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## Increasing Access to Startup Financing Through Intellectual Property Securitization, 27 J. Marshall J. Computer & Info. L. 613 (2010)

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# COMMENT

## INCREASING ACCESS TO STARTUP FINANCING THROUGH INTELLECTUAL PROPERTY SECURITIZATION

KYLE TONDO-KRAMER\*

### I. INTRODUCTION

In 2008, the United States fell victim to a freeze in its credit market. The cause of the credit freeze can be traced back to defaults on subprime mortgages, and among the victims were small technology and software companies (“startup companies”).<sup>1</sup> As a result of the credit freeze, these companies’ startup efforts have become frustrated as they are now unable to obtain financing.<sup>2</sup> The inability for these small startup companies to obtain financing is unfortunate because, with a little luck and some help, they could end up being just as powerful as Google or Microsoft. The consequences for these startup efforts, and the ideas and technology that come with them, may never have the chance to grow if they cannot secure large amounts of capital upfront. Giving startup companies the chance to prosper is essential for our society to continue to grow and develop because people now rely on advanced technology to perform everyday tasks and operate their businesses efficiently.

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1. Patrick O’Grady, *Quest for Funding a Struggle for Startups*, PHOENIX BUS. J., May 15, 2009, available at <http://phoenix.bizjournals.com/phoenix/stories/2009/05/18/story19.html> (“Funding for small firms and new business ventures continues to be locked up as companies face increased competition for cash from bearish investors. . . . At Invest Southwest, the largest conference in Arizona for companies seeking capital, none of the participants received financing”).

2. Victoria Pavlov, *Looking Beyond Loans: Where to Find Financing Now*, CNN MONEY.COM (Sept. 24, 2009, 3:56 PM), <http://smallbusiness.blogs.cnnmoney.cnn.com/2009/09/24/looking-beyond-loans-where-to-find-financing-now/> (describing the unique ways entrepreneurs are attempting to secure financing and the troubles they continue to have).

Financing has been cut off due primarily to the recession and stock market losses, and startup companies now realize that they have limited ways to secure available financing.<sup>3</sup> Prior to the recession, startup companies had many available avenues to obtain financing, and securing it was a relatively simple process.<sup>4</sup> Previously, startup companies would attract early-stage investors, also known as “angels,” that would pour capital into the company in exchange for a piece of the ownership,<sup>5</sup> or they would attempt to secure a loan through a bank.<sup>6</sup> Now that the funding from venture capital firms, banks, and other early-stage investors has dried up these startups are left scrambling for options in an attempt to come up with creative ways to bring in cash to keep the company operating.<sup>7</sup> It is difficult to predict when the credit squeeze will end. Thus, it is necessary to do everything possible in order to entice creditors back into the market. A simple way to clear up the secured lending process and encourage creditors to begin lending again is to create a privately managed nationwide database containing the information relating to security interests in intangible assets.

Companies have recently discovered a new trend, which allows them to exploit their intangible assets to obtain cash. In support of this trend, revised Article 9 of the Uniform Commercial Code (“Article 9”) acknowl-

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3. Gus G. Sentementes, *Startups Have a Hard Time Finding Angels; While Many Try ‘Bootstrapping’ in Slump, Some Firms Land Investors*, THE BALT. SUN, Sept. 23, 2009, at 14A, available at <http://www.baltimoresun.com/business/bal-bz.angels23sep23,0,5580903>. story (explaining that the traditional investors have become much tighter in their lending practices and start-up companies are searching for unique and innovative ways to obtain financing).

4. Galen Moore, *Three Alternate Routes to Financing a Startup*, MASS HIGH TECH, Dec. 2, 2009, available at <http://www.masshightech.com/stories/2009/11/30/weekly11-Three-alternate-routes-to-financing-a-startup.html>. (In discussing the difficulty that startup companies are facing, the author says:

If you believe the blogosphere, the venture capital model is broken. If you don’t believe that, there’s no arguing that [venture capital]’s are more cautious than ever. Angels have pulled back too: Angel investments in the first half of 2009 fell by 27 percent compared with last year’s first half. And banks, their balance sheets in disarray, aren’t writing new loans – heck, with the real estate market the way it is, a desperate entrepreneur can’t even get a second mortgage to fund a wild idea. In this environment, investors and entrepreneurs are devising creative ways to fund startups that look nothing like the traditional venture finance model).

5. Sentementes, *supra* note 3, at 14A (explaining that, in the past, companies with little more than an idea would be able to attract investors, but these risk-taking investors have lost so much money during the downturn that they have very little left, if anything, to invest at this point).

6. *Id.* (describing the difficulty technology start-ups are having securing financing even from traditional investors such as venture capital firms).

