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CREDITORS' RIGHTS ISSUES IN COPYRIGHT LAW: CONFLICT AND RESOLUTION*

Charles Shafer†

Although preferring voluntary payment from debtors, creditors must often compel the sale of debtors' property to satisfy debts. Ordinarily, state law controls the acquisition of a judgment or a security interest, and federal law controls when there is a federal tax lien or a bankruptcy proceeding. However, if the debtor's property to be sold is a copyright, both federal and state creditors' law must be reconciled with federal copyright law. The author briefly reviews recent developments in both creditors' and copyright law, discusses areas in which creditors' rights law and the Copyright Act conflict, and suggests resolution of these conflicts by considering the underlying rationale of the laws, emphasizing the Copyright Act's purpose of providing authors with a sufficient monopoly to encourage creativity.

I. INTRODUCTION

The drafters of the United States Constitution, recognizing the significance of creativity, granted to Congress the power to give "Authors" exclusive rights in their "writings."¹ The drafters also recognized that only a monopoly sufficient to encourage socially useful creativity was necessary and therefore provided that the exclusive rights should exist for only a "Limited Time."² Pursuant to this constitutional grant, Congress enacted a copyright statute, the current version of which gives creators not only exclusive rights in their works but also the power to sell those rights.³ As a property right which the author may sell, a copyright is also a right which creditors of the owner should be able to use in satisfaction of the owner's debts.⁴

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1. U.S. CONST. art. I, § 8, cl. 8. The term "author" includes artists, composers, choreographers, and other creators. The term "writings" includes records, films, paintings, statues, and other works. See Copyright Act of 1976, 17 U.S.C. § 102(a) (Supp. IV 1980). In this article, any reference to "author" includes all creators of copyrightable works.

2. U.S. CONST. art. I, § 8, cl. 8.

3. Copyright Act of 1976, 17 U.S.C. § 201(d) (Supp. IV 1980). The copyright statute has been periodically revised since originally enacted by the first Congress. Prior to the 1976 Act, the most recent thorough revision had been in 1909. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5738-39 [hereinafter cited as House Report with page citations to [1976] U.S. CODE CONG. & AD. NEWS].

4. The fact that a copyright may be seized makes it of more, not less, value to the owner. The availability of the copyright as an asset increases the net worth of the owner, to which creditors look when deciding whether to extend credit, even if unsecured.

Issues involving creditors' use of copyrights have surfaced in few recorded cases.⁵ Perhaps one reason for this dearth of cases is that the value of literary and artistic property has only recently been great enough to warrant widespread use of copyrights to satisfy debts or to resort to litigation.⁶ It is more likely that conceptual and procedural difficulties arising from the conflicting federal and state statutes have limited the apparent usefulness of copyright to creditors.

Creditors' rights and responsibilities are governed by a variety of federal and state statutes. When a creditor procures an agreement from a debtor allowing the creditor to keep or sell named property upon the debtor's default, the creditor is secured and his⁷ rights and obligations, as well as priorities between creditors, are controlled by state Uniform Commercial Code (UCC) provisions.⁸ When a judgment creditor⁹ seeks satisfaction by sale of the debtor's property, his duties and the procedures for such sale are ruled by other state statutory provisions.¹⁰ In cases involving the federal government as a creditor, federal statutes such as the Tax Lien Act¹¹ mandate still other procedures upon default¹² and often afford the government a higher priority as to the

5. The only reported cases which deal with creditors' attempts to satisfy obligations by the sale of copyrights are the following: *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852) (execution sale of engraving did not pass title to copyright); *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963) (local lien law notwithstanding, unpaid manufacturer of copyrighted goods may not sell those goods without court determination that failure to pay was unjustified); *Republic Pictures Corp. v. Security-First Nat'l Bank*, 197 F.2d 767 (9th Cir. 1952) (state courts have jurisdiction over copyright foreclosure); *In re Leslie-Judge Co.*, 272 F. 886 (2d Cir.) (copyrights can only be mortgaged under federal law), *cert. denied sub nom. Green v. Felder*, 256 U.S. 704 (1921); *Kingsrow Enterprises, Inc. v. Metromedia, Inc.*, 397 F. Supp. 879 (S.D.N.Y. 1975) (sheriff's sale of films does not constitute sale of copyrights); *Independent Film Distribs., Ltd. v. Chesapeake Ind., Inc.*, 148 F. Supp. 611 (S.D.N.Y. 1957) (court questions but does not resolve potential conflict between state created lien on motion pictures and Copyright Act), *rev'd on other grounds*, 250 F.2d 951 (2d Cir. 1958); *In re P.H. McBride & Co.*, 132 F. 285 (S.D.N.Y. 1904) (court deals with assignability of copyright by bankruptcy trustee).

6. See Note, *Transfers of Copyrights for Security Under the New Copyright Act*, 88 YALE L.J. 125, 125 nn.2 & 4 (1978).

7. The use of any gender in this article shall include the other gender, whenever appropriate.

8. The UCC, prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, has gone through a number of revisions, the most significant being the revisions of Article Nine in 1972 and Article Eight in 1977, with conforming amendments throughout the Code. This last revision is referred to as the 1978 Official Text.

9. A judgment creditor is "one who has obtained a judgment against his debtor, under which he can enforce execution." BLACK'S LAW DICTIONARY 980-81 (4th ed. 1968).

10. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. §§ 11-401 to -503 (1980 & Supp. 1982); MD. R.P. 619-628, F1 to G61.

11. I.R.C. §§ 6321-6326 (1976 & Supp. IV 1980).

12. *Id.* § 6322 (1976).

debtor's property.¹³ Finally, if the debtor seeks relief under the bankruptcy laws, the formalities and priorities relevant to use of the debtor's property to satisfy obligations are governed by the federal Bankruptcy Act.¹⁴ In any of these situations, if the property to be sold is a copyright, compliance with the federal Copyright Act's provisions regulating the transfer of copyright ownership¹⁵ may be mandated. Since copyright law and creditors' rights law have developed independently and serve different purposes, it is difficult to reconcile the resulting conflicting provisions.

This article reviews recent developments in both creditors' and copyright law, cites and examines many of the conflicting statutory provisions, and discusses the problems presented by these conflicts. The author suggests resolution of these conflicts by emphasizing the underlying constitutional purpose of copyright legislation: providing authors with a sufficient monopoly to encourage creativity.

II. BACKGROUND: RECENT STATUTORY DEVELOPMENTS

Much of what has been written on this topic predates significant changes in the law.¹⁶ Three major components of the relevant law have undergone complete statutory revision.¹⁷ First, the rights of secured creditors are now governed by Article Nine of the Uniform Commercial Code (hereinafter referred to as Article Nine),¹⁸ a statute which has been in effect in most states for only about twenty years.¹⁹ Prior to its

13. *Id.* § 6323.

14. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1160 (Supp. IV 1980).

15. Copyright Act of 1976, 17 U.S.C. §§ 201-205 (Supp. IV 1980).

16. The scholarly literature on the subject consists of the following: I G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 410-16, 542-46 (1965); Bramson, *Intellectual Property as Collateral—Patents, Trade Secrets, Trademarks and Copyrights*, 36 BUS. LAW. 1567 (1981); Concoff, *Motion Picture Secured Transactions Under the Uniform Commercial Code: Problems in Perfection*, 13 U.C.L.A. L. REV. 1214 (1966); Ditto, *Musical Copyright as Collateral in Secured Transactions*, 19 COPYRIGHT L. SYMP. (ASCAP) 219 (1971); Freeman, *The Copyright as a Security*, 12 J.B.A. KANSAS 257 (1944); Kaplan, *Literary and Artistic Property (Including Copyright) as Security: Problems Facing the Lender*, 19 LAW & CONTEMP. PROBS. 254 (1954); Note, *Copyright as Collateral in a Secured Transaction*, 39 ST. JOHN'S L. REV. 90 (1964); Note, *Creditors' Rights Against Interests in Patents and Copyrights*, 26 VA. L. REV. 1038 (1940); Note, *Transfers of Copyrights for Security Under the New Copyright Act*, 88 YALE L.J. 125 (1978).

17. Only one component, state law concerning the rights of unsecured creditors, continues to change at a glacial pace. However, these changes, to the extent they are intelligible, tend to lessen the obstacles a creditor must face in using a copyright to satisfy a judgment. See text accompanying notes 113-33 *infra*.

18. In 1972, thirty-five states adopted revisions of Article Nine. UNIF. COMMERCIAL CODE, I U.L.A. 1 (Supp. 1982). Many states have adopted non-uniform provisions. For a compilation, see the state correlation tables, U.C.C. Rep. Serv. (Callaghan) (Supp. 1982).

19. Prior to 1960, only Pennsylvania and Massachusetts had adopted the UCC. By 1968, all states except Louisiana had adopted the Code. Louisiana adopted Arti-

enactment it was questionable whether a copyright was susceptible to a security interest, which of the forms of security interests would be appropriate, and what method of perfection was appropriate. To further complicate the problem, the result varied from state to state. Now, however, under Article Nine, a copyright is classified as a "general intangible" which may be the subject of a security interest.²⁰ Regardless of what a transaction was termed prior to the adoption of Article Nine, the term "security interest" now applies to all transactions in which personal property secures an obligation,²¹ and filing an Article Nine financing statement perfects a security interest in all general intangibles.²² Article Nine is virtually uniform national law.²³

The second revision involved the passage of the Bankruptcy Reform Act of 1978.²⁴ The substantive law of bankruptcy which relates to copyrights changed very little. A copyright can be property of the bankruptcy estate which the trustee may sell in liquidating the estate to satisfy creditors.²⁵

Finally, copyrights themselves have been the subject of a thorough statutory revision. The Copyright Act of 1976, which went into effect on January 1, 1978, is the first revision of the federal copyright laws in seventy years.²⁶ Significant in the area of creditors' rights are the aspects of the new law relating to the creation and transfer of copyrights.

