENATE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION; REPORT TOGETHER WITH ADDITIONAL VIEWS TO ACCOMPANY 22, S. REP. NO. 473, 94TH CONG., 1ST SESS. 106 (1975).


170. Register’s 1965 Supplementary Report, supra note 147, at 69.

171. Id.

172. See 3 KAMINSTEIN, supra note 92, at 489. Subsequent changes did not affect the provision’s central thrust that recordation of a document would provide constructive notice only if the copyright which is the subject of the document is registered and the work is specifically identified. Id. at 491, 495-96, 501.

173. Id. at 491, 500.

174. 1 GILMORE, supra note 34.
In 1975, the Register of Copyrights summarized progress relating to the developments of the proposed Copyright Act's definitions and provisions relating to transfer and ownership as follows:

With respect to the definitions, these have evolved slowly, and in some cases torturously over the legislative process.... I don't recall that there was any extensive challenge to any of the language in 101....

[D]uring the prelegislative period in the current revision program, particularly between 1961 and 1965, the provisions on ownership and transfers of copyright were the subject of close scrutiny, some hot debate, and a great deal of tortuous drafting and redrafting. Almost every provision in chapter 2 represents a compromise of one sort or another.... However;... by the time the bill reached the stage of hearings in 1965, most of the disagreements were either resolved or on the way to being resolved. After painstakingly reviewing chapter 2... and after adopting some amendments, the subcommittee produced a chapter on copyright ownership and transfer together with a definitive legislative report that have remained unchanged and virtually unchallenged for nearly 10 years.175

This summary may be a reasonably accurate characterization of the copyright law revision process during Phase I which led to section 101's definition of "transfer of copyright ownership" and section 205's constructive notice and priority provisions.176 It also is clear that Article 9, possibly the most significant development in the Anglo-American law of personal property security since Twyne's Case,177 figured hardly at all in the close scrutiny, hot debate, and tortuous drafting.

**JUDICIAL RESPONSES TO CONGRESSIONAL AMBIGUITY**

Congress provided no statutory guidance in the Copyright Act concerning the relationship of its transactional provisions with Article 9 of the U.C.C. or other state commercial law. As the legislative history makes clear, it is entirely possible that the predictable intersection between Article 9 and the transactional provisions of the Copyright Act was missed by everyone involved in the twenty year drafting effort. Instead of grappling with the transactional preemption issues as it did with substantive preemp-

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176. Others may view these developments as having been less controversial. See Litman, *supra* note 94, at 888. According to the *1964 Preliminary Draft, supra* note 147, at 300-01, there were very few comments on the first proposed statutory language concerning assignments, recordation, etc.

177. Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601).
tion, Congress obscurely permitted persons to file documents "pertaining to copyright" in the Copyright Office and specified some rules to apply to certain transfers. The failure to address the preemption issues implicit in the new Copyright Act's transactional provisions resulted in uncertainty and, ultimately, judicial decision making to resolve them. In this part, we examine that latter history for the light it sheds on the legislative process.

It is unclear as an empirical matter how lending practice reacted to section 205 of the new Copyright Act, if there was a reaction at all. There was little contemporary scholarship about how one would perfect a security interest in intellectual property under the new statute. Some of what existed at the time suggested some uncertainty about the mesh between Article 9 and the new Copyright Act. This apparent dearth of interest in the question may reveal either an economic insignificance to the transactions or a very highly specialized and inaccessible law practice.

In the mid-1980s, judicial decisions held that Article 9 compliance was adequate to perfect security interests in patents and trademarks against a bankruptcy trustee asserting the rights of a hypothetical lien creditor. Those cases attracted commentators' attention and may have suggested to some that the same analysis could be extended to copyrights despite statutory differences.

Surprisingly, courts did not determine the relationship between federal and state transactional law governing exchanges of copyrights until 1990 when California federal courts handed down National Peregrine, Inc. v. Capitol Federal Savings & Loan Ass'n (In re Peregrine Entertainment, Ltd.) and Official Unsecured Creditors' Committee v. Zenith Products, Ltd. (In re AEG Acquisition Corp.). Both cases involved lenders who took security interests in their debtors' copyrighted films and related collateral and attempted to perfect those security interests by properly complying with Article 9 of the U.C.C. In both cases the courts held that compliance with the re-

178. For a brief discussion of Congress's contrasting approach to substantive preemption, see supra text accompanying notes 52-61.

179. Prior to enactment of the Copyright Act, Leon Kaplan, Literary and Artistic Property (Including Copyright) as Security: Problems Facing the Lender, 19 LAW & CONTEMP. PROBS. 254 (1954), was the major work on protecting a security interest in intellectual property. Following enactment, the initial major commentary on the scene was a student note, William W. Chip, Note, Transfers of Copyrights for Security Under the New Copyright Act, 88 YALE L.J. 125 (1978). Ultimately, commentators recommended compliance both with the Copyright Act and Article 9. See authority cited infra note 222.