7. Pavlov, *supra* note 2 (describing the ways entrepreneurs are securing funding including loans from friends and family, establishing banking relationships, and trimming down plans in order to get the initial idea out).

edges that a creditor can acquire a security interest<sup>8</sup> in intangible assets including a company's intellectual property.<sup>9</sup> Both parties to a transaction will benefit by using intellectual property to secure financing. For the debtor,<sup>10</sup> the company can quickly obtain a large influx of cash and can also maintain its interest in the intellectual property. For the secured creditor,<sup>11</sup> the debt is secured by the intellectual property, which can be sold off to cover losses in the case of default,<sup>12</sup> and the creditor can receive a substantial profit from interest payments.<sup>13</sup>

Although there are benefits to both parties in performing these transactions, these transactions can create problems for the creditor. Article 9 sets out guidelines that must be followed in order for these transactions to retain the full intended effect, and the creditor is often the party bearing most of the burden.<sup>14</sup> One of the largest challenges for creditors is that they are responsible for knowing whether to follow the filing guidelines set out in Article 9. This is a problem because there

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8. U.C.C. § 1-201(b)(35) (2001) ("Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation").

9. U.C.C. § 9-102 cmt. 5(d). The term general intangible includes "rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement." *Id.*

10. BLACK'S LAW DICTIONARY 433 (8th ed. 2004) (defining a debtor as, "[o]ne who owes an obligation to another, especially an obligation to pay money").

11. *Id.* (defining a secured creditor as, "[a] creditor who has the right, on debtor's default, to proceed against collateral and apply it to the payment of the debt").

12. U.C.C. § 9-601(a) (2001). The U.C.C. states:

After default, a secured party has the rights provided in this part and, except as otherwise provided in Section 9-602, those provided by agreement of the parties. A secured party:

- (1) may reduce a claim to judgment, foreclosure, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and
- (2) if the collateral is documents, may proceed either as to the documents or as to the goods they cover. *Id.*

13. Eldon H. Reiley, *Drafting Security Agreements-Standard Security Agreement Clauses-Loan Transaction Provisions*, 1 SEC. INTERESTS IN PERS. PROP. § 8:12, 2010, available at Westlaw, GSI §8:12. The description of the debtor's obligation to the creditor should include the obligation to pay, how much to pay, and all other obligations of the debtor. *Id.*; Bryan G. Bosta, Comment, *Bringing Article 9 Up to Speed: The Need for a National Filing System*, 31 U. DAYTON L. REV. 25, 26 (2005) (describing a security interest as "'a partial interest taken in a debtor's assets - the collateral - to secure a loan.' In the event of a default by the debtor, the lender may take possession of the collateral and sell it to satisfy the debt").

14. The creditor is considered the party bearing most of the burden because the creditor has the most to lose in the transaction. The creditor provides the loan to the debtor and then relies on repayment from the debtor. In the event of default, the creditor is now out of the original loan to the debtor and must rely on being able to recoup the money by selling off the debtor's assets. Debtors also have the ability to change locations or attempt to sell off the assets without informing the debtor. Under these circumstances, the creditor must take steps to protect itself or risk becoming unsecured or unable to locate either the debtor or the debtor's assets.

are instances when federal law preempts Article 9, requiring that a “financing statement”<sup>15</sup> is filed with a federal registry instead of following the guidelines of Article 9 in order to perfect the security interest.<sup>16</sup> Moreover, on occasion there is a federal law governing a general area of intellectual property, but courts have held that the federal law does not preempt Article 9.<sup>17</sup> This creates even more confusion among creditors because the language of the statutes and the holdings in several court decisions appear to be contradictory.<sup>18</sup>

Furthermore, even when Article 9 is not preempted by federal law, many uncertainties still exist. For example, creditors face questions such as: which state to file the financing statement with and which jurisdiction’s law will govern perfection.<sup>19</sup> Also, even after perfecting a security interest, it is possible that the debtor may relocate<sup>20</sup> to a new jurisdiction and a new financing statement must be filed in the new jurisdiction for the security interest to remain perfected.<sup>21</sup>

This puts strain on creditors by forcing them to perform high levels of due diligence. Creditors are forced to weed through this confusion both to figure out where they need to file a financing statement to perfect

15. U.C.C. § 9-102(a)(39) (2001); BLACK’S LAW DICTIONARY 664 (8th ed. 2004) (defining a financing statement as, “[a] document filed in the public records to notify third parties, usually prospective buyers and lenders, of a secured party’s security interest in goods or real property”).

16. *In re World Auxiliary Power Co.*, 303 F.3d 1120 (9th Cir. 2002) (explaining that a creditor who takes a security interest in a registered copyright must record that security interest with the Copyright Office in order to perfect the security interest).

17. *Trimarchi v. Together Dev. Corp.*, 255 B.R. 606 (Bankr. D. Mass. 2000). The court in *Trimarchi* explained that the Lanham Act, which governs trademarks, does not have a federal system for the recordation of recording security interests, and thus the Lanham Act does not preempt Article 9. *Id.* Therefore, the perfection of a security interest in a trademark is governed by Article 9. *Id.*

18. *See infra* Part II.B.1 (discussing the federal preemption clause of Article 9 and its effect on different types of intellectual property).