Under the previous version of the Copyright Act, federal copyright protection usually began with the "publication" of a work.²⁷ Before publication, an author often had state law protection, which was called common law copyright.²⁸ The new Copyright Act has virtually eliminated common law copyrights. Now every author has a federally protected copyright in a work as soon as it is "fixed in any tangible medium of expression."²⁹ An author need not register or obtain any certification in order to obtain a copyright in a work. For example, although the author has no federally protected copyright in thoughts

cles One, Three, Four and Five in 1975, UNIF. COMMERCIAL CODE, I U.L.A. 1 (1976), and Articles Seven and Eight in 1978. *Id.* (Supp. 1982).

20. U.C.C. § 9-106. Issues involving copyrights must be distinguished from assignments of payments due for the sale of copyrights. Such an assignment would be of a general intangible, but state law regarding assignments would govern rather than the Copyright Act.

21. *Id.* § 9-102 comment 1.

22. *Id.* § 9-302.

23. *See* note 18 *supra*.

24. 11 U.S.C. §§ 101-1160 (Supp. IV 1980).

25. *See* text accompanying notes 171-81 *infra*.

26. *See* House Report, *supra* note 3, at 5660.

27. Copyright Act of 1909, 17 U.S.C. §§ 10, 24 (1976) (repealed 1976). Publication was generally defined as distribution of copies of a work to the public. *Id.* § 26.

28. 3 M. NIMMER, NIMMER ON COPYRIGHT § 2.02, at 2-16-17 (1982). The term is misleading in that some states also had statutes governing "common law" copyrights. Absent a statute, however, case law often served to protect an author's unpublished work. *Id.*

29. Copyright Act of 1976, 17 U.S.C. § 102(a) (Supp. IV 1980).

told to a friend, he does have a copyright when those thoughts are placed on paper. However, the author must place a copyright notice on the work if it is published. This notice consists of the word "copyright" or the symbol C, the year of the publication, and the name of the copyright owner.³⁰ If a work is published without such a notice, the work may be considered to be in the public domain, which means it has no copyright protection.³¹ A copyright can be registered in the Copyright Office by depositing the work and completing an application.³² Although registration is not necessary for a work to have copyright protection, it is necessary to record ownership transfers and to obtain relief for infringements.³³

The revisions regarding transfers of copyrights are particularly significant in the area of creditors' rights. Under the old Copyright Act there was some question as to the legitimacy of an author's selling only some of the rights secured by a copyright.³⁴ The new Act explicitly provides that an author may sell one or more of the rights secured by a copyright and reserve to himself other rights.³⁵ Therefore, the author may grant to a publisher the rights to produce and sell a book and may grant to a studio the right to produce a movie based on that book.

The grant of a security interest is explicitly included within the term "transfer of copyright ownership" as used in the Copyright Act.³⁶ All such ownership transfers can be recorded in the Copyright Office.³⁷ That recordation gives all persons constructive notice of the transfer only if the document "specifically identifies the work . . . [and] registration has been made for the work."³⁸ Hence recordation is ineffective if the work is unregistered.

The statute continues to have one priority provision to resolve disputes between conflicting transferees. The old Copyright Act essentially provided that if a transfer was not recorded within three months of execution, it would be subordinate to a later good faith transfer which was duly recorded.³⁹ The new Act provides:

30. *Id.* § 401.

31. *Id.* §§ 401, 405.

32. *Id.* § 408(a).

33. *Id.* §§ 205(c), 411, 412.

34. See House Report, *supra* note 3, at 5738-39.

35. Copyright Act of 1976, 17 U.S.C. § 106 (Supp. IV 1980).

36. Actually, the copyright statute defines a transfer to include a "mortgage" or "hypothecation." *Id.* § 101. It is puzzling that the statute does not use the one term by which Article Nine designates all such transactions, to wit, "security interests."

37. *Id.* § 205(a).

38. *Id.* § 205(c).

39. The old Act provided that

[e]very 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, without notice, whose assignment has been duly recorded.

As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice . . . at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such 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.⁴⁰

Two provisions of the new Copyright Act which provide protection to authors and may have significant implications in the creditors' rights area are a nonwaivable right of termination⁴¹ and a prohibition of certain involuntary transfers.⁴² The new right to terminate transfers essentially allows an author to terminate or revoke a transfer of rights thirty-five to forty years after the original grant was executed.⁴³ The author must give at least two years, and no more than ten years, notice of his intention to terminate the grant.⁴⁴ The Act prevents waiver of this right.⁴⁵ The rationale is that the author is in an unfair bargaining position since he cannot predict the value that a work will have many years in the future.⁴⁶ Therefore, he should not be allowed to sell those future rights.

The right of termination is a substitute for the old Act's renewal provision, under which a copyright had a duration of twenty-eight years with a right of renewal.⁴⁷ An author who sold rights in a work actually sold those rights for only twenty-eight years. This led to the practice of selling the right of renewal along with the copyright, and courts recognized the validity of the sale of the renewal right.⁴⁸ Since the right of termination is now nonwaivable, that right should not suffer the same fate as the right of renewal.

The second innovation in the Copyright Act is the provision preventing involuntary transfers.⁴⁹ This provision prevents copyrights from being seized by governmental units:

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official organi-

Copyright Act of 1909, 17 U.S.C. § 30 (1976) (repealed 1976).

40. Copyright Act of 1976, 17 U.S.C. § 205(e) (Supp. IV 1980).

41. *Id.* § 203(a)(5).

42. *Id.* § 201(e).

43. *Id.* § 203(a)(3).

44. *Id.* § 203(a)(4).

45. *Id.* § 203(a)(5). "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." *Id.*

46. See House Report, *supra* note 3, at 5740.

47. Copyright Act of 1909, 17 U.S.C. § 24 (1976) (repealed 1976).

48. *E.g.*, Fisher Music v. Witmark & Sons, 318 U.S. 643 (1943).

49. Copyright Act of 1976, 17 U.S.C. § 201(e) (Supp. IV 1980).

zation purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect⁵⁰

The purpose of the section is to prevent governments from silencing dissidents by seizing the copyrights to their works.⁵¹ The drafters of the section were particularly concerned with possible action by Communist governments. Arguably, if a government seized the copyright, the government could then rely on the International Copyright Convention to prevent dissemination of the work in other countries. It has been pointed out that this statutory remedy was unnecessary for the feared evil.⁵² As written, the provision may have serious implications in the area of creditors' rights since seizure of a copyright by any government official to satisfy a debt may be precluded.⁵³

Although this ends the discussion of the Copyright Act provisions which are most significant to creditors, there is one relevant aspect of copyright law which is not present in the statute. This concept is *droit moral*, moral right. The civil law countries provide a cause of action for violation of an author's *droit moral* to obtain redress for deformation of the artist's work.⁵⁴ The law recognizes that an artist may have a continuing interest in the presentation of his work despite his surrender of all economic interest in the work. American courts have not explicitly recognized a moral right.⁵⁵ However, courts have found a variety of conventional theories which can be used to vindicate that right. For example, a contractual retention of control could be implied into the copyright grant.⁵⁶ A distorted presentation of the author's work could be classified as a misrepresentation to the audience on which the author is financially dependent. Also, when a work is distorted but still published under the original author's name, courts can find a misstatement of source,⁵⁷ redress for such misstatement may be had under section 43(a) of the Lanham Act,⁵⁸ the federal unfair competition law.

In the area of creditors' rights, the implications of the moral right concept are important. This concept highlights the difference between

50. *Id.*

51. See House Report, *supra* note 3, at 5739.

52. 3 M. NIMMER, NIMMER ON COPYRIGHT § 10.04, at 10-41 (1982).

53. See text accompanying notes 49-51 *supra*.

54. Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act — A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377, 379 (1980).

55. *Id.* at 377. But see *Gilliam v. ABC*, 538 F.2d 14, 23-24 (2d Cir. 1976) (recognizing that courts have granted relief for misrepresentation of an artist's work based on theories outside the statutory law of copyright).

56. See, e.g., *Gilliam v. ABC*, 538 F.2d 14, 21 (2d Cir. 1976) (agreement interpreted as reserving to author the authority to prevent revisions of work); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (contractual duty to attribute work implies duty not to distort work).

57. See, e.g., *Gilliam v. ABC*, 538 F.2d 14, 24-25 (2d Cir. 1976).

58. 15 U.S.C. § 1125(a) (1976).

a copyright and other types of property, such as a carload of steel coils. Both are property which can be used to satisfy debts. Surely the manufacturer of the coils would be saddened to see them seized, but presumably he has no continuing interest in what happens to them. The author or artist may see his work as an extension of himself and may feel as strongly as a parent feels about a child regarding the treatment of the work. Second, although the Copyright Act does not recognize the moral right, the fact that courts find ways to give expression to the moral right may influence the result reached where copyright law is ambiguous. Having reviewed the recent developments in creditors' law, as well as specific Copyright Act provisions and concepts, it is important to address specific conflicting provisions with regard to secured, unsecured, and government creditors.

III. SECURITY INTERESTS IN COPYRIGHTS

A. *State-Federal Conflicts*

Since problems involving secured transactions and copyrights are controlled by two comprehensive statutes, both of which were recently enacted, it is surprising that there is much confusion in the interplay of these federal and state laws. It appears, however, that the drafters of the Copyright Act gave little thought to security interests and that the drafters of Article Nine gave little thought to copyrights.

As this conflict involves federal and state legislation, it is important to consider the federal preemption doctrine, which requires that when Congress has legislated pursuant to a constitutional grant, state law may not controvert federal law.⁵⁹ If, however, the federal statute does not resolve a particular issue, it may be permissible to resort to state law. State law can have effect only if the constitutional grant to Congress does not preclude any state legislation.⁶⁰ Copyright is such an area.⁶¹ However, any state law which does deal with copyright issues cannot stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶² This issue was addressed in a case in which a state law prevented "blind booking" of film rights by film distributors.⁶³ Blind booking requires theatre owners to commit themselves to the showing of films before actually seeing them and, therefore, affects profits earned. Since profitable distribution of

59. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

60. *Goldstein v. California*, 412 U.S. 546, 559 (1973). The Court cited *The Federalist* for the three instances in which the constitutional grant to the federal government is deemed exclusive: (1) the Constitution expressly states that the grant is exclusive; (2) the Constitution expressly limits state authority; and (3) state law would be inherently contradictory of any national law. *Id.* at 552-53 (citing *THE FEDERALIST* No. 42, at 305 (B. Wright ed. 1961)).