180. See, e.g., Chip, supra note 179, at 132.


quirements of Article 9 was ineffective because its provisions were preempted by those of the Copyright Act.\textsuperscript{184}

In \textit{Peregrine}, the debtor gave as collateral a "library of copyrights, distribution rights and licenses to approximately 145 films, and accounts receivable arising from the licensing of these films to various programmers."\textsuperscript{185} The secured party took a broad security interest and filed financing statements in state filing offices but filed nothing in the Copyright Office.\textsuperscript{186} When the debtor later became debtor in possession in a Chapter 11 bankruptcy,\textsuperscript{187} it challenged the security interests as being unperfected because the creditor had not made federal filings with the Copyright Office.\textsuperscript{188} If the security interest were unperfected, the debtor in possession in the bankruptcy process would have priority in the copyrights and receivables over the secured creditor.\textsuperscript{189}

The \textit{Peregrine} court had to first determine whether the security interest was perfected, and then resolve the priority contest between the lender and the debtor in possession.\textsuperscript{190} Neither determination was easy, as neither the federal nor state statutory provisions were sufficiently unambiguous to point to a clear answer.\textsuperscript{191}

The perfection question depended on the propriety of a state filing to perfect a security interest in federal copyrights and related collateral. This question, according to the court, hinged on whether the Copyright Act's filing provisions in section 205 supplanted those of the U.C.C. for this kind of collateral.\textsuperscript{192} As discussed earlier, the Copyright Act's filing provision permits recording of "any transfer of copyright ownership or other document pertaining to a copyright" in the Copyright Office, but does

\textsuperscript{184} \textit{Peregrine}, 116 B.R. at 199; \textit{AEG Acquisition}, 127 B.R. at 40.

\textsuperscript{185} \textit{Peregrine}, 116 B.R. at 197.

\textsuperscript{186} The security interest extended to "[a]ll inventory consisting of films and all accounts, contract rights, chattel paper, general intangibles, instruments, equipment, and documents related to such inventory, now owned or hereafter acquired by the debtor ..." \textit{Id.} at 198 n.3. The documents went on to further elaborate on the breadth of the security interest being taken. \textit{Id.}

\textsuperscript{187} 11 U.S.C. §§ 1101-1174 (1988). For the definition of debtor in possession, see § 1101(1).

\textsuperscript{188} \textit{Peregrine}, 116 B.R. at 198.


\textsuperscript{190} \textit{Peregrine}, 116 B.R. at 199-204.

\textsuperscript{191} In an area such as secured financing in copyrights where Congress and states both have an arguable claim to controlling law, Congress could reduce uncertainty by making clear (as it did with substantive preemption) the breadth of its control over the field. Similarly, states could reduce uncertainty by explicitly deferring broadly to federal law. Because of the likelihood that states will continue to control many underlying questions despite substantial federal involvement, preemption problems will always be with us. \textit{See supra} text accompanying notes 25-29.

\textsuperscript{192} \textit{Peregrine}, 116 B.R. at 198-200.
not mandate a filing or otherwise state the requirements for taking a security interest in a federal copyright. The creditor, therefore, maintained that compliance with the filing requirements of either the copyright or the Article 9 system would suffice to defeat the debtor in possession in the Chapter 11 case. The court rejected this argument, holding that the federal system was preemptive of the state system. Because Congress was silent on resolving this predictable controversy, the court looked to the structure and policy of the Copyright Act to decide whether “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”

The support for federal preemption had three legs. First, the court maintained that the alternative, permissive filing in either a federal or state office, was bad commercial policy. Second, the court believed that federal filing was, on balance, more certain than state filing. Finally, the court thought that the differing priority systems of the U.C.C. and the Copyright Act meant inevitable state interference with the federal scheme. Each of these points is worth examining.

The court’s first proposition, that parallel recording systems are undesirable and therefore, by implication, Congress intended the copyright system to be preemptive was interwoven with its second, that federal filing was, on balance, more certain. The general thrust of the argument was that lenders should be able to determine what they need to know at one clearly defined place, not two or three. Given the Copyright Act’s permissive filing provision, the supposedly indeterminate nature of state filing, and the undesirability of multiple filing systems,
the court thought that preemptive federal filing was the best solution. 202

The assumption that federal, rather than state, filing is the most cost effective solution to this aspect of the preemption problem may be true only in the marginal case; whether federal or state filing is the most economical depends on the character of typical transactions and on lenders' actual activities with respect to risk assessment. 203 There are no data about how lenders actually conduct their businesses or assess and control risk in these circumstances.

The point is not that the court advanced insufficient support with respect to these two justifications; rather, it is that assumptions about business activity embedded in judicial reasoning have unknown validity as an empirical matter. Courts simply are not equipped to survey or ascertain business practices and needs; these are tasks better performed by a legislature. 204 By failing to attempt to clarify the preemption issues in the legislative process, Congress created interim uncertainty and ultimately threw the preemption decision to the courts, whose prospects for formulating sound policy in this complex commercial area are inferior to a legislature's. 205

The Peregrine court's third point, that the Copyright Act had a separate and different priority system from the U.C.C., and that by implication they cannot coexist without interfering with federal policy, reflected a challenge to judicial decision making from a different direction. 206 Congress could create a regime that would permit the two secured financing systems to mesh and interact. Indeed, it is possible that Congress, which requires two different filings in some cases to perfect a security interest. See Ky. Rev. Stat. Ann. § 355.9-401 (Baldwin 1983); Mo. Ann. Stat. § 400.9-401 (Vernon Supp. 1992); 13 Pa. Cons. Stat. Ann. § 9401 (1984); Wyo. Stat. § 34.1-9-401 (1991).