19. U.C.C. § 9-301 (2001) The U.C.C. states that:

- (1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.
- (2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral. *Id.*

20. U.C.C. § 9-307(b) (2001). The U.C.C. states that except as otherwise provided in this section, the following rules determine a debtor’s location:

- (1) A debtor who is an individual is located at the individual’s principle residence.
- (2) A debtor that is an organization and has only one place of business is located at its place of business.
- (3) A debtor that is an organization and has more than one place of business is located at its chief executive office. *Id.*

21. U.C.C. § 9-316(a)(2) (2001) (stating that a perfected security interest remains perfected until “the expiration of four months after a change of the debtor’s location to another jurisdiction”).

the security interest and to find out if any other creditor has a prior security interest in the intellectual property or intangible asset of the debtor.

The resultant confusion has the effect of driving away creditors and also preventing debtors from either obtaining financing altogether or receiving the full value of their intellectual property or intangible assets. The uncertain and complicated nature of the financing process must be simplified because without simplification, creditors will be unwilling to engage in the financing of small startup companies. With more creditors in the market, it will be easier for those startup companies with intellectual property assets to obtain cash, extract more value from their assets, and receive the cash at lower interest rates. The current system puts an unnecessary amount of investigative strain on creditors because there is a relatively simple solution to reduce this strain on creditors without completely overhauling the entire system.

Determining where to file, and figuring out whether and when to refile, could be made substantially easier by adopting a nationwide system. It has been proposed that a federal system, managed by the government, for filing financing agreements would solve the problem. This proposed federal system would maintain all of the information surrounding the security agreements in a central database.<sup>22</sup> This solution, however, will not work because the individual states generally charge a fee every time a financing agreement is filed and they would be unwilling to give up this revenue. Furthermore, a federal filing system operated by the government would be difficult to implement. Instead, a more practical solution is for the private sector to fill this void, and it is unlikely that the Article 9 filing rules would even need to be altered to accommodate this proposed solution.

This single, nationwide database managed by a private company would operate independently and would not interfere with the current filing rules. Creditors would still file with the appropriate registry, whether that is the debtor's state under Article 9 or in a federal registry, and the private company would purchase the financing statement. The private company would compile a national list, organized according to the name of the debtor. Creditors would then pay the private company a reasonable fee to run a search in the national list and inform the creditor whether a debtor's assets are encumbered.

This paper will discuss how a private company running a single, nationwide database of encumbered intellectual property and intangible

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22. U.C.C. § 9-102(a)(73) (2001); BLACK'S LAW DICTIONARY 1387 (8th ed. 2004). A "security agreement" is, "[a]n agreement that creates or provides for an interest in specified real or personal property to guarantee the performance of an obligation. It must provide for a security interest, describe the collateral, and be signed by the debtor." *Id.*

assets can ease the burden on creditors and pave the way for more creditors to enter this market. Part two offers a brief overview of how intellectual property securitization works and some of the impediments to using this type of securitization. Part three proposes a possible solution to the problem creditors face regarding the filing of a financing statement when attempting to securitize intellectual property, and provides an in depth analysis as to why the suggestion that a private company runs a single, nationwide database is appropriate. Finally, part four will conclude by arguing that, if implemented properly, the single, nationwide database managed by a private company is the first step towards bringing more creditors into the market and providing startups with the necessary cash to survive.

## II. BACKGROUND

Currently, even established companies are struggling to obtain financing. Established companies typically have tangible assets and, before the credit market froze, were able secure a loan using these tangible assets as collateral. Unlike more traditional businesses, however, technology and software startup companies typically have very few tangible assets that can be used to secure a loan. This makes obtaining financing even more difficult for technology and software startup companies.

Often, the only assets a startup company will have that can be used to secure financing are intangible assets,<sup>23</sup> including patents, trademarks, registered or unregistered copyrights, websites, and computer programs or other software.<sup>24</sup> Because of the credit market freeze, and creditors becoming increasingly more cautious about their investment decisions, startup companies now need to find creative ways to access cash. Using intellectual property and intangible assets as security is one way to achieve this. This process is relatively new, however, and there are still obstacles to securitizing intangible assets that often are not present when securitizing a traditional tangible asset.<sup>25</sup>

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23. U.C.C. § 9-102(a)(42) (2001). The U.C.C. defines “general intangible” as:

Any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software. *Id.*

24. U.C.C. § 9-102 cmt. 5(d). (“‘General intangible’ is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument”).

25. Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645, 1647-1651 (1996) (describing how using intellectual

Although there are several distinctions between securitizing a tangible and an intangible asset, the overall process is similar. In order to have an enforceable security interest in any asset, either tangible or intangible, the creditor must first ensure that their security interest is “attached” to the collateral.<sup>26</sup> Second, the creditor must ensure that the attached security interest is “perfected.”<sup>27</sup>

#### A. ATTACHMENT OF A SECURITY INTEREST IN GENERAL

In order to have an enforceable security interest a creditor must first attach that interest to the collateral.<sup>28</sup> Three requirements must be satisfied for the creditor to make certain that the security interest is attached to the collateral.<sup>29</sup> These three requirements can be met in any order; however, all three requirements must be met before the creditor’s security interest will attach to the collateral.<sup>30</sup>

First, the creditor must provide value to the debtor.<sup>31</sup> Value is usually made by advancing money or credit, or by the creditor legally binding itself to advance money or credit.<sup>32</sup> Other ways for a secured party to give value include “taking a security interest to satisfy a pre-existing claim, or in return for any consideration which could support a contract.”<sup>33</sup>

Second, the debtor must have rights in the collateral or the power to transfer the rights in the collateral to the creditor.<sup>34</sup> Typically, “rights in the collateral” refers to the debtor having full ownership of the property or assets to be used as collateral.<sup>35</sup> The underlying rule is that the

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property as collateral in a secured transaction is a relatively new phenomenon that is constantly growing and changing).