61. *Id.* at 559.

62. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), cited with approval in *Goldstein v. California*, 412 U.S. 546, 561 (1973).

63. *Allied Artists Picture Corp. v. Rhodes*, 207 U.S.P.Q. (BNA) 630 (S.D. Ohio 1980).

films is also made possible by copyright protection, it was argued that the state law which impeded such distribution interfered with the Copyright Act.⁶⁴ The court, however, determined that the state statute did not undermine any congressional purpose and, therefore, upheld the law.⁶⁵

The preemption doctrine is explicitly incorporated into the Copyright Act by section 301 which preempts any state law which both deals with subject matter within the scope of the Act and provides rights equivalent to copyright.⁶⁶ The preemption doctrine is also included in Article Nine which expressly provides that it does not apply "to a security interest subject to any statute of the United States, to the extent that such statute governs rights of parties to and third parties affected by transactions in particular types of properties."⁶⁷ This provision adds nothing to the law since, even without it, state law could not conflict with federal law regarding federally created rights.⁶⁸ The difficult question, however, is determining the extent to which state law may be resorted to in resolving particular issues when copyright law is ambiguous or nonexistent.

Security interest problems usually involve two issues: enforceability, whether the secured party obtains rights in the property against the debtor; and perfection, whether the secured party has rights against third parties such as purchasers of the collateral or other secured parties. Both the Copyright Act and Article Nine have provisions relating to those two issues.⁶⁹

B. Obtaining a Security Interest

As indicated earlier, the provisions in the Copyright Act governing a transfer of ownership also govern a grant of a security interest.⁷⁰ Ownership of a copyright may be transferred by "any means of conveyance"⁷¹ but is not valid unless "an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner."⁷² The requirement of a writing appears also in Article Nine.⁷³ The required writing, however, is a "security agreement" defined as a document "which creates or provides for a security interest."⁷⁴ There is

64. *Id.* at 655.

65. *Id.* at 650-51.

66. Copyright Act of 1976, 17 U.S.C. § 301(a) (Supp. IV 1980).

67. U.C.C. § 9-104(a).

68. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

69. Copyright Act of 1976, 17 U.S.C. §§ 201-204 (Supp. IV 1980) (transfers of ownership); *id.* § 205 (recording and priorities); U.C.C. §§ 9-201 to -204 (enforceability); *id.* §§ 9-301 to -318 (perfection and priorities).

70. See note 36 and accompanying text *supra*.

71. Copyright Act of 1976, 17 U.S.C. § 201(d) (Supp. IV 1980).

72. *Id.* § 204(a).

73. U.C.C. § 9-203(1)(a).

74. *Id.* § 9-105(1)(1).

some dispute as to whether a security agreement must contain a granting clause which explicitly creates the security interest.⁷⁵ If Article Nine is interpreted as necessitating such a clause, then the state law requirements for the creation of a security interest are stricter than the Copyright Act's transfer provision requiring merely a memorandum.⁷⁶ One writer has interpreted the Copyright Act's reference to a memorandum to mean that even a subsequent confirmation in writing of a prior oral agreement validates the grant *ab initio*.⁷⁷

It could be argued that the Article Nine rules cannot prevail since they conflict with the Copyright Act. Congress has explicitly provided a more lenient memorandum requirement. In fact, the requirement appears to be significantly more lenient than the old Copyright Act which required "an instrument in writing signed by the proprietor."⁷⁸ Opting for the Article Nine requirement would produce the apparently anomalous result that the procedure for sale of a copyright is simpler than for creating a security interest. However, the language of the Copyright Act does support an argument that it sets forth only the minimum requirements and that states may impose additional requirements for particular types of transfers.⁷⁹

The most convincing argument to resolve this dispute is that imposition of the state requirements does not conflict with the congressional purpose of creating a valuable property right for authors. The state law does not dilute the value of the copyright and thereby discourage creativity; instead, it protects the copyright owner. Lending parties aware of the Article Nine requirements in advance can, with no additional cost, comply with them. The apparent anomaly is explained by the fact that a sale usually accompanies greater evidence of intent since the buyer begins to use the copyright immediately, whereas a lender takes no visible action until foreclosure. Therefore, it is reasonable to require better documentation for the grant of a security interest.

One additional Article Nine requirement not found in the Copy-

75. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-3, at 904-10 (2d ed. 1980).

76. Copyright Act of 1976, 17 U.S.C. § 204(a) (Supp. IV 1980).

77. 3 M. NIMMER, NIMMER ON COPYRIGHT § 10.03[A], at 10-34 (1982).

78. Copyright Act of 1909, 17 U.S.C. § 28 (1976) (repealed 1976). *But see* Khan v. Leo Feist, Inc., 70 F. Supp. 450 (S.D.N.Y.), *aff'd*, 105 F.2d 188 (2d Cir. 1947) (written assignment of copyright deemed to relate back to time of parol assignment two years earlier).

79. Section 204(a) of the Copyright Act of 1976 provides that "a transfer . . . is not valid *unless* . . ." (emphasis added). It might be argued that if Congress had intended to prevent additional state imposed requirements, the statute would have read "a transfer is valid *if*" and, therefore, it merely sets forth minimum requirements as written. Moreover, there is nothing in the legislative history indicating a desire to provide a more lenient requirement for copyright security interest documentation than state law requires for other property. In fact, the language that a copyright may be transferred by "any means of conveyance" implies that state law means of conveyance are applicable and that the transfer, therefore, would have to comply with state law.

right Act is that value must be given to create a security interest.⁸⁰ Since the definition of "value" is so sweeping,⁸¹ it is difficult to conceive of a security interest transaction that would not involve the giving of value. This requirement is more significant for dating attachment of a security interest for purposes of priority.⁸²

C. Perfection of Security Interests

Both the Copyright Act and Article Nine provide a system of recordation of ownership transfers to give notice to third parties. When that transfer is a security interest, normally the Article Nine recordation system applies. With copyrights, however, the preemption doctrine would obviate resort to a state filing system if use of such system contravenes the Copyright Act. Article Nine itself has a provision which specifically incorporates that doctrine with regard to recordation requirements.⁸³

Under the old Copyright Act, there was no problem because security interests in copyrights were subject to federal recordation even absent a prior copyright registration.⁸⁴ Under the present Copyright Act, use of the Copyright Act filing system is not always available or appropriate. There may be no copyright registration, an absolute prerequisite for a filing to be effective.⁸⁵ One instance involves a book or movie prepared in stages.⁸⁶ Each copyright registration of such a work covers only the portions prepared at the time the copyright is registered. If an

80. U.C.C. § 9-203(1)(b). The value requirement previously appeared as § 9-204 of the 1962 edition of the UCC.

81. The UCC provides that "a person gives 'value' for rights if he acquires them (a) in return for a binding commitment to extend credit . . . (b) as security for . . . satisfaction of a pre-existing claim . . . (c) by accepting delivery . . . [of] a pre-existing . . . purchase; or (d) . . . in return for any consideration" U.C.C. § 1-201(44).

82. In the Copyright Act of 1976, § 205(e) dates priority from the time the transfer is "executed." 17 U.S.C. § 205(e) (Supp. IV 1980). Section 204 is titled "execution" but it only states that a transfer is not valid without a writing. *Id.* § 204. It has also been demonstrated that a subsequent memorandum will suffice as a writing. The date of execution would not, therefore, necessarily be the date of the writing. If, for purposes of a security interest, execution occurs when the security interest becomes enforceable, it would not occur until value is given. For purposes of § 205(e), priority would date from the time value is given.

83. U.C.C. § 9-302(3).

84. Copyright Act of 1909, 17 U.S.C. § 30 (1976) (repealed 1976). Even though § 30 refers only to assignments, any doubt regarding the availability of Copyright Office recording for security interests appears to be settled by regulations providing for recordation of mortgages. Bramson, *Intellectual Property as Collateral — Patents, Trade Secrets, Trademarks and Copyrights*, 36 BUS. LAW. 1567, 1580-81 (1981).

85. The Copyright Act of 1976 provides that documents must be recorded "in the manner required to give constructive notice." 17 U.S.C. § 205(e) (Supp. IV 1980). The Act also provides that the work must be registered in order for a filing to give constructive notice. *Id.* § 205(c).

86. The practices of the movie industry are discussed in Note, *Transfers of Copyrights for Security Under the New Copyright Act*, 88 YALE L.J. 125, 128-29 (1978).

author completes five chapters of a book and has that portion registered, a subsequently completed sixth chapter would not be covered by the registration. If the sixth chapter were not registered, a security interest recordation would not cover the sixth chapter and the security interest as to that chapter would be unperfected. There are other potential situations in which a Copyright Office filing may not be appropriate to perfect a security interest. An author may feel that the work is of little value and does not require registration. A valid security interest in unregistered works and works that are not specifically identified in the recorded documents may be created.⁸⁷ However, the Copyright Act does not provide for valid perfection of these interests.