203. If, for example, security interests in copyrights are almost never taken without "state" collateral (trade secrets, contract rights, goods, accounts receivable, etc.), exclusive federal filing will tend to mean state and federal searches and state and federal filings in each transaction even though only a federal filing is necessary to perfect the interest in copyrights. On the other hand, if creditors typically examine federal copyright files to determine ownership and the nature of the debtor's interest, federal filing—whether permissive or mandatory—will add little cost to the underlying transaction because the lender will be searching the federal file anyway. There is no data which reveals what sorts of transactions and business activities are "typical" when debtors seek to use their copyrights as collateral. See generally Weinberg & Woodward, supra note 33, at 79-84 (discussing advantages and disadvantages to various reform proposals).

204. Cf. Heald, supra note 2, at 967-69.

205. It may be appropriate in some cases for Congress to dodge a difficult political issue in order to get legislation passed and it may be that the question whether the U.C.C. or federal law should govern secured financing in copyrights was such a question. If this was the case, however, Congress left no trace either of the impasse or of recognition that there was one.

despite its silence on the subject, expected the federal and state filing systems to operate at the same time. The problem here is that any planned interaction of the Copyright Act's transaction filing system and Article 9's notice filing system would be extraordinarily complex and would call for numerous judgments concerning the best rules to govern various priority contests. Once again, this is functionally a legislative matter. A court that considers the future implications of its decision for other cases is not equipped to map out the complex interaction in a judicial decision.  

In light of the court's concern with congressional intent behind the new copyright statute, the complexity of the interaction issues, and the statutory silence on the preemption issue, the court in Peregrine may have been forced to the decision that federal law broadly preempted state commercial law, whatever may have been the intent of Congress on the issue. There simply may have been no alternatives that did not overtax judicial competence. Indeed, the most disturbing and controversial aspect of the decision—that federal preemption extended to the security interest in receivables resulting from the copyrights—may have been inevitable as well. The challenge in Peregrine was to the security interest in the copyrights and related receivables which actually would have been "general intangibles" if Article 9's definitions were operable. The court swept the receivables into its analysis early in the opinion by observing merely that an agreement creating a security interest in the receivables from a copyright is a "document pertaining to a copyright" which could be filed in the Copyright Office. Having thus enabled the secured party seeking a

207. City Bank & Trust Co. v. Otto Fabric, Inc., 83 B.R. 780 (Bankr. D. Kan. 1988), and In re Transportation Design & Technology, Inc., 48 B.R. 635 (Bankr. S.D. Calif. 1985), involved clashes between state-filed secured creditors and trustees in bankruptcy challenging their security interests as unperfected due to their lack of filing in the patent office. Both courts ruled for the secured lender. The Patent Act contains provisions governing various priority contests which are similar to (albeit less extensive than) those in the Copyright Act. Thus, in that context, one could argue that the differing priority provisions of Article 9 could interfere with the federal scheme as well. Neither of these courts, however, considered the broader priority systems of which the disputes before them were but a part. Indeed, it would probably be impossible for a court to determine with any confidence how the Patent Act and Article 9 would interact in any but the most simple priority contest. For example, as between a state filed Article 9 security interest and a later, federally filed patent mortgage in the same patent, who would win? The courts in these two cases did not look beyond the trustee-secured creditor contest before them. Had they considered the broader interaction of the two statutes, their decisions might have been different. See infra text accompanying notes 208-15.


209. U.C.C. § 9-106 limits "accounts" to "right to payment for goods sold or leased or for services rendered." "General Intangibles" picks up that collateral not covered by other definitions. Id.

security interest in copyright receivables to file with the Copyright Office, a focus on the receivables themselves disappears. The remainder of the analysis simply applied to the receivables as well as to the copyrights themselves.\footnote{211}

Given the alternatives available, the court may have been left with no decision other than federal preemption as to receivables. Suppose, for example, that a secured party wishing to use a debtor's receipts as collateral took a security interest in present and after-acquired accounts and general intangibles (including receivables resulting from licensing copyrights) and filed in the correct state office on February 1. Then, a year later, suppose the debtor gave a security interest in copyrights and the receivables resulting from those copyrights to a second secured party which filed in the Copyright Office. Suppose then that the copyrights began generating receivables, the debtor succumbed financially, and a contest developed between the two secured parties on the rights to income generated by the copyrights.

There are several ways of resolving such a priority question. The *Peregrine* court offered a first method of resolution. It felt that a state filing simply does not reach copyright receivables and awarded the income to the federally-filed party.\footnote{212} A second approach would be to give the state system some play and to award priority to the state creditor who filed first. This would put into place a first-to-file rule across the two systems.\footnote{213} The difficulty of articulating a source for such a first-to-file rule to apply across both the federal and state systems militates against this approach as a palatable solution.\footnote{214} A third approach would give priority to the first secured party on the theory that the federal filing was ineffective to protect a security interest in copyright receivables.