26. U.C.C. § 9-203(a) (2001) (stating that “a security interest attaches to collateral when it becomes enforceable against the debtor”).

27. BLACK’S LAW DICTIONARY 1173 (8th ed. 2004) (defining perfection as the “validation of a security interest as against other creditors, usually by filing a financing statement with some public office or by taking possession of the collateral”).

28. U.C.C. § 9-201(a) (2001) (“A security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors”).

29. U.C.C. § 9-203 cmt. 2. (2001). After rights or power to transfer rights in collateral, and agreement plus satisfaction of an evidentiary requirement are met, a security interest becomes enforceable between the parties and attaches. *Id.*

30. U.C.C. § 9-203 (2001).

31. U.C.C. § 9-203(b)(1) (2001).

32. Michael I. Spak, Comment, *Filing Nationwide Perfectly or Get With The Trend*, 47 CLEV. ST. L. REV. 11, 13-14 (1999) (explaining the concept of value and what it typically entails).

33. *Id.* at 14.

34. U.C.C. § 9-203(b)(2) (2001).

35. U.C.C. § 9-203 cmt. 6. (2001). The official comment to the U.C.C. states that: A debtor’s limited rights in the collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property

debtor cannot transfer rights in collateral that the debtor does not have.

Third, the debtor must authenticate a written security agreement that describes the intellectual property or other intangible as collateral.<sup>36</sup> Typically, any written security agreement that meets the requirements of the Statute of Frauds will suffice.<sup>37</sup> The granting clause of the security agreement should contain the description of the collateral and a general description will generally suffice.<sup>38</sup>

#### B. PERFECTION OF A SECURITY INTEREST IN VARIOUS TYPES ON INTELLECTUAL PROPERTY

Attachment of security interest is generally a relatively simple process. Difficulty may arise when it comes to perfection of a security interest using intellectual property or intangible assets as collateral because the Supreme Court has not determined where financing statements should be filed. The confusion surrounding where to file the financing statement is of great significance because this step is extremely important for the creditor to remain secured;<sup>39</sup> and in order to perfect a secur-

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conveyance principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be. *Id.*

36. U.C.C. § 9-203(b)(3)(A) (2001) (explaining that the security agreement must provide a description of the collateral).

37. U.C.C. § 9-203 cmt. 3. (2001). The official comment to the U.C.C. states that, “[e]nforceability requires the debtor’s security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral.” *Id.*

38. Eldon H. Reiley, *Original Article 9 and Collateral Descriptions-Description by General Type*, 1 SEC. INTERESTS IN PERS. PROP. § 10:5, 2010, available at Westlaw, GSI § 10:5 (explaining:

It is clear that a serial number description or an item-by-item description is not necessary on either a security agreement or financing statement. A description of collateral by type, i.e., “equipment” or “inventory” should generally suffice; but this must be approached with caution. Especially when the debtor is a consumer or a farmer, the relationship between the breadth of the collateral description and the validity of the transaction seems to become tainted with issues of unconscionability or overreaching. Collateral descriptions of “consumer goods” and “all personal property” have been held too broad).

39. Robert K. Weiler, *Presentation to the Onandaga County Bar Association: Basics of Creation and Perfection of Security Interests Under Article 9 of the Uniform Commercial Code* (Sept. 2006), available at [http://www.gslaw.com/resources/pdf/Article%209\\_Weiler.pdf](http://www.gslaw.com/resources/pdf/Article%209_Weiler.pdf). In discussing why it is important to be a secured creditor as opposed to an unsecured creditor, the commenter says:

To understand the significance of a security interest, it is important to understand the legal process if a creditor does not have a security interest (i.e., is unsecured). If the creditor makes an unsecured loan or extends unsecured credit to a debtor, and the debtor defaults, then the creditor must commence an action and obtain a judgment. After the judgment is obtained, the creditor cannot simply take the debtor’s property. It must enforce the judgment by execution through sheriff. CPLR 5201 et seq. This is often a difficult and unrewarding process. Even worse,

ity interest, the secured party must file a financing statement in the appropriate filing office.<sup>40</sup> The intricacies of Article 9, however, lead to confusion as to the appropriate place to file the financing statement.<sup>41</sup>

The general rule under Article 9 requires that a financing statement be filed with the state that has jurisdiction over the property.<sup>42</sup> The problem arises when federal law preempts Article 9.<sup>43</sup> If federal law preempts Article 9, the financing statement must be filed with a federal registry in order to perfect the security interest.<sup>44</sup> However, much confusion exists about where to file a financing statement when the federal law does not explicitly state that it is applied to security interests.<sup>45</sup> In such instances, courts have held that the federal law does not preempt Article 9 and that the appropriate place to file is with the state office.<sup>46</sup>