In any such situation, it would be important to determine whether an Article Nine filing is effective. The result might differ depending on whether a state adopted the 1972 amendments to Article Nine. Therefore each edition of Article Nine should be examined separately. Although a financing statement is necessary to perfect a security interest in a general intangible such as a copyright,⁸⁸ section 9-302(3) of the pre-1972 Article Nine provides, in pertinent part, "The filing provisions of this Article do not apply to a security interest in property subject to a statute (a) of the United States which provides for a national registration or filing of *all* security interests in such property"⁸⁹ Under the new Copyright Act, there are security interests that cannot be perfected by recordation. Therefore, since the statute does not provide for a national registration of *all* copyright security interests, UCC section 9-302 could be interpreted to require state recordation of all copyrights. But such an interpretation might be invalid in light of the preemption doctrine. The Copyright Act provides a clear statement that where at least one copyright transfer is recorded in the manner required to give constructive notice, that transfer has priority vis-à-vis later transfers.⁹⁰ Since that is clearly a national registration system, the UCC could be interpreted to mean that no grants of security interests in copyrights can be recorded in state files. A plausible interpretation of section 9-302(3) is that the filing provisions of Article Nine do not apply to those copyrights for which a Copyright Act filing would be effective to perfect a security interest. However, where the copyright is not registered, a UCC filing could be effective.⁹¹

87. Additionally, a business may own material that has copyright protection but which has been distributed so that it has been placed in the public domain by publication. See text accompanying note 31 *supra*.

88. The UCC defines a general intangible as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money." U.C.C. § 9-106. Comment 1 expressly includes copyrights. Section 9-302(1) lists the exceptions to the filing requirement; general intangibles are not excepted.

89. U.C.C. § 9-302(3) (1962 version) (emphasis added).

90. Copyright Act of 1976, 17 U.S.C. § 205(e) (Supp. IV 1980).

91. This argument requires defining "such property" to mean registered copyrights but not unregistered copyrights.

Article Nine may be interpreted in such a way that, absent copyright registration, a state filing may be effective. Whether this approach conforms to the copyright law has not yet been addressed by any court. If it is recognized that once a copyright is registered the federal filing system must be exclusive, the new Copyright Act can be viewed as having an anti-clutter provision which allows for two levels of copyright protection. The "federal" level is the more expensive and burdensome, requiring registration in the federal system. The "state" level is available only when the parties desire it. A security interest in a particular work which is unregistered or an unregistered addition to a work which is registered would be perfected by filing in the state system. Of course, the secured party would always take the risk that the copyright would be subsequently registered and that the later secured lender or purchaser would record in the Copyright Office. But that is a risk the secured party takes voluntarily and it is perfectly consistent with an Article Nine policy of placing the burden on the secured party to police the debtor.⁹² Moreover, such an interpretation of Article Nine and the Copyright Act would not compromise the statutory purpose of providing an artist a reasonable monopoly. It is true that reliance on state filing is risky, a risk that might translate into a lower value for the copyright. That risk, however, could be totally eliminated by registration and recordation in the Copyright Office.

The 1972 revisions of Article Nine contain language which makes it more difficult to conclude that although a state filing is ineffective if there is a copyright registration, it is of at least questionable effectiveness if there is no federal registration. The relevant language of the new section 9-302(3) reads: "The filing of a financing statement . . . is not necessary *or* effective to perfect a security interest in property subject to (a) a statute or treaty of the United States which provides for a national . . . registration . . . *or* which specifies a place of filing different from that specified in this Article"⁹³ Certainly when there is a federal registration, an Article Nine filing is neither effective nor necessary. However, the provision that a financing statement is not effective when a national registration is available or a place of filing is specified does not seem to leave open the possibility of an Article Nine filing even when there is no federal registration. It does not appear that any thought was given to the effect of this change with regard to copyrights.⁹⁴ A strained interpretation of the new section 9-302(3)(a) which would effectuate state filing when there is no federal registration is as follows: when the particular copyright is unregistered, the national filing is unavailable and, therefore, there is no place of filing specified.

92. See U.C.C. § 9-307. For example, one risk that a secured party takes is that the debtor will remove collateral from the state.

93. *Id.* § 9-302(3)(a) (emphasis added).

94. The change was made because of problems with state certificate of title laws. U.C.C. app. II § 9-302 reasons for 1972 change.

The term "registration" would need to be construed as referring only to property for which registration of all transfers of ownership are required. Since such transfers are not "registered" for copyrights but merely "recorded," the reference to registration is not relevant to copyright problems. Such an interpretation of section 9-302 is consistent with the section's probable purpose of avoiding state regulation when it is preempted.

D. Foreclosure Procedure

Although the Copyright Act recognizes the right to hypothecate a copyright, it provides no rule of procedure for the foreclosure of a security interest. Part five of Article Nine provides a law of foreclosure of security interests which is probably applicable to copyrights.⁹⁵ In 1952 the United States Court of Appeals for the Ninth Circuit decided that state courts, not federal courts, had jurisdiction over foreclosure proceedings.⁹⁶ The court rejected the contention that since federal courts had jurisdiction of any action "arising under" the copyright statute,⁹⁷ the federal courts must have jurisdiction over copyright foreclosure. The decision is based on an analogy to patent law and a presumption of "restriction on federal jurisdiction in the absence of a clear grant," resulting from the limited jurisdiction of federal courts.⁹⁸ The decision implies that foreclosure actions do not "arise under" the Copyright Act and that therefore state law controls.⁹⁹

There is a sounder basis on which to find that state law should apply: Congress recognizes security interests, so *a fortiori* there must be some procedure for foreclosure; this cannot be an area where Congress by silence meant there should be no rule.¹⁰⁰ The purpose of providing artists with a monopoly of reasonable duration would not be defeated

95. U.C.C. §§ 9-501 to -518.

96. Republic Pictures Corp. v. Security-First Nat'l Bank, 197 F.2d 767 (9th Cir. 1952).

97. Title 28, § 1338(a) of the United States Code provides, in pertinent part, that federal "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights." 28 U.S.C. § 1338(a) (1976).

98. Republic Pictures Corp. v. Security-First Nat'l Bank, 197 F.2d 767, 770 (9th Cir. 1952). See also Newman v. Crowell, 205 U.S.P.Q. (BNA) 517 (S.D.N.Y. 1979).

99. The assumption throughout a discussion of foreclosure is that the agreement creating the security interest contains a power of sale. Otherwise, the secured party would need assistance in seizing the copyright, thus implicating a discussion of unsecured creditors' rights. See notes 112-50 and accompanying text *infra*. Some security agreements neglect to include such a provision. See, e.g., Vol. 1796 U.S. Copyright Office Files, Security Agreement and Assignment of Copyrights by Topps Chewing Gum, Inc. 262 (1980). Other secured parties apparently acquire the power of sale by structuring the security agreement as an assignment of all rights to the lender with the borrower retaining rights to exploit the copyright. See, e.g., Vol. 1813 U.S. Copyright Office Files, Collateral Assignment of Rights of Orion Pictures Co. 23 (1980).

100. Even when Congress is silent, the court may construe an intent to preempt any state legislation. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

by following potentially non-uniform procedures in foreclosure.¹⁰¹ This is based on the fact that the details of the procedures of foreclosure do not impact on the nature of the voluntary transaction into which the copyright owner and his lender enter. This is particularly true since the applicable state law gives the creditor the obligation of proceeding in a commercially reasonable manner.¹⁰²

E. Right to Terminate

When a copyright is involved, secured creditors must be aware of the author's right to terminate a transfer.¹⁰³ Since the grant of a security interest is considered to be a grant of a transfer,¹⁰⁴ the termination provision applies to security interests as well as outright sales. However, the underlying rationale of the termination provision, inability to predict the copyright's value years in advance,¹⁰⁵ appears inapplicable to security interests. Upon sale of the debtor's property, secured parties are required to turn over to the debtor the amount received exceeding the amount of the outstanding debt.¹⁰⁶ Therefore, the copyright owner's inability to predict the copyright's value years in advance is irrelevant since he benefits from the increase in value. If the copyright has not substantially appreciated in value but there exists some reasonable possibility it might, the secured party should be just as reluctant as the author to sell it.¹⁰⁷ Presumably a secured lender can mitigate the harshness of the right to termination by specifying that the termination of transfer is an event of default. Since the right of termination does not arise for thirty-five years, it is doubtful that conventional secured lending transactions would be implicated.

The right to terminate does raise some questions concerning security interest foreclosure sales. Although providing that the author may terminate the transfer thirty-five years after the grant,¹⁰⁸ the statute is ambiguous as to when the thirty-five years begins to run, *i.e.*, from the date of the grant of the security interest or from the date of the foreclosure sale. This is significant for two reasons. First, if the author does not exercise his right to terminate within the specified two- to ten-year period, he loses his right.¹⁰⁹ Second, the third party who purchases the

101. Although Article Nine has been adopted in 49 states, it is conceivable that states might adopt variations which would make the procedure for foreclosure non-uniform. It is for this reason the text refers to those procedures as "potentially non-uniform."

102. U.C.C. § 9-504(3).

103. See text accompanying notes 41, 43-48 *supra*.

104. Copyright Act of 1976, 17 U.S.C. § 101 (Supp. IV 1980).

105. See text accompanying note 46 *supra*.

106. U.C.C. § 9-504(2).

107. While, in the case of a public sale, the secured party could purchase the property being sold, U.C.C. § 9-504(3), the UCC requires that all aspects of the sale, including the time, be "commercially reasonable." *Id.*

108. Copyright Act of 1976, 17 U.S.C. § 203(a)(3) (Supp. IV 1980).

109. *Id.* § 203(a)(4)(A).

copyright at a foreclosure sale must be able to determine the length of his ownership. Consider the situation where a copyright is granted as security in year one and a foreclosure sale takes place in year ten. Does the third party purchaser's absolute ownership rights extend for thirty-five years or only twenty-five? Must the author give notice of termination in twenty-five to thirty-three years from the sale or fifteen to twenty-three years from the sale?

Two arguments can be based on the statutory language to favor dating the right of termination to the date of the grant of the security interest. First, the only voluntary "grant" made by the author was the security agreement. Second, the original grant of the security interest includes within it an agreement to make a future grant, *i.e.*, the foreclosure sale; the Copyright Act's provision preventing waiver of the author's termination right includes within it "an agreement . . . to make a future grant."¹¹⁰ Thus, dating the termination right from the foreclosure sale, as opposed to the original grant, would be contrary to the spirit of the anti-waiver provision.