The problem with the third approach is that it devalues the copyright office filing. If a federal filing did not reach the receivables generated by federal copyrights, the Copyright Office would offer considerably narrowed protection for the collateral inasmuch as licenses are an important way of exploiting intellectual property.\footnote{215} A rule giving effect to a state

\footnote{211. Id.}

\footnote{212. Id. at 201 (discussing how a state filing system would be inadequate with regard to copyright receivables).}

\footnote{213. See U.C.C. § 9-312(5)(a) for Article 9's first-to-file rule.}

\footnote{214. A property-based justification for a first-to-file rule—that the first secured party wins because the debtor already had conveyed the property to him and, consequently, conveyed nothing to the second secured party—makes little sense for after-acquired collateral such as the accounts generated here. The proposition that the debtor cannot convey what he or she does not own (and consequently the first secured party wins) also defeats the first secured party because the debtor did not "own" the after-acquired collateral when he or she conveyed it. The federal and state systems are entirely different conceptually, see Weinberg & Woodward, *supra* note 33, at 72-79, and they defy non-legislative meshing with one another.}

\footnote{215. Indeed, as if to underscore the point, the Copyright Act permits infinite subdivision of interests in a copyright and confers standing to sue on each holder of such an interest. 17 U.S.C. § 201(d) (1988).}
filing covering receivables of federal copyrights could, in effect, require lenders to search and file both in the federal and state office to get protection for the full value of the copyrighted collateral.

The Peregrine court's decision on the receivables in the context of the hypothetical is a recognition that the receivables are integral to the value of the underlying copyrights and that federal law must cover them if federal filing is to be meaningful. This seems the most sensible resolution for a priority contest involving two secured parties. But Peregrine was not like the hypothetical. It involved a contest between the debtor in possession (with the powers of a trustee in bankruptcy) and the Article 9 secured creditor, not a contest between two secured parties perfected under different systems. Might the court have simply resolved that problem without looking ahead to priority contests not before it?

Even though neither the statute nor the legislative history suggests that Congress consciously considered this priority contest in particular, the available evidence suggests an intent to broadly cover security interests (even if that terminology was not used) and an intent that the federal file contain as much information as possible about the legal status of federal copyrights. Moreover, a rule broadly devaluing the rights of lien creditors vis-à-vis secured parties and others is unprecedented in secured financing and would probably be bad policy at both state and federal

216. See supra notes 63-177 and accompanying text.
217. See supra text accompanying notes 108-74.
218. See supra text accompanying notes 118-56.
219. Article 9 of the U.C.C. makes a proper filing good against lien creditors and most secured parties. Instances in which an improper filing defeats only later lien creditors are rare and narrowly drawn. See, e.g., U.C.C. §§ 9-103(1)(d)(i), 9-103(3)(e); cf. § 9-301(2) which gives only purchase money secured parties priority over earlier lien creditors and then only for a limited period of time.
220. While judgment creditors who employ state law collection machinery to obtain their liens are not “reliance creditors” in the sense that they consult the secured financing files before they extend credit, state legislatures have compelling reasons not to subordinate their interests vis-à-vis other kinds of claimants. Lien often are claimants who pursued the litigation system to judgment and then deployed usually costly execution proceedings to obtain a lien on the debtor's assets. The value of a civil judgment in the state litigation system depends partly on the viability of the state's collection system and the ability of claimants through that system to obtain priority through its use.

As if to underscore the point, during the 1980s, California and several other states enacted legislation designed to strengthen the ability of the holder of a civil judgment to get a lien. Those judgment creditor liens generally defeat later Article 9 secured parties and, in some cases, even defeat preexisting secured parties. See William J. Woodward, Jr., New Judgment Liens on Personal Property: Does "Efficient" Mean "Better"?, 27 HARV. J. ON LEGIS. 1, 18-27 (1990). In the zero-sum game in which a priority system operates, improving the protection for secured lenders at the expense of "lien creditors" has a direct impact on the value of civil judgments. It is thus not surprising that state secured financing law contains little precedent for a rule that improperly filed financing statements defeat lien creditors but not others.

221. Even if one believed that secured lending interests could persuade a state legislature to develop a system that singled out lien creditors for subordinate treatment vis-a-vis secured
levels. If Congress had thought about this specific question, it probably would have legislated consistently with the view in *Peregrine*.222

The fact that the *Peregrine* court may have decided the case consistently with congressional intent is, on balance, of little solace to those interested in optimal systems for secured lending and intellectual property because the preemptive federal law is primitive and impedes secured financing as compared with Article 9. This can be seen most readily in *AEG Acquisition*.223

In *AEG Acquisition*, the debtor was a film library which held the copyrights and related assets in some 100 motion pictures. The debtor's predecessor gave its creditor, Zenith, rights in two foreign films and one domestic film as security for a loan. Zenith filed in state U.C.C. offices. It also filed copyright mortgages for each of the three films in the Copyright Office but filed a copyright registration for only the domestic film in the Copyright Office. Failing to register the two foreign films was fatal to the security interest in those films, despite both the federal and state filings.224 Copyright registration was central to Zenith's case because the Copyright Act conditions effective recordation on registration.225 The provision provides that "[r]ecordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if . . . (2) registration has been made for the work."226

Zenith maintained that the Berne Convention,227 an international copyright convention to which the United States was a party, excused its com-

creditors, such a state system would directly affect the bankruptcy system. Federal bankruptcy's viability depends in direct part on the extent and validity of state liens recognized in bankruptcy and recognition of a subordinated lien creditor rule would reduce the estate's power to avoid other competing interests in the bankruptcy context. See Woodward, supra note 220, at 27-35. Inasmuch as Congress is responsible for the bankruptcy statute as well as the copyright statute, it seems unlikely that Congress would have intended a copyright system that would have singled out the lien creditor (read "trustee in bankruptcy") for special subordinated treatment with respect to competing secured lenders.