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the debtor may file for bankruptcy, in which event, except in rare cases, the unsecured creditors receive little, if any, recovery. *Id.*

40. Eldon H. Reiley, *Perfection By Filing Under Revised Article 9—Where to File Under Revised Article 9*, 1 SEC. INTERESTS IN PERS. PROP. § 9:26 (2009). Typically, the location of the debtor will determine the appropriate state to file the financing statement. Once a determination has been made of the appropriate state to file within, Article 9 of the governing state will be looked to for the location and identity of the office within that state in which the filing is to be made. . . For most collateral, filing will be in a central office, usually the Secretary of State. *Id.*

41. BLACK'S LAW DICTIONARY 664 (8th ed. 2004). A financing statement is defined as “a document filed in the public records to notify third parties, usually prospective buyers and lenders, of a secured party’s security interest in goods or real property.” *Id.*

42. U.C.C. § 9-501(a) (2001). The U.C.C. says:

[I]f the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is: . . . (2) the office of [ ] [or any office duly authorized by [ ]], in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing. *Id.*

43. *See infra* Part III.B.1 (discussing when federal law preempts Article 9); U.C.C. § 9-109(c) (2001). The U.C.C. says:

This article does not apply to the extent that: (1) a statute, regulation, or treaty of the United States preempts this article; (2) another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or the governmental unit of this State; (3) a statute of another State, a foreign country, or a governmental unit of another State or foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country or governmental unit[.] *Id.*

44. *In re World Auxiliary Power Co.*, 303 F.3d 1120, 1128 (9th Cir. 2002) (explaining that a creditor who takes a security interest in a registered copyright must record that security interest with the Copyright Office in order to perfect the security interest).

45. *See infra* Part III.B.1.c (discussing how the Lanham Act does not explicitly state that it applies to security interests and, therefore, confusion exists as to where security interests in trademarks need to be filed).

46. *Trimarchi v. Together Dev. Corp.*, 255 B.R. 606, 610 (Bankr. D. Mass. 2000) (explaining that the Lanham Act governing trademarks does not have a federal system for the

Due to the preemption clause of Article 9, courts construe the law in such a way that when financing statements are filed in the wrong location, the creditor's interest never becomes perfected, and thus is not secured.<sup>47</sup> Therefore, the creditor's interest is vulnerable to claims from others, including bankruptcy lien creditors.<sup>48</sup> The Supreme Court has yet to determine where financing statements should be filed in order to perfect security interests in intellectual property. In order to protect their interests, creditors must look to the text of Article 9 in combination with the decisions of lower courts. Failure to do so could leave the creditors unperfected. An unperfected security interest is not as valuable to a creditor because it may not protect against other creditors, the debtor's trustee in bankruptcy, or purchasers of the collateral.<sup>49</sup>

### 1. *Federal Preemption*

The Uniform Commercial Code ("U.C.C.") clearly states that Article 9 does not apply when a statute, regulation, or treaty of the United States preempts it.<sup>50</sup> This preemption provision has been the source of much confusion. One commenter has said:

Under existing law, where to register a security interest in [intellectual property] is at best confusing and at worst a malpractice suit waiting to happen. To properly protect themselves, their clients, and their clients' assets, attorneys must juggle a system of filing requirements and purposes that the courts have not simplified.<sup>51</sup>

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recording of security interests, thus the Lanham Act does not preempt Article 9 and perfection of a security interest in a trademark is governed by Article 9).

47. *Id.* at 610-11 (rejecting creditor's argument that security interests in trademarks should be filed with the Patent Trademark Office and holding that the creditor's security interest was unperfected because the creditor failed to file the financing statement according to Article 9).

48. U.C.C. § 9-102(a)(52) (2001). The U.C.C. defines "Lien Creditor" as:

- (A) a creditor that has acquired a lien on the property involved by attachment, levy, or the like;
- (B) an assignee for benefit of creditors from the time of assignment;
- (C) a trustee in bankruptcy from the date of the filing of the petition; or
- (D) a receiver in equity from the time of appointment. *Id.*

49. Eldon H. Reiley, *Drafting Security Agreements – Standard Security Agreement Clauses – Loan Transaction Provisions*, 1 SEC. INTERESTS IN PERS. PROP. § 9:1, 2010, available at Westlaw, GSI §9:1.

50. U.C.C. § 9-109(c) (2001).

51. R. Scott Griffin, Note and Comment, *A Malpractice Suit Waiting to Happen: The Conflict Between Perfecting Security Interests in Patents and Copyrights (A Note on Peregrine, Cybernetic, and Their Progeny)*, 20 GA. ST. U. L. REV. 765, 787 (2004) (citing Kenneth C. Booth, Presentation at the American Intellectual Property Law Association 2002 Annual Meeting: Obtaining and Protecting Security Interests in Intellectual Property: What You Don't Know Could Cost You (Oct. 18, 2002) (stating that one needs to file for notice with the USPTO and with the state for perfection because incorrect or faulty filing may result in lost value of the intellectual property)).