But the foreclosure sale could be deemed an independent grant since the author at that time does have the right to either satisfy the debt or participate in the sale.¹¹¹ Furthermore, the foreclosure sale often occurs at a time when the copyright is more fairly valued. Since the rationale for the termination provision is the difficulty of predicting the value of a literary work more than thirty-five years in advance, dating the termination right from the sale is therefore more appropriate.

IV. UNSECURED CREDITORS

If a debtor fails to voluntarily pay a creditor who has obtained a judgment, the judgment creditor is able to satisfy the judgment by sale of property of the debtor. The method and terminology for this procedure vary from state to state. The basic procedure, however, is essentially uniform. The judgment creditor obtains a writ directing an officer (usually called the sheriff) to execute on the judgment debtor's property. The officer then seizes and sells the property at an execution sale.¹¹² The issues which arise are whether copyright is a form of property which is seizable under state law, whether such seizures have effect under the copyright laws, and whether the judgment creditor has priority vis-à-vis other claimants to the copyright.

110. *Id.* § 203(a)(5).

111. *See* U.C.C. § 9-506.

112. The initial writ is variously called writ of execution, *fiery facias*, or attachment. The officer might be called a sheriff, constable or sergeant. There is also a supplementary procedure which is an outgrowth of an equitable process initiated by a creditor's bill. The creditor's bill still survives in many states although it cannot be used if property can be otherwise reached. *See* Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155 (1956-1957).

A. Amenability to Seizure Under State Law

There is reason to doubt whether a copyright is a kind of property on which the executing officer may levy. Since at one time levy always involved an actual seizure prior to sale, it is easy to understand why common law execution could not reach intangibles.¹¹³ Some intangibles have become so identified with a writing that seizure of the paper itself has long constituted seizure of the obligation it memorializes. Examples are a negotiable instrument, negotiable warehouse receipt or security.¹¹⁴ A copyright, however, is a pure intangible; the physical object which contains the copyrighted material and the copyrighted material itself are distinct forms of property. Sale of the object does not constitute sale of the copyright.¹¹⁵ Even possession of a certificate of copyright conveys no rights to the copyright.¹¹⁶ Although at common law the writ of execution would not empower the sheriff to seize the copyright, recent statutes have expanded the reach of common law execution to include intangible properties.¹¹⁷ Conceivably, therefore, a copyright could be reached by this process.¹¹⁸

Even in states where a copyright is theoretically available for seizure, the rules or statutes establishing the procedures for seizure often do not expressly provide for this type of property.¹¹⁹ This creates

113. See *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852). This is still true in at least one state. VA. CODE § 8.01-478 (1977).

114. See, e.g., U.C.C. § 7-602 (warehouse receipt); *id.* § 8-317 (securities).

115. Copyright Act of 1976, 17 U.S.C. § 202 (Supp. IV 1980). *Accord*, *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852) (sale of engraving at execution sale does not convey copyright); *Kingsrow Enterprises, Inc. v. Metromedia, Inc.*, 397 F. Supp. 879 (S.D.N.Y. 1975) (execution sale of films and copyright certificates conveys no rights in copyrights).

116. Copyright Act of 1976, 17 U.S.C. § 204(a) (Supp. IV 1980); see *Kingsrow Enterprises, Inc. v. Metromedia, Inc.*, 397 F. Supp. 879 (S.D.N.Y. 1975).

117. See, e.g., CAL. CIV. PROC. CODE § 688(a) (West 1980) ("all goods, chattels, moneys or other property"); MD. CTS. & JUD. PROC. CODE ANN. § 3-305 (1980) ("any property or credit").

118. There may be some value in relegating copyright seizure to supplementary proceedings. See text accompanying notes 130-33 *infra*. Generally, other assets would have to be seized first and supplementary proceedings allow the court some discretion in selecting property to be seized. Although states have generally abandoned efforts to control the order of seizure, see, e.g., *Steinhardt v. Russian Orthodox Catholic Mut. Aid Soc'y*, 366 Pa. 222, 77 A.2d 393 (1951), the philosophy underlying *droit moral* may support such an approach by courts in regard to copyrights.

119. For example, Subtitle G of the Maryland Rules of Procedure provides for seizure of tangible personal property and garnishment of credits belonging to the debtor. Garnishment involves a mini-lawsuit against the party owing property or money to the judgment creditor. But copyright is a kind of intangible property for which there is no appropriate garnishee because no other person owes the property to the debtor. See also MD. R.P. G40-47. Pennsylvania provides for seizure of tangible personal property, partnership interests and other intangibles by serving a garnishee. PA. R. 3108. It is clear that "intangibles" does not apply to copyrights. See PA. R. 3254, which contains the appropriate form. California provides only for the following types of property: "tangible personal property in the possession

an unfortunate gap. If the levying officer is given no procedure for seizing and selling the property, it is arguably of no value that the property is theoretically amenable to execution. However, the lack of a specific statutory procedure for levying on a copyright should not be considered fatal. A law providing that "all property" is subject to levy implies that some procedure to enforce the law must be available.¹²⁰ Conceptually there is no reason why copyrights could not be levied upon. Seizure no longer requires that the court actually take custody of the property. Even for tangible property, seizure often is no more than a symbolic act.¹²¹ Levy is better considered functionally as a process which prevents, to the extent possible, deterioration or disposition of the asset and which gives fair notice of the judgment creditor's interest to other parties contemplating obtaining an interest in the property. For this reason, seizure of a debt is often accomplished merely by giving notice to the debtor.¹²² It is perfectly acceptable, then, to consider service on the debtor of a notice specifying which copyrights are being seized as an appropriate levy.¹²³ At an ensuing sale, the officer would need only to give a receipt to the buyer.¹²⁴

The flexibility and liberal statutory interpretation promoted by the foregoing argument is illustrated by a 1960 case decided by the Califor-

of the debtor" (CAL. CIV. PROC. CODE § 688(c) (West 1980); "property or debt owed to the judgment debtor which is subject to execution but for which a method of levy or attachment is not provided" (*id.* § 688(b)); negotiable instruments and securities (*id.* § 487.010(c)); tangible personal property in possession of third party (*id.* § 487.330); and "choses in action" constituting debts in possession of a business (*id.* § 481.150). *See also* Peterson v. Sheriff of City & County of San Francisco, 115 Cal. 211, 46 P. 1060 (1896) (no method provided to execute on patent); Lowenberg v. Greenebaum, 99 Cal. 162, 33 P. 794 (1893) (no method to execute on seat on stock exchange).

120. *See* McCray v. Chrucky, 68 N.J. Super. 533, 535, 173 A.2d 39, 40 (1961) ("The courts are enjoined to regard statutes [governing execution] as remedial in nature and to construe them liberally in favor of creditors and claimants.").
121. Often the levying officer leaves the property in the hands of the debtor. *See, e.g.,* MD. R.P. G46. It has been held that "[i]t is not essential that the [levying] officer make an actual seizure. If he have the goods in his view and power and note on the writ the fact of his levy thereon, this will in general suffice." Palais v. DeJarnette, 145 F.2d 953, 954 (4th Cir. 1944) (quoting BURKS PLEADING AND PRACTICE § 366, at 619 and construing Virginia law).
122. Seizure of a debt or obligation needs to be distinguished from a garnishment in which the garnishee is required to pay money into the court. Seizure and sale of the debt at the execution sale would result in the debt being owed to the buyer. The buyer, of course, takes the risk that the debt will not be paid. *See, e.g.,* CAL. CIV. PROC. CODE § 688(b) (West 1980).
123. An analogous development is recent amendments to Article Eight of the UCC which permit the creation of "uncertificated security" in corporations. U.C.C. § 8-102(b). An attachment or levy on such securities is accomplished "by legal process at the issuer's chief executive office in the United States." *Id.* § 8-317(2). Possibly, when a copyright is registered, levy should require recording at the Copyright Office. In any event, when a copyright is registered the levy could not bind subsequent purchasers without such a filing.
124. *See* Reynolds v. Reynolds, 54 Cal. 2d 669, 671, 355 P.2d 481, 483 (1960).

nia Supreme Court.¹²⁵ A creditor had obtained a writ of execution to levy upon the debtor's property, intangibles in the form of corporate stock. The writ was served upon a corporation from which the debtor had stock certificates. The sheriff purported to sell those shares at auction despite a statutory provision that the transfer of certificates was the exclusive means of transferring shares.¹²⁶ Although the court held that the corporation could not be compelled to issue new certificates to the purchaser, the court did give some effect to the sale. The court pointed out that the sheriff's sale did transfer "all the right, title and interest" of the debtor.¹²⁷ Therefore, the purchaser became substituted to all the debtor's rights, title and interest in the shares. Thus, the corporation could pay dividends to the buyer, and the buyer could vote.¹²⁸ Of course, if the debtor had sold the certificates to a good faith purchaser, the execution buyer would have lost his rights.¹²⁹ But until then the execution buyer would have the right to locate the certificates and compel the debtor to transfer them.

The case is significant for two reasons. It distinguishes between the execution buyer's rights against the debtor and his rights against third parties, and it provides a method of reaching an asset of the debtor that is not clearly provided for by statute. Therefore, when state law provides that intangibles may be levied upon, notice from the sheriff to the debtor that a copyright is being seized should be considered sufficient even though not explicitly provided for by a statute. In the case of copyrights, when there is no certificate similar to a stock certificate, recording of the transfer at the Copyright Office should be sufficient to protect the creditor and execution buyer from claims of third parties.

If state law does not allow execution on copyrights, a creditor unable to satisfy a judgment may utilize a state proceeding supplementary to execution. In such proceedings the creditor is entitled to compel the debtor to answer questions regarding the location or existence of the property.¹³⁰ This may be of use in discovering copyrights or copyrightable materials of which the creditor may not be aware, since a search of the copyright files in the Copyright Office under the name of the debtor would produce nothing unless the copyright is registered.¹³¹ Apart from discovery, supplementary proceedings often permit the court to

125. *Reynolds v. Reynolds*, 54 Cal. 2d 669, 355 P.2d 481 (1960).