222. As indicated earlier, several courts have held that an Article 9 filing defeats a bankruptcy trustee in the patent and trademark area. See supra notes 42-46 and accompanying text. Those courts made no attempt to consider the priority implications of their decisions beyond the specific dispute before them. What now remains is uncertainty and debate about what rules would be applicable in contests involving, for example, a state filed secured party and a later federally filed secured party or a state filed secured party and a buyer. The advice that has followed this uncertainty is to use both systems to perfect a security interest in patents or trademarks. See, e.g., Nimmer & Krauthaus, supra note 21, at 208, 211; Thomas L. Bahrick, *Security Interests in Intellectual Property*, 15 A.I.P.L.A. Q. J. 31, 42, 45 (1987); Engel & Radcliffe, supra note 21, at 12, 21.


224. Id. at 41-42.

225. Legislative history concerning the relationship of the registration requirement to recording can be found supra text accompanying notes 129-56.


pliance with the registration requirement. The court rejected the argument and the upshot was that the federally filed mortgages were ineffective to perfect Zenith's security interest in the two foreign films. The court took *Peregrine* as a point of departure for its decision that the U.C.C. filings were ineffective to perfect the security interest.

If, as we believe, *Peregrine* and *AEG Acquisition* are consistent with legislative intent, it is difficult to overestimate the adverse impact Congress delivered to secured financing in the Copyright Act. Apart from the uncertainty that resulted from failure to address the preemption issues, the federal approach to secured financing, held in *Peregrine* to be preemptive, is a relatively cumbersome transaction filing system. *Peregrine* implied that a proper federal filing would perfect an interest in receivables resulting from a copyright. But the receivables would, under the statute as interpreted by *AEG Acquisition*, have to be the product of a registered copyright. In addition, the Copyright Act specifies that a filed document will not provide constructive notice unless it "specifically identifies the work to which it pertains." As the court in *Peregrine* observed, the system set into place by Congress would require "dozens, sometimes hundreds, of individual filings" to record a security interest in the copyrights of a film library.

The specificity requirement also means that a blanket federal filing against the debtor's receivables, present and future, would fail. This effectively may eliminate the possibility of original receivables-based financing where the receivables are generated by copyrights. There remains

228. Noting that the convention was not self-executing and that Congress created a much narrower exception to the registration requirement in the implementing legislation, the court was unpersuaded by Zenith's claimed exception. *AEG Acquisition*, 127 B.R. at 41.

229. *Id.* at 42.

230. *Id.* at 40-41.

231. For a discussion of transaction and notice filing systems generally, see 1 *Gilmore*, *supra* note 34, §§ 15.1-15.3.


236. The specificity requirement might well require a filing against the receivables of each copyright and would require a continuing series of registrations (and perhaps filings) as new copyrights arose. Those that finance on the basis of accounts receivable are not interested in scrutinizing individual transactions; accounts receivable financing under Article 9 involves one filing at the place of the debtor's business. Given the registration and specificity requirements in the Copyright Act, it is unlikely that receivables resulting from copyrights would be attractive as original collateral to a traditional receivables financier. Similarly, if (as is likely) the borrower were required to pay the lender's search and compliance costs, these costs would be sufficiently high relative to most loans to make them unworkable.
copyright-based financing that presumably would reach receivables as “proceeds” of the copyrights but that, too, is a cumbersome process.\textsuperscript{237}

Congress’s failure to embrace modern financing concepts in the Copyright Act is itself lamentable. What has made matters far worse is that the Copyright Act also replaced with its Nineteenth Century approach modern financing concepts applicable to copyrightable intellectual property that were actually in place prior to the Copyright Act. This is because Congress temporally expanded federal copyright back from the point of publication under the 1909 Copyright Act to the point in time where the work was “fixed in a tangible medium of expression” under the Copyright Act.\textsuperscript{238} If, as we believe, \textit{Peregrine} and \textit{AEG Acquisition} are correct interpretations of congressional intent, much of the copyright financing that used to be controlled by state law and Article 9 of the U.C.C. is now controlled by federal law and, therefore, by far more primitive principles.

One result of this expansion may be to sharply reduce or eliminate the possibility of using creative work in progress as collateral for a loan. Consider, for instance, a debtor that creates valuable intellectual property in stages, for example, an author whose work is produced over time or through different drafts, or a movie studio that produces a film from daily shootings.

Under the pre-1976 law, federal copyright protection could attach only at the time of publication of the completed book or movie.\textsuperscript{239} At that point, a debtor could grant a lender a security interest in his or her federal copyright, presumably through the federal system.\textsuperscript{240} Prior to that point under the old law, the debtor would have had a common law copyright in his or her creative work—in drafts of a book or daily prints of a movie. That interest, a “general intangible” under Article 9 parlance, could serve as collateral for a loan.\textsuperscript{241} Because the lender’s interest could extend to after-acquired property, one Article 9 filing would have sufficed to protect the collateral through all stages of creative development, up until the point of publication when the federal interest could attach and, presumably, federal law would displace Article 9.