Federal law generally governs patents, copyrights, and trademarks.<sup>52</sup> Whether the federal law preempts Article 9, however, depends on the specific wording and intent of the federal law in question. Therefore, when a federal law has created a filing system covering a security interest in a specific type of intellectual property, a security interest in that type of intellectual property can be perfected only by complying with the provisions of that particular federal law. To further complicate matters for creditors, Section 9-311 of the U.C.C. states that the financing statement is not effective if filed in the wrong place; and, consequently, a creditor's security interest will remain unperfected.<sup>53</sup> As a result, creditors must be particularly cautious when determining the appropriate location for filing the financing statement. Therefore, it is imperative that the federal laws governing patents, copyrights, and trademarks be read together with the preemption provision of Article 9 to ensure that the financing statement is filed correctly.

*a. Perfection of a Security Interest in a Registered Copyright*

Courts have consistently held that the Copyright Act sets forth a federal filing scheme that preempts the Article 9 filing requirements for security interests in registered copyrights.<sup>54</sup> Moreover, the courts have held that a creditor's security interest is unperfected if the creditor filed the financing statement under the Article 9 filing provisions rather than filing with the United States Copyright Office ("USCO").<sup>55</sup> In fact, the

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52. See 35 U.S.C. § 1-376 (2000); 17 U.S.C. § 101-1332 (2000); 15 U.S.C. § 1051-1141 (2002).

53. U.C.C. § 9-311(a)(1) (2001). Under the U.C.C.:

[T]he filing of a financing statement is not necessary or effective to perfect a security interest in property subject to: (1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Section 9-310(a).[.] *Id.*

54. 17 U.S.C. § 205(c) (2010). The Copyright Act states:

Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if – (1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and (2) registration has been made for the work. *Id.*

55. Nat'l Peregrine, Inc. v. Capitol Fed. Savings and Loan Ass'n of Denver (*In re Peregrine Entertainment, Ltd.*), 116 B.R. 194, 201 (Bankr. C.D. Cal. 1990) (explaining that "because the Copyright Act and Article Nine create different priority schemes, there will be occasions when different results will be reached depending on which scheme was employed"). "The availability of filing under the UCC would thus undermine the priority scheme established by Congress with respect to copyrights. This type of direct interference with the operation of federal law weighs heavily in favor of preemption." *Id.*; See also Official Unsecured Creditors' Committee v. Zenith Productions, Ltd. (*In re AEG Acquisition Corp.*), 127 B.R. 34, 41 (Bankr. C.D. Cal. 1991) (describing that the perfection of a security

highest court, in any jurisdiction, to address security interests in copyrights is at the appellate level. In *In re World Auxiliary Power Co.*, the Ninth Circuit Court of Appeals held that the Copyright Act preempts revised Article 9 - a ruling that is consistent with lower court precedent.<sup>56</sup> Although the Supreme Court has never explicitly ruled on a case involving the securitization of a registered copyright, combining the holdings of these lower court cases with the wording of Article 9, a creditor should know to at least file a financing statement with the USCO or risk losing priority to another party such as a lien creditor. To ensure priority under the current system, however, it is in the creditor's best interest to file a financing statement with the USCO and the state according to the Article 9 provisions of the local jurisdiction.

*b. Perfection of a Security Interest in an Unregistered Copyright*

Early cases regarding the perfection of a security interest in unregistered copyrights held that the Copyright Act preempted the Article 9 filing provisions.<sup>57</sup> Under old case law, in order to obtain a security interest in an unregistered copyright, the copyright first had to be registered in the USCO, and, in addition, the creditor was also required to file a financing statement with the USCO.<sup>58</sup>

The most recent case has explained that perfection of a security interest in an unregistered copyright can be achieved by complying with local Article 9 provisions, thereby overruling earlier decisions.<sup>59</sup> Nevertheless, as with registered copyrights, due to the lack of case law on the subject, it is once again in the creditor's best interest to follow the dual filing process and file a financing statement with both the USCO and

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interest in a copyright requires that the financing statement be filed in the United States Copyright Office).

56. *In re World Auxiliary Power Co.*, 303 F.3d 1120, 1132 (9th Cir. 2002).

57. See *Official Unsecured Creditors' Comm.*, 127 B.R. 34; *Avalon Software Inc.*, 209 B.R. at 521.

58. *Avalon Software Inc.*, 209 B.R. at 521 (explaining:

"[p]erfection of a security interest in a motion picture, as in any copyright, requires two steps: the film must be registered with the United States Copyright Office, and the security interest must be recorded in the same office. Registration of a copyright is accomplished by the submission of an application to the copyright office together with a nominal filing fee and one or two copies of the work to be copyrighted").

A security interest in any copyright is unperfected unless the financing statement is filed with the United States Copyright Office, but the only way to put the world on notice of the security interest is to first register the copyright with the United States Copyright Office. *Id.* at 521-22.

59. *World Auxiliary Power Co.*, 303 F.3d at 1129-32 (rejecting earlier cases and holding that the perfection of a security interest in an unregistered copyright is with the state filing system and revised Article 9 is not preempted by the Copyright Act regarding an unregistered copyright).

with the state filing system as set forth in Article 9 of the local jurisdiction.