126. The provision is similar to § 8-313(7)(a) of the UCC. The situation is more relevant to copyrights since California had not adopted a provision requiring seizure of certificates for attachment or levy.

127. *Reynolds v. Reynolds*, 54 Cal. 2d 669, 682, 355 P.2d 481, 489 (1960). *See also* *McAlvay v. Consumers' Salt Co.*, 112 Cal. App. 383, 297 P. 135 (1931).

128. *Reynolds v. Reynolds*, 54 Cal. 2d 669, 682, 355 P.2d 481, 489 (1960).

129. *Id.* at 681, 355 P.2d at 488.

130. *See, e.g.*, MD. R.P. 628(a).

131. As indicated in text accompanying note 29 *supra*, the debtor may not even be aware that a federal copyright has attached to some of his works.

order the debtor to relinquish property for sale in satisfaction of the judgment.¹³² Finally, the statutes permit the court to appoint a receiver to administer the property of the debtor. Such a receiver could execute the grant necessary to sell the copyright.¹³³

B. Amenability to Seizure Under Copyright Law

It is necessary to examine the Copyright Act's provisions regulating transfers of ownership to determine whether it sanctions the methods available to judgment creditors. Two sections are particularly relevant. Section 201(d) enumerates the types of ownership transfers permitted, *i.e.*, any means of conveyance, operation of law, will, and intestate succession.¹³⁴ Section 204(a) sets forth the appropriate methods of executing such transfers, "by operation of law" or a "memorandum . . . signed by the owner."¹³⁵

When a copyright owner is compelled by a court to execute a transfer for the benefit of a creditor, the involuntary character of the transaction should not invalidate the transfer. Such a transfer involves an instrument signed by the owner and is valid under the laws of the state in which it occurred. A court-ordered conveyance would, therefore, be valid under the Copyright Act. Similarly, when a court-appointed receiver executes the transfer, presumably the law recognizes the receiver as the owner and his signature as that of the owner.¹³⁶

Conversely, when there is a sale of a copyright upon which a court official has levied, there is no instrument signed by the owner. Nevertheless, in the absence of a signed instrument, section 204(a) of the Copyright Act does provide for transfers "by operation of law."¹³⁷ Although the statute and legislative history provide no guidance as to the meaning of "by operation of law," both bankruptcy proceedings and intestate succession were apparently contemplated.¹³⁸ The validity of a

132. *See, e.g.*, MD. R.P. 628(d).

133. *See* CAL. CIV. PROC. CODE § 568.5 (West 1980); MD. R.P. 628(d). *See also* Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33, 53 P. 440 (1898) (proper for court to appoint receiver to take legal title and make conveyance); Olsan v. Comora, 73 Cal. App. 3d 642, 140 Cal. Rptr. 835 (1977) (receiver can be appointed to collect simple money judgment); Wilson v. Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 515, 24 N.E. 784 (1890) (master can assign patent); Gulf Mortgage & Realty Invs. v. Alten, 282 Pa. Super. 230, 422 A.2d 1090 (1980) (Court Rule 3118(6), stating court may grant relief deemed necessary, provides for compelling turnover of stock certificate).

134. Copyright Act of 1976, 17 U.S.C. § 201(d)(1)-(4) (Supp. IV 1980).

135. *Id.* § 204(a).

136. *See* Ager v. Murray, 105 U.S. 126 (1882) (patent can be reached by creditor's bill, based on statutory language that conveyance can be executed by owner's "legal representative"); Wilson v. Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 515, 24 N.E. 784 (1890) (master can assign patent).

137. Copyright Act of 1976, 17 U.S.C. § 204 (Supp. IV 1980).

138. Since the Copyright Act recognizes intestate succession to transfer ownership, *id.* § 201(d)(1), it is not consistent to read § 204(a), requiring a memorandum, to mean that such transfers are invalid. The language added to the involuntary

levy and sale of a copyright must also be based on the phrase "by operation of law."

This result is supported by the use of the term "operation of law" in section 201(d), which sets out the types of transfers permissible: namely by a conveyance, will, intestate succession, and "operation of law."¹³⁹ Since the statute specifies the three other forms of transfer, "by operation of law" in section 204(a) must refer to an involuntary bankruptcy proceeding and judgment creditor levy. Presumably if "operation of law" referred only to the one extremely narrow class of transfers represented by involuntary bankruptcies, Congress would have so specified.

The conclusion that the phrase "operation of law" in section 204(a) should be construed to countenance a sheriff's seizure is further supported by reference to analogous situations involving the levy of other personal rights which are subject to government regulation regarding transfers of ownerships. These involve the levy of trucking and taxicab licenses issued by state and federal agencies. Modern courts have consistently upheld the sale of such licenses.¹⁴⁰ The cases do not make clear exactly how that levy is carried out. Presumably the certificate itself is seized although there is no pretense that the certificate is as closely identified with the intangible property rights as is a negotiable instrument or security. The seizure of the certificate, however, does serve to give the debtor notice and to limit his rights to dispose of the intangible. The courts often uphold these sales despite statutory language stating the license is not property and may not be transferred without the approval of the issuing authority.¹⁴¹ The courts refuse to read statutory requirements for approval of transfers by a state board or commission to prevent execution sales. Rather, the courts merely hold that the purchase of a license at an execution sale is subject to such approval.¹⁴² Similarly, sales of copyrights would require record-

transfer provision exempting bankruptcies from that provision indicates that transfers as a result of involuntary bankruptcy proceedings are also valid. See text accompanying note 147 *infra*. Therefore a transfer as a result of an involuntary bankruptcy must also be a transfer "by operation of law."

139. Copyright Act of 1976, 17 U.S.C. § 201(d)(1) (Supp. IV 1980).

140. See *Barutha v. Prentice*, 189 F.2d 29 (7th Cir.) (trucking license issued by state sold by bankruptcy trustee), *cert. denied*, 342 U.S. 841 (1951); *Fidler v. United States*, 72-2 U.S. Tax Cas. (CCH) 9507 (N.D.N.Y. 1972) (ICC Certificate of Public Convenience properly levied upon and sold); *Mirin v. Clark County Taxicab Auth.*, 90 Nev. 46, 518 P.2d 597 (taxi license properly levied upon and sold subject to Taxicab Authority approval), *cert. denied*, 419 U.S. 859 (1974); *McCray v. Chrucky*, 68 N.J. Super. 533, 173 A.2d 39 (1961) (taxi license properly levied upon in execution despite statutory restrictions against pledging or mortgaging license).

141. See, e.g., *Mirin v. Clark County Taxicab Auth.*, 90 Nev. 46, 518 P.2d 597, 598, *cert. denied*, 419 U.S. 859 (1974); *McCray v. Chrucky*, 68 N.J. Super. 533, 536-37, 173 A.2d 39, 40-41 (1961). The "property" language is present in statutes in an attempt to shield withdrawal or denial of the license from constitutional due process scrutiny.

142. E.g., *McCray v. Chrucky*, 68 N.J. Super. 533, 540, 173 A.2d 39, 43 (1961).

ing to be effective.

Another area of recent judicial activity which demonstrates amenability of statutorily created rights to execution process has involved seizure of stock in professional corporations. Often there are statutory provisions restricting the transferability of such shares to persons licensed in the profession.¹⁴³ Courts have held that these provisions require only that the purchaser of the shares be a licensed person or the corporation itself but that execution and sale by law to a judgment creditor is not prevented.¹⁴⁴

Even though "by operation of law" can be liberally construed to include creditor seizure of copyrights, there is still one statutory barrier for the judgment creditor. That barrier is the involuntary transfer provision, section 201(e) of the new Copyright Act.¹⁴⁵ At first blush, this provision prevents creditor seizure of copyrights to satisfy judgments.¹⁴⁶ The fact that Congress amended the section to exclude the bankruptcy laws from the prohibition supports the conclusion that, without the amendment, seizure as a result of an involuntary bankruptcy would have been precluded.¹⁴⁷ Therefore, the involuntary seizure provision may restrict domestic governmental seizures.¹⁴⁸

Only by ignoring the words of the statute and confining the involuntary seizure provision to its narrow purpose of preventing foreign governments from suppressing dissent could a court avoid the use of the provision to invalidate a creditor's seizure.¹⁴⁹ If, as argued, "opera-

143. See, e.g., 15 PA. CONS. STAT. ANN. § 2911 (Purdon 1967 & Supp. 1982).

144. *Gulf Mortgage & Realty Invs. v. Alten*, 282 Pa. Super. 230, 239, 422 A.2d 1090, 1095 (1980). When the by-laws of the corporation prevented transfer of shares to non-licensed professionals, a bankruptcy court held that the shares should be treated as belonging to a professional who had lost his license and by state law was required to redeem them. *In re Andrews*, 14 Bankr. 356 (M.D. Tenn. 1981).

In some states, the execution lien of seized property relates back to the date that the writ of execution is handed to the sheriff. Such a lien could not take priority over a later transferee who records in the Copyright Office. Cf. *In re Cone*, 11 Bankr. 925 (M.D. Fla. 1981) (execution lien on airplane could not relate back to defeat security interest perfected by filing with Federal Aviation Administration). The proposal that levy of a copyright gives the creditor rights against the debtor, but not innocent third parties, is in line with *Cone*.

145. Copyright Act of 1976, 17 U.S.C. § 201(e) (Supp. IV 1980). The provision is set out in text accompanying note 50 *supra*.

146. See 1981 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT 98.

147. The last six words of the section, "except as provided under title 11," were added on November 6, 1978, effective October 1, 1979. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 313, 92 Stat. 2549, 2676 (codified at 17 U.S.C. § 201(e) (Supp. IV 1980)).

148. In reality, Congress does not seem to have considered the effect of the involuntary seizure section on the right of a judgment creditor to seize a copyright. The House Report states, "Traditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures, are not within the scope of this subsection; the authors in such cases have voluntarily consented to these legal processes" House Report, *supra* note 3, at 5739. Note that the Report ignores judgment creditors' seizure, which is also a traditional legal action.