\textsuperscript{237} See generally Weinberg & Woodward, \textit{supra} note 33, at 113-18.

\textsuperscript{238} See \textit{supra} text accompanying notes 48-63.

\textsuperscript{239} There was an exception for certain unpublished works which could receive federal protection if they were registered. \textit{See supra} notes 64-177 and accompanying text. Many authors of unpublished works did not seek protection under this provision. \textit{See Copyright Studies, supra} note 114, at 26-27.

\textsuperscript{240} For purposes of this example, it can assumed that federal copyright law prior to 1976 was as preemptive as the courts in \textit{Peregrine} and \textit{AEG Acquisition} said it was under the 1976 Copyright Act. This may not be a safe assumption as the court in \textit{Peregrine} suggested that the new law was more preemptive than the old because the new copyright law had a more well-developed priority system in place. To the extent the old law gave more play to Article 9 when both systems could apply to the same security interest, the argument in the text becomes stronger.

\textsuperscript{241} U.C.C. § 9-106.
Under newly extended federal copyright protection, each daily addition to the book, each draft of the book, each daily print of scenes of the movie would be "fixed in a tangible medium of expression" and therefore be protected by federal copyright. Once federal copyright protection attaches, common law copyright would end. While this was a good development from the perspective of substantive intellectual property law and probably made the intellectual property more valuable, the effect under *Peregrine* and *AEG Acquisition* is to substantially impair financing based on intellectual property during its development stage. Those cases together hold that one must register copyrighted intellectual property before a perfected security interest can be obtained. This requirement of repeated registration makes it very costly to utilize work in progress as collateral for a loan, and probably makes such collateral unavailable except in larger transactions.

In enacting the Copyright Act, Congress wanted to enhance the value of copyrightable intellectual property over what had existed under the 1909 Copyright Act. Yet it not only missed an opportunity to advance its goal by embracing modern financing ideas, but it also devalued intellectual property by displacing modern state law financing with an approach of a bygone era. It compounded both defaults by failing to address the transactional preemption questions its legislation raised, thus throwing the decision to a judiciary less equipped than Congress to decide policy issues. This result seems incredible given the nearly twenty years of study preceding the Copyright Act, and paradoxical given a central legislative thrust to enhance the value of copyrights. The next part reflects more broadly on this history.

**LESSONS**

This survey of the federal legislative process preceding the Copyright Act indicates a disturbing neglect of the prospective effect of its lawmaking on well-established state commercial law. This legislative history teaches that Congress was indeed acutely aware of substantive preemption and faced those issues in the copyright legislation itself. By contrast, it seemed only vaguely aware of transactional preemption and unaware of the competing state commercial financing system which its legislation would affect. By failing to understand and address the transactional preemption issues in the legislation, Congress left those complex issues for resolution by the judiciary after a sustained period of uncertainty. And because the Copyright Act extended the protection of federal copyright to a much earlier

242. See supra text accompanying notes 48-63.
point in the creative process, Congress replaced much modern state financing law with a cumbersome, outmoded system. In the process, Congress may have made it nearly impossible to use creative work in process as collateral.\textsuperscript{244}

The long process preceding the Copyright Act represents not only a missed opportunity to wring some of the complexity and expense out of financing based on federal copyrights, but also the infliction of positive harm by effectively dismantling Article 9 financing for creative works in progress. These results are, of course, directly at odds with a main underlying purpose of the copyright legislation—to modernize the law of copyrights in order to make them more valuable.

Collaboration among intellectual property and commercial lawyers finally began in early 1990 in an attempt to remedy the many problems involved in financing based on intellectual property collateral.\textsuperscript{245} We have considered the underlying policy questions in this area of financing elsewhere and will not reiterate them here.\textsuperscript{246} Rather, we want to advance here some questions and observations about a legislative process that achieves these results in the commercial arena and offer some suggestions for avoiding them in the future.

It is obvious that there is a central need in the legislative process to confront preemption issues, particularly if the federal legislation may have an impact on commercial law.\textsuperscript{247} Uncertainty and unpredictability usually mean commercial risk and risk simply adds non-productive costs to transactions. When there is uncertainty about what law applies, risk-averse parties will comply with all possible governing regimes and drive up their costs of doing business. While there will, of course, always be some areas of uncertainty where federal and state law collide, Congress demonstrated in its preemption formula for substantive state intellectual property law\textsuperscript{248} that it is capable of facing these difficult questions and developing tests.

\textsuperscript{244} See \textit{supra} text accompanying notes 240-43.

\textsuperscript{245} The ABA Section of Business Law's Committee on Technology and Intellectual Property created a Task Force on Intellectual Property Financing comprised of business lawyers and liaison members from the ABA's Patent, Trademark, and Copyright Section.

\textsuperscript{246} See generally Weinberg & Woodward, \textit{supra} note 33 (discussing conflicts between federal and state filing systems and possible reforms).

\textsuperscript{247} It is possible that during the legislative process someone thought of Article 9, but because of the complexity and political sensitivity of meshing the two regimes together, the issue was buried. If this was the case, it was a very effective burial because there were no traces left.