*c. Perfection of a Security Interest in a Trademark*

Although the Supreme Court has not heard a case regarding security interests in trademarks, lower courts have remained consistent in their holdings that the Lanham Act does not preempt revised Article 9 and that creditors should file financing statements with the state filing system according to the rules of the local jurisdiction.<sup>60</sup> Once again, because the Supreme Court cannot be looked to for a precedential ruling, it has been suggested that secured parties should file a financing statement with both the United States Patent and Trademark Office (“USPTO”) and with the state filing system proposed under revised Article 9 of the local jurisdictions, in order to ensure that other parties are on notice of the security interest.<sup>61</sup>

*d. Perfection of a Security Interest in a Patent*

Similar to the holdings regarding federal preemption of security interests in trademarks by the Lanham Act, courts have consistently held that, under Article 9, federal law does not preempt security interests in patents and that the Patent Act does not set out a federal filing system.<sup>62</sup> Furthermore, the Patent Act does not preempt Article 9 because the Pat-

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60. *Trimarchi v. Together Dev. Corp.*, 255 B.R. 606, 610 (Bankr. D. Mass. 2000) (holding that the perfection of a security interest in a trademark is governed by revised Article 9 and that the Lanham Act’s registration provision does not preempt U.C.C.’s filing requirements); *Roman Cleanser Co. v. Nat’l Acceptance Co. of Am.* (*In re Roman Cleanser Company*), 43 B.R. 940, 944 (Bankr. D. Mich. 1984) (explaining that because “a security interest in a trademark is not equivalent to an assignment, the filing of a security interest is not covered by the Lanham Act. Accordingly, the manner of perfecting a security interest in trademarks is governed by Article 9 and not by the Lanham Act”).

61. Andrew L. Jiranek, *Intellectual Property Secures Debt Financing*, 41 Md. B.J. 34, 39 (Jan./Feb. 2008). In order to prevent any confusion:

Secured parties should file and record a notice of conditional assignment with the USPTO in order to ensure that subsequent purchasers or mortgagees of the trademark have notice of the security interest and take that interest subject to the creditor’s lien. In addition, the secured creditor should file a U.C.C.-1 form in the debtor’s state to perfect its security interest in the marks under the U.C.C.

62. *City Bank & Trust Co. v. Otto Fabric, Inc.*, 83 B.R. 780 (Bankr. D. Kan. 1988). The reasons that the Lanham Act does not preempt Article 9 are:

First, the federal statute does not expressly state that one must file an assignment with the Patent and Trademark Office to perfect a security interest. The statute has been amended since the advent of modern commercial law. If Congress intended to preempt the field of filing, it could have said so. Second, the federal statute appears to leave open the area of protection against the interests of lien creditors . . . Thus, while the federal statute may preempt in part the system for perfecting security interests in patents, it is only a partial preemption. It leaves open a state filing to protect one’s security interest in a patent against a lien creditor. *Id.*

ent Act only extends to ownership interests in patents and does not cover security interests.<sup>63</sup> As noted by the *Cybernetics Services* court, the Patent Act only addresses transfers of ownership in a patent and a secured interest in a patent will not necessarily include a transfer of ownership.<sup>64</sup> Again, the lack of case law, especially the absence of a Supreme Court decision, leaves this a somewhat grey area. Once again, in order for the creditor to fully protect its interest, a creditor is advised to file both with the USPTO and with the state filing system according to the Article 9 provisions.

## 2. *Filing Location Under Article 9*

On the other hand, domain names or websites, as well as other technology such as computer programs, which fall under the umbrella of intangible assets, are governed by Article 9. Domain names and websites have the potential to create significant revenue for a company, making it both possible and worthwhile for the company to use its domain name or website as collateral. Security interests in domain names do not meet any of the exceptions under Section 9-310(b),<sup>65</sup> so it is appropriate to file the financing statement with the state according to the Article 9 provisions of the local jurisdiction.<sup>66</sup> Additionally, security interests in domain names do not fall under any of the exceptions set out in Section 9-301(3) of the U.C.C.,<sup>67</sup> and, therefore, the law governing the perfection of

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63. *In re Cybernetic Serv., Inc.*, 252 F.3d 1039, 1056-58 (9th Cir. 2001) (explaining that the Patent Act does not extend to security interests or lien creditors, and, therefore, filing a financing agreement with the United States Patent and Trademark Office is not necessary because the Patent Act does not preempt Article 9).

64. *Id.*

65. U.C.C. § 9-310(b) (2001). The U.C.C. states:

The filing of a financing statement is not necessary to perfect a security interest: (1) that is perfected under Section 9-308(d), (e), (f), or (g); (2) that is perfected under Section 9-309 when it attaches; (3) in property subject to a statute, regulation, or treaty described in Section 9-311(a); (4) in goods in possession of a bailee which is perfected under Section 9-312(d)(1) or (2); (5) in certificated securities, documents, goods, or instruments which is perfected without filing, control, or possession under Section 9-312(e), (f), or (g); (6) in collateral in the secured party's possession under Section 9-313; (7) in a certificated security which is perfected by delivery of the security certificate to the secured party under Section 9-313; (8) in deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under Section 9-314; (9) in proceeds which is perfected under Section 9-315; or (10) that is perfected under Section 9-316. *Id.*