149. See text accompanying notes 49-53 *supra* for a discussion of the purpose of the involuntary seizure provision.

tion of law" does refer to creditor seizure and the involuntary seizure provision invalidates creditor seizure, the statute is inconsistent; it allows a creditor's levy in one section and prohibits it in another. To avoid reading the statute inconsistently, courts should hold that the involuntary seizure provision prevents only foreign governmental seizures designed to suppress dissent.¹⁵⁰

The above argument assumes that most courts would limit the operation of section 201(e). That will not necessarily always be the case. Given compelling facts a court may consider an involuntary seizure of an author's work undesirable and, therefore, hold that the language prevents judgment creditors from selling copyrights. The involuntary seizure provision may thus be seen as a way of infusing *droit moral* principles into copyright law.¹⁵¹

V. GOVERNMENTAL LIENS

In addition to secured and unsecured creditors generally, federal and state governmental units comprise a particularly favored class of creditors. Both the state and federal governments prescribe statutory liens which attach to debtor's property to secure unpaid taxes. The Federal Tax Lien Act¹⁵² creates a lien on all property of a taxpayer who fails to pay after demand.¹⁵³ While a notice of tax lien must be filed in order for the federal government to have priority over most of the taxpayer's transferees,¹⁵⁴ the Act provides that limited classes of purchasers and secured lenders can prevail even when there has been such a notice filed.¹⁵⁵ Since the Copyright Act also has a filing provision to record a creditor's interest in the copyright, there is a potential conflict between two federal statutes, the Tax Lien Act and the Copyright Act.

According to the tax lien statute the notice is to be filed "in one office within the state . . . , as designated by the laws of such State, in which the property . . . is situated."¹⁵⁶ The property is considered located at the residence of the taxpayer.¹⁵⁷ If the state has not designated one office that meets the requirements of the law, the notice is filed in

150. Since the involuntary seizure provision applies only when the author has not previously voluntarily transferred copyright, courts could also limit the scope of the provision by allowing seizure of all of the author's interest in the copyright when the author has transferred only a security interest in, or one of the exclusive rights under, the copyright. Each of these proposed results resolves an ambiguity in the statute in a way that would restrict considerably the effect of the provision on the grounds that a more liberal interpretation would not serve to further the purpose of that section.

151. See text accompanying notes 54-58 *supra*.

152. I.R.C. §§ 6321-6326 (1976 & Supp. IV 1980).

153. *Id.* § 6321 (1976). The lien relates back to the date of assessment. *Id.* § 6322.

154. *Id.* § 6323(a) & (f) (1976 & Supp. IV 1980).

155. *Id.* § 6323(b)-(d) (1976).

156. *Id.* § 6323(f)(1).

157. *Id.* § 6323(f)(2).

the federal district court for the judicial district in which the property subject to the lien is located. The Copyright Act requires recordation in the Copyright Office.¹⁵⁸ It is apparent that the states are caught in the crossfire between conflicting federal statutes.

There are three possibilities to consider. State *A* specifies that tax liens against copyrights shall be filed at the Copyright Office.¹⁵⁹ State *B*'s statute provides that the tax liens for all personal property should be filed in a particular state office.¹⁶⁰ Finally, state *C* makes no appropriate provision and, therefore, filings would have to be made in the district court.¹⁶¹ If the Copyright Act controls, a tax lien filing against a copyright must be made in the Copyright Office, even in states *B* and *C*. If the Tax Lien Act controls, tax liens in state *A* must be filed in the district court since the state fails to meet the one office rule.

There are no recorded decisions dealing with the conflicting filing requirements of the Tax Lien Act and the Copyright Act. Two analogous cases involve conflicts between federal property registration systems and the Tax Lien Act.¹⁶² However, those decisions offer little guidance as they lead to opposite conclusions. The first case involved a conflict between the Federal Aviation Administration Act and the Tax Lien Act. The United States Court of Appeals for the Ninth Circuit held that federal tax liens need not be filed with the Federal Aviation Administration¹⁶³ even though the relevant portion of the Federal Aviation Administration Act¹⁶⁴ is similar to the priority provisions of the Copyright Act.¹⁶⁵ This would indicate that the Tax Lien Act controls. However, the United States District Court for the Southern District of Texas, in discussing a conflict between a tax lien and a lien filed in accordance with the federal Ship Mortgage Act, stated, "Maritime liens and proceedings are . . . 'of such a specialized nature' . . . Congress evidently intended that field of law (Maritime) to govern exclusively."¹⁶⁶ Since the Copyright Act is also a specialized provision, one could conclude that the Copyright Act should control.

Resolution of the conflict requires consideration of the underlying

158. Copyright Act of 1976, 17 U.S.C. § 205(a) (Supp. IV 1980).

159. See, e.g., MASS. GEN. LAWS ANN. ch. 255, § 39B(1)(a) (West Supp. 1981).

160. See, e.g., MD. REAL PROP. CODE ANN. § 3-401(b) (1981). This is a slightly modified version of the language of the Uniform Federal Tax Lien Registration Act, 7A U.L.A. 111 (1978), and the Uniform Federal Lien Registration Act. *Id.* at 16 (Supp. 1982).

161. See W. PLUMB, FEDERAL TAX LIENS 62-66 (1972).

162. See *CIM Int'l v. United States*, 641 F.2d 671 (9th Cir. 1980); *Gulf Coast Marine Ways, Inc. v. The J.R. Hardee*, 107 F. Supp. 379 (S.D. Tex. 1952).

163. *CIM Int'l v. United States*, 641 F.2d 671 (9th Cir. 1980). This is based on a provision in Federal Aviation Administration regulations, "A notice of Federal tax lien is not recordable under this part, since it is required to be filed elsewhere by the Internal Revenue Code." 14 C.F.R. § 49.17(a) (1981).

164. 49 U.S.C. § 1403 (1976 & Supp. IV 1980).

165. See text accompanying note 40 *supra* for the text of the statute.

166. *Gulf Coast Marine Ways, Inc. v. The J.R. Hardee*, 107 F. Supp. 379, 385 (S.D. Tex. 1952).

rationale of both the tax lien and copyright statutes. The Tax Lien Act attempts to give the federal government the highest priority conscionable in satisfying tax debts out of the taxpayer's property.¹⁶⁷ But even when a tax lien has been filed, some transfers of property survive. For example, it would be unreasonable to require searching a state filing system for such transfers as personal property purchased at retail or in certain casual sales.¹⁶⁸ The copyright statute can logically be read as another specific statutory exception to the priority of tax liens filed in state filing systems. To the extent that a purchaser cannot rely on the Copyright Office registration files, the value of a copyright decreases considerably. Therefore, giving priority to the Copyright Act is consistent with the philosophy underlying both the tax lien and copyright systems by making an exception to the Tax Lien Act based on the reasonable expectation of subsequent transferees. At the same time, there is no need to read the Copyright Act as prohibiting all use of state methods of perfecting transfers.¹⁶⁹ When a copyright is not registered and no transfers are recorded, a tax lien should be effective.

Using the above analysis for states *A*, *B* and *C*: state *A*'s statute requiring recording in the Copyright Office for tax liens is ineffective. The Copyright Act controls and in some cases it (not state tax lien statutes) requires filing in the Copyright Office. When a tax lien filing *could* be effective without copyright filing, state *A*'s statute violates the one office rule. State *B*'s statute requiring filing in a particular state office is effective to the extent it does not conflict with the Copyright Act. In state *C*, a filing in the federal district court is effective to the extent it does not conflict with the Copyright Act.

In addition to the federal tax liens, states also provide for tax liens which attach to personal property.¹⁷⁰ Where the lien requires filing, that filing should be effective as to copyrights with the attendant risk that a later copyright filing will have priority.

VI. BANKRUPTCY

A bankruptcy case can be "commenced" by a voluntary petition filed by the debtor or by a petition filed by creditors of the debtor.¹⁷¹ The commencement of the case creates an "estate" which consists of "all legal or equitable interests of the debtor in property."¹⁷² Although the old Bankruptcy Act specified that the estate consisted of all "inter-

167. Even many state-created liens which arise prior to the tax lien are subordinated by use of the "choateness" doctrine. Liens are not specific as to lienor or amount of the lien, and property subject to the lien is inchoate. *See* *United States v. Globe Corp.*, 113 Ariz. 44, 546 P.2d 11 (1976).

168. *See* I.R.C. § 6323(b)(2), (3) (1976).

169. For a discussion of the use of state filing to perfect security interest in copyrights, see text accompanying notes 83-94 *supra*.

170. *See, e.g.*, MD. ANN. CODE art. 81, § 322 (1980).

171. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 301-303 (Supp. IV 1980).

172. *Id.* § 541(a)(1).

ests in patents, patent rights, copyrights, and trademarks,"¹⁷³ the current language is more expansive and "includes all kinds of property."¹⁷⁴

No filing in the copyright records is necessary by the bankruptcy trustee to perfect the estate's interest. The bankruptcy code provides that the trustee may avoid transfers of property that occur after the commencement of the case.¹⁷⁵ Although both the tax lien statute and the Copyright Act support a conclusion that the Copyright Act controls conflicts between the two, here the copyright provisions should not control. The Bankruptcy Act established a constitutionally provided for orderly procedure for all creditors to share all the property of the debtor.¹⁷⁶ The Bankruptcy Act, unlike the Tax Lien Act, does not provide for classes of claimants to the property who do not take subject to the lien.¹⁷⁷

When prior to the commencement of a bankruptcy case an author sells a copyright in exchange for a promise of royalty payments, the right to those payments is the property of the estate. But if the debtor is the owner of the copyright who has an obligation to pay royalties, the trustee may have the power to sell the copyright free of that obligation.¹⁷⁸ The author would merely be a general creditor of the debtor.

173. *Id.* § 110(a)(2) (1976) (repealed 1978).