While no one could determine empirically whether it would be better to have a transactionally defective copyright statute sooner than a transactionally improved copyright statute later, the justification would have to be strong indeed to support a conscious ducking of commercial preemption issues.

\textsuperscript{248} The statutory provision of the Copyright Act is quoted \textit{supra} note 55.
that can reduce substantially the areas of uncertainty.\textsuperscript{249} Plainly, our economic system can be more competitive in a global economy by reducing nonproductive costs of doing business.

Before Congress can confront preemption issues intelligently, it must obtain more information about the otherwise applicable state system. Here, again, there has been major failure. Examination of the legislative history suggests a remarkable lack of awareness of the relevance of Article 9 for the Copyright Act revision process. The revolutionary approach that Article 9 brought to secured financing at the state level should have been central in congressional deliberations about which approach Congress should take to secured financing based on copyrights. Whether Congress would have chosen to defer to Article 9, to use it as a model for a federal approach, or to reject its approach entirely, Article 9's existence at the state level and its incompatibility with the older transaction-based system made a more pressing need to address the preemption questions directly. While we cannot explain the absence of discussion of Article 9 in the legislative history, its absence obviously underscores the necessity of ensuring that those concerned with state law become involved with federal lawmaking and vice versa.\textsuperscript{250}

Yet the problem lies not only with the formal legislative process. The congressional process that led to the Copyright Act was preceded by nearly ten years of pre-legislative activity beginning at the American Bar Association and ending with the Copyright Office.\textsuperscript{251} The effort involved many lawyers and academics. Commercial lawyers and academics apparently did not perceive the significance of evolving copyright legislation for personal property financing, and copyright lawyers and academics apparently did not see the significance of the Uniform Commercial Code for secured financing. This speaks volumes about legal specialization and the need for cross fertilization both within the formal legislative processes and in professional organizations such as the American Bar Association. The Copyright Act is not, of course, an isolated instance of federal law having a preemptive

\textsuperscript{249} While the courts in \textit{Peregrine} and \textit{AEG Acquisition} broadly preempted state law, they cannot be criticized for leaving the law less certain than it was before their decisions. To the extent the opinions are authoritative (the authority of \textit{Peregrine}, a district court opinion, and \textit{AEG Acquisition}, a bankruptcy court opinion, inevitably will be questioned; there is nothing a court can do to reduce uncertainty from this source), they leave no doubt that if a federal copyright is involved, federal law will control.

\textsuperscript{250} If financing on the basis of intellectual property historically was handled by the intellectual property bar and if intellectual property lawyers and other business lawyers have little contact with one another, that might explain this curious history. The bar may well be balkanized if the American Bar Association is any indication. Following the decisions in \textit{Otto Fabric} and similar cases, see \textit{supra} text accompanying notes 178-81, the ABA's Intellectual Property Section worked for several years on legislation to bring financing based on patents and trademarks out of Article 9 and into the federal system. Although the effort was open and public, it took the ABA's Section of Business Law more than two years to learn of it.

\textsuperscript{251} See \textit{supra} text accompanying notes 108-56.
effect on state commercial law. In 1965, Grant Gilmore described several pieces of major federal legislation with impact on Article 9\textsuperscript{252} and claimed that "[t]hese statutes pose intricate and difficult problems with respect to the interrelationship of state and federal law and the jurisdiction of state and federal courts—problems which remain largely unsettled and indeed unexplored."\textsuperscript{255} Congress has since shown an increasing tendency to legislate in commercial areas\textsuperscript{254} and commentators predictably have complained about the uncertain scope and preemptive effect of federal legislation in the commercial fields.\textsuperscript{255} Because federal law in the commercial area is interstitial in nature,\textsuperscript{256} difficult preemption issues are to be expected any time Congress legislates against the backdrop of state law.

The extent to which federal legislation should displace state commercial law typically is a complex and difficult policy question. Once this displacement question is resolved for a given piece of legislation, stating the preemption decision in clear and useful statutory language presents a significant drafting challenge. Yet, as this Article argues, ducking the issue or resolving it with inadequate information probably has negative economic consequences for those in business who must operate with added

\begin{itemize}
\item 252. Gilmore included the Ship Mortgage Act of 1940, the Civil Aeronautics Act, the Interstate Commerce Act, and the Patent and Copyright Acts as impacting on Article 9. 1 Gilmore, supra note 34, at 401-02.
\item 253. Id. at 402.
\item 256. Gilmore quotes Hart and Wechsler as follows:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

1 Gilmore, supra note 34, at 402 (quoting HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)).
\end{itemize}
uncertainty. While no legislative process will ever detect and solve every preemption problem, the history of the Copyright Act suggests that there is vast room for improvement. If the preemption issues that are inevitable in a federal system are to be addressed effectively, mechanisms to improve the chances that such issues will be raised for intelligent resolution during the legislative process must be considered.

There is no doubt that there are many possibilities for improving the quality of the process that leads to federal commercial legislation. The New York legislature, for example, has long used the services of its Law Revision Commission\textsuperscript{257} to ensure that proposed enactments would not be at cross purposes with the state's commercial activity. There is no direct analogue at the federal level despite an increasing tendency to enact legislation affecting commercial law. Major enactments such as the Bankruptcy Code and the Copyright Act are, of course, preceded by extensive study by experts. But, if the Copyright Act is typical, the experts may be too narrowly selected. Additionally, less extensive legislation such as the Food Security Act\textsuperscript{258} is not subject to comparable study. The New York model might be promising for consideration by Congress.

A somewhat less ambitious approach that might have promise would be simply to develop closer communication—either formal or informal—between federal lawmakers and their state counterparts. Fortunately, improving communications between federal and state lawmakers in the commercial area is made easier because much commercial law is contained in the U.C.C. which is developed centrally under the auspices of the National Conference of Commissioners of Uniform State Laws (NCCUSL).

Closer communication in the intellectual property area has begun already within the American Bar Association as intellectual property and business lawyers are working together to develop an optimal approach to intellectual property financing. This effort will feed into the Article 9 revision process and virtually guarantees that any federal and state legislative recommendations will be consistent with one another and that they will include guidance on the preemption issues that permeate the area. At this time, it seems very unlikely that legislation which finally resolves the intellectual property financing problems will suffer from large areas of uncertainty over what is the applicable law.

An institutional effort within NCCUSL to improve lines of communication would escape unnecessary bureaucratization, a complex congressional committee system, two-party politics, and election year turnover. The organization could, for example, create an office whose job it would be to monitor proposed federal legislation for potential impact on state commercial legislation and, with the help of bar association volunteers,\textsuperscript{257} This and similar study groups made extensive recommendations to their legislatures regarding enactment of the U.C.C. See sources cited supra note 105.


257. This and similar study groups made extensive recommendations to their legislatures regarding enactment of the U.C.C. See sources cited supra note 105.
determine what sorts of impact might be forthcoming.\footnote{259} Once potential impact was assessed, the office then could be responsible for alerting Congress to the potential problems and, again with volunteers from the Bar, work to achieve optimal solutions. It should be obvious that an effective effort here will require the office to spend time developing good working relationships with members of Congress and their staffs. Because NCCUSL has representatives from all states and from a myriad of economic sectors, a representative from that organization potentially has a political neutrality seldom achieved by those who work with Congress. That neutrality could go a long way in establishing needed credibility.\footnote{260}

Some improvement probably is possible even short of an actual office within NCCUSL. Several Articles of the U.C.C. presently are either under study or being redrafted. Drafting committees and study committees could be expected to work more closely with appropriate bodies concerned with federal law to insure minimal conflicts with federal law. For example, the Article 8 drafting committee is consulting with the Securities and Exchange Commission. Similarly, a drafting committee for Article 9 could be expected to work not only with those involved with federal intellectual property law but also with those groups interested in federal bankruptcy law. While such an effort would not perform the federal law monitoring function that an actual office within NCCUSL could, it can help insure that

\footnote{259} Currently, NCCUSL has access to a volunteer "Hot Line," a loose organization of lawyers from different states who have volunteered to monitor state legislation for non-uniform amendments to the U.C.C., to help with the U.C.C. enactment process, and to share information about the commercial statute with persons in other states. It certainly would be possible to harness this energy to assist in developing analysis of proposed federal legislation.

\footnote{260} The intention is not to advocate an office that necessarily will lobby for state law instead of federal law. Federal legislation is enacted for a myriad of reasons and a person who lobbied against federal legislation simply because it was federal would not develop the credibility in Washington needed to be effective. Rather, we envision an office that would become recognized in Washington as of high quality and effective in alerting Congress to unnecessary preemption problems and, more generally, to the relationship its draft legislation may have with commercial law. To the extent Congress determined that preemption was necessary, the office could assist in drafting preemption provisions which reduced doubt about which law was applicable in given situations. Moreover, with a broad range of commercial law experts at its disposal, the office could contribute to improvement of federal legislation by commenting on the compatibility of the terms used in proposed federal legislation with their state law counterparts and, more generally, on the effectiveness of the legislation's language in achieving the Congressional objectives.

It should be obvious that this or any other comparable effort will not be cheap. For this solution, credibility would require that an experienced lawyer or academic staff the office, optimally on a long-term basis, and the office would require support personnel, space, equipment, etc. Yet, put into perspective, clearly it would be money well spent. For this example, even the most extravagant estimate of yearly costs is dwarfed by the yearly extra transaction costs borrowers generally sustain in grappling with an uncertain copyright transactional system. Perhaps the Copyright Act was an anomaly; however, if it was not, then investing resources into a better relationship between federal and state law makers could deliver substantial economic dividends.
decisions made for revising the uniform statute will not conflict with federal interests.

Our federal system has the tremendous benefits of local lawmaking and individual experimentation.\(^2\) Because there are competing sources of law, however, the system is more prone to uncertainty about applicable law. In the business area, uncertainty simply adds costs to transactions and in a competitive world economy, increased transaction costs resulting from federalism puts the United States at a disadvantage. More certainty in financing based on intellectual property will inure to the advantage of borrowers who pay the costs their lenders sustain in reducing uncertainty. The blemished history of the Copyright Act of 1976 suggests quite strongly that focused attention on the coordination of federal and state lawmaking in the commercial area is long overdue.

\(^2\) These values are in tension with uniformity of the law and easy access to it. See F. Stephen Knippenberg & William J. Woodward, Jr., Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda, 45 Bus. Law. 2519 (1990). Whether we can maintain a federalized approach in the commercial arena despite increased globalization of business remains to be seen.