174. S. REP. NO. 989, 95th Cong., 2d Sess. 367-78, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, 5868.

175. Bankruptcy Reform Act of 1978, 11 U.S.C. § 549 (Supp. IV 1980).

176. U.S. CONST. art. I, § 8, cl. 4.

177. The only exceptions involve purchasers for value who take after an involuntary petition is filed, but before the bankruptcy court issues an order for relief, Bankruptcy Reform Act of 1978, 11 U.S.C. § 549(b) (Supp. IV 1980), and some purchasers of real property. *Id.* § 549(c).

178. This would be analogous to a sale of goods on credit. If *S* sells goods to *D* on credit, *S* is merely a creditor of *D*'s. In such a situation, *S*'s right to reclaim the goods themselves is quite limited. *See* U.C.C. § 2-702 (seller may reclaim goods only within 10 days after buyer's receipt of goods if buyer is discovered insolvent; within 30 days if there has been a misrepresentation of solvency or intent to pay). *S* becomes a general, *i.e.*, unsecured, creditor of *D*'s. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L. REV. 1057, 1060 (1954). The author could improve his position only by retaining a security interest in the copyright as collateral for the royalty payment. *Id.* at 1060 n.7. *See* B&P Lumber Co. v. First Nat'l Bank of Atlanta, 147 Ga. App. 762, 250 S.E.2d 505 (1978). Nevertheless, an author might advance three arguments against the trustee's right to the copyright free of the royalty obligation. The first is that despite the sale of the copyright, it is encumbered with an "equitable servitude." *See In re Waterson, Berlin & Snyder Co.*, 48 F.2d 704, 710 (2d Cir. 1931). However, bankruptcy law generally prevents equitable liens from encumbering the trustee's title.

Equitable liens were explicitly prohibited by the old Bankruptcy Act. Bankruptcy Act, 11 U.S.C. § 60(a)(6) (1976) (repealed 1978). That language, dealing specifically with preferential transfers, was not included in the Bankruptcy Code since the law of secured transactions was no longer ambiguous. Article Nine now makes clear that equitable liens are unperfected security interests. H.R. REP. NO. 595, 95th Cong., 1st Sess. 209, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6170. *See In re Washington Communications Group, Inc.*, 10 Bankr. 676 (D.C. 1981). While the former section 60 dealt only with preferential transfers,

The author could only improve his position by retaining a security interest in the copyright as collateral for the royalty payments.¹⁷⁹

Since a copyright exists as soon as a work is fixed in tangible form, a person has a copyright in notes, diaries and manuscripts existing at the time the petition is filed. A professor's lecture notes may cause no problem. But if a professional author petitions for bankruptcy, any manuscripts ought to be listed on the bankruptcy petition. They could then be exempted from sale (possibly at minimal value).¹⁸⁰ Otherwise the debtor/author risks losing the bankruptcy discharge.¹⁸¹

VII. LIMITATIONS ON THE VALUE OF COPYRIGHTS TO CREDITORS

Judgment and foreclosure sales are notorious for bringing bargain

the same policy supports disregarding equitable liens in other contexts. *Waterson* could similarly be explained by the unavailability of the means to retain a security interest in a copyright at that time.

The author could also claim that the original grant contained an explicit or implied restriction on assignments. Such a restriction should not be enforceable in bankruptcy. Bankruptcy Reform Act of 1978, 11 U.S.C. § 541(c) (Supp. IV 1980). Finally, the author might argue that the transfer of the copyright was part of an "executory contract." Property rights of the debtor in such a contract are governed by section 365 of the Bankruptcy Code which might either prevent the trustee from assigning the contract at all, *id.* § 365(c), or require the trustee to cure past defaults and give adequate assurance of future performance. *Id.* § 365(b)(1)(A), (f). The trustee could be prevented from assigning the contract on the grounds that it is a "personal service contract" unassignable without the permission of the author. *See In re P.H. McBride & Co.*, 132 F. 285 (S.D.N.Y. 1904) (author had retained authority to approve future assignments, and the character and relations of the publisher in the Catholic book trade were material due to the nature of book). *But see In re Howley-Dresser Co.*, 132 F. 1002 (S.D.N.Y. 1904). Moreover, an agreement whereby the debtor purchases a copyright in exchange for a promise of future royalty payments would probably not be considered an executory contract within the terms of the Bankruptcy Code. *See Countryman, Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 451, 458, 460 (1973) ("Executory contract" does not include contracts the performance of which is substantially completed by either the debtor or creditor, but only "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.") Professor Countryman does argue that patent license agreements could be considered executory due to an implied warranty of validity. *Id.* at 501-02. But the case of an outright sale of a copyright is distinguishable, especially if warranties are explicitly excluded.

179. Congress could afford authors relief if it so chooses. For example, consumers who make deposits in layaway transactions are given priority in distributions. Bankruptcy Reform Act of 1978, 11 U.S.C. § 507(a)(5) (Supp. IV 1980). A purchaser of real property of the debtor is, in some instances, given a lien on the property for recovery of money paid towards the purchase of the property. *Id.* § 365(j). Congress could, therefore, provide for a lien of some sort in the copyright.

180. *Id.* § 522.

181. *See id.* § 727(a)(1), (4).

prices for property.¹⁸² Several aspects of copyright and related law contribute to that phenomenon. One is the termination of transfers discussed above.¹⁸³ When a copyright is seized, the author may retain the right to terminate the transfer. The rationale for the non-waivable termination right, the difficulty of predicting the value of the copyright in thirty-five years, supports that result. That difficulty may explain why an author would resist selling the copyright to satisfy a judgment or debt. If the judgment or debt remains unsatisfied when the copyright transfer is terminated, the creditor could seize the copyright again.¹⁸⁴

The language of the copyright statute may also be interpreted to prevent termination by the author. The statute speaks of a "grant," implying a voluntary transaction. But a sheriff's seizure is not a voluntary transaction; therefore, the termination clause would not apply. Moreover, if authors are thus prevented from terminating involuntary creditor sale transfers, presumably they would have incentive to seek profitable sales elsewhere, the proceeds of which would accrue to the benefit of the creditor.

Finally, it is likely that courts would find an interpretation limiting the author's right to terminate more attractive. The inclusion by Congress of the non-waivable right to terminate resulted from judicial hostility to the nontransferability of the right of renewal.¹⁸⁵ Here again the termination provision of the statute limits the value of the author's asset to a purchaser. However, if after a creditor's sale the new owner of the copyright misuses the copyright or it dramatically increases in value, a court could easily dismiss the above reasoning favoring non-termination and find the sale a terminable transfer: *droit moral* dressed up in right-to-termination clothes.¹⁸⁶

Any execution purchaser takes the risk that there may be some lack of jurisdiction that would nullify the sale.¹⁸⁷ To the extent that a purchaser risks the sale's invalidation, the value (and hence the price) of the property decreases. While a conveyance executed by a receiver stands on firmer legal ground than an execution sale, there is nevertheless the risk that there might be a defect in the court's jurisdiction over the owner or that a receiver's act would be found in excess of the authority granted by the court. Such defects would render the convey-

182. See Annot., 5 A.L.R.4th 794 (1981) (collection of cases revealing prices obtained at judgment sales).

183. See text accompanying notes 43-46 and 103-111 *supra*.

184. The validity of this statement depends on state statutes of limitations on judgments. In Maryland, by use of the writ of *scire facias*, a judgment can be kept alive indefinitely. See MD. R.P. 624.

185. See text accompanying notes 47-48 *supra*. There are no cases which discuss the effect of seizure of copyrights on the renewal right under the old Act.

186. See text accompanying notes 54-58 *supra* for a discussion of *droit moral*.

187. See *Lincoln-Mercury-Phoenix, Inc. v. Base*, 84 Ariz. 9, 322 P.2d 891 (1958) (execution based on void judgment is void). Courts may also set aside a sheriff's sale when the price is grossly unfair. See, e.g., *McCartney v. Frost*, 282 Md. 631, 386 A.2d 784 (1978).

ance void.¹⁸⁸

Although a purchaser at an execution or foreclosure sale obtains all rights included within the copyright, the author retains a variety of state created rights which may serve to diminish the value of the copyright itself. Although the state created rights are often similar to copyrights, they do not appear to be preempted by the Copyright Act. For example, a "personality" may have a right of publicity.¹⁸⁹ Such a right is not seized along with the copyright. The purchaser of the copyright would not have the right to exploit the personality of the author in selling the work. This limitation could affect the value of the copyright. Additionally, there may be a right of privacy which can be invaded by the public display of a person's work.¹⁹⁰ One state statute governs proper attribution of an author's work.¹⁹¹ Unfair competition law may also be used to challenge profiting from the work of another or inaccurately identifying the creator of a work. The right to those potential causes of action could not be seized by a creditor. The danger that exploitation of the work may subject the copyright purchaser to a suit for invasion of privacy or improper attribution also affects the value of the copyright.

VIII. CONCLUSION

Although knotty problems arise in the interplay of the Copyright Act and creditor's rights law, consideration of the underlying purpose of the Copyright Act (limited monopoly to encourage creativity) can be helpful in their resolution. The Copyright Act can thereby be interpreted to allow for giving effect to state filings of transfers in some situations, and the UCC can be interpreted (or — if necessary — redrafted) to that effect. Similarly state lien law can be interpreted in relation to the Copyright Act to best effectuate the purposes of each. Finally we have seen that there are sufficient ambiguities to allow courts to infuse *droit moral* principles into Copyright law when courts believe that justice requires.

188. See *Nicholson v. Western Loan & Bldg. Co.*, 60 F.2d 516 (9th Cir. 1932), *cert. denied*, 288 U.S. 605 (1933); *McCutchen v. Superior Court*, 134 Cal. App. 5, 24 P.2d 911 (1933).

189. See *Factors Etc. Inc. v. Pro Arts, Inc.*, 208 U.S.P.Q. (BNA) 529 (S.D.N.Y. 1980).

190. See Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 991-95 (1970).

191. See *Folett v. Arbor House Publishing Co.*, 208 U.S.P.Q. (BNA) 597, 602 (S.D.N.Y. 1980) (construing N.Y. CIVIL RIGHTS LAW § 51 (McKinney 1976)).