66. U.C.C. § 9-501(a).

67. U.C.C. § 9-301(3). The U.C.C. states:

While tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs: (A) perfection of a security interest in the goods by filing a fixture filing; (B) perfection of a security interest in timber to be cut; and (C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral. *Id.*

a security interest in a domain name is the law of the jurisdiction of the debtor's location.<sup>68</sup>

Problems can arise early on because the creditor may have trouble identifying the appropriate jurisdiction and end up filing in the wrong location. Assuming the creditor does file in the proper location, the creditor must continue to monitor the activities of the debtor even after filing. Problems can arise down the line if the creditor fails to monitor the activities of the debtor throughout the duration of the security agreement. For example, if the debtor changes jurisdiction at any point, the secured party must file a financing agreement in the new jurisdiction to ensure that the interest in the domain name is still secured.<sup>69</sup> If the secured party does not monitor the activities of the debtor and the debtor changes locations without the creditor noticing, the creditor will become an unsecured creditor and lose the benefits achieved by becoming a secured creditor in the first place.<sup>70</sup>

### III. ANALYSIS

Given the state of the current system, small start-up companies are suffering. They are even worse off due to the extremely complex and confusing nature of the securitization requirements.<sup>71</sup> Thus, there is reason to believe that a single, nationwide database managed by a private company would eliminate much of the confusion that surrounds perfecting a security interest in intellectual property or other intangible assets. This would encourage creditors to enter the market and aid small start-up companies.

This section will assert four benefits that a single, nationwide database managed by a private company would provide. These four benefits are: efficiency, accuracy, monetary increases for individual states, and maintaining the advantages of filing with federal registries (i.e.,

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68. U.C.C. § 9-301(1).

69. U.C.C. § 9-316(b). The U.C.C. states:

If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed to never have been perfected as against a purchaser of the collateral for value. *Id.*

70. U.C.C. § 9-316(a)(2) (explaining that a security interest becomes unperfected at the expiration of four months after the debtor has changed locations, unless a financing statement is filed in the new jurisdiction).

71. Haemmerli, *supra* note 25, at 1649. There is a need for change in the law regarding secured interests in intellectual property because "the law surrounding these security interests has become terribly complicated and arguably dysfunctional. Just as intellectual property assets, and commercial transactions in them, have become more widespread, the law that regulates them has become increasingly uncertain, thereby increasing the costs associated with these transactions." *Id.*

USPTO and USCO). This section will also elaborate on the differences between a nationwide filing system run by the government and a nationwide database managed by a private company. This section will conclude by enunciating how the benefits of a privately run database far outweigh the benefits of a government run filing system, by arguing that a privately managed database is both more efficient and more effective than a nationwide system run by the government. Finally, because no plan is without its flaws, this section will address the potential obstacles involved with a private, nationwide filing system, and will conclude by proposing how to combat those obstacles.

#### A. BENEFITS OF A SINGLE, NATIONWIDE DATABASE MANAGED BY A PRIVATE COMPANY

The four major benefits to a single, nationwide database managed by a private company are efficiency, accuracy, monetary increases for individual states, and maintaining the advantages of filing with federal registries. These advantages outweigh the potential benefits of any other proposed reform to the current system such as the government run nationwide filing system.<sup>72</sup> These four benefits will first be discussed separately.

##### 1. *Efficiency*

A debtor changing locations presents one of the greatest hindrances to a creditor when attempting to determine whether the debtor's assets are already encumbered. When a debtor relocates, it is the responsibility of the creditor to file a financing statement in the new jurisdiction.<sup>73</sup> It may be difficult for a creditor to determine exactly where the debtor is located if the debtor is capable of changing locations with ease.<sup>74</sup> This is a problem when dealing with intangible assets because they are generally not tied to a physical location and the debtor has the ability to easily change locations.<sup>75</sup>

For example, assume that the debtor is an unregistered organization with its only place of business, including its chief executive office or

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72. Bosta, *supra* note 13, at 25 (2005). In an increasingly global society, "a nationwide U.C.C. filing system would be the most cost-effective, accurate, and efficient manner in which to put lenders on notice that an individual or business has an existing debt." *Id.*

73. U.C.C. § 9-316(a)(2) (2001).

74. Reiley, *supra* note 13. A security agreement should, however, include language that requires the debtor to either inform the creditor of or seek permission of the creditor before a change of name, change of state of incorporation, or change of residence. *Id.*

75. U.C.C. § 9-316 (2001). There is no Article 9 rule that requires the debtor to inform the creditor of a change in location. *Id.* Without the creditor ensuring that the language of the security agreement requires the debtor to inform the creditor of a change in status, the debtor has no obligation to inform the creditor of these changes. *Id.*

headquarters, in Illinois, and, in January, a creditor takes a security interest in some of the debtor's intangible assets and files the financing statement in Illinois. In August of the same year, the debtor's business has expanded and the debtor quietly moves its chief executive office to the State of Indiana, but still maintains substantial operations in Illinois. The company will continue to give the outward appearance that its headquarters remains in Illinois because they continue to maintain substantial operations in Illinois. In October, the debtor enters an agreement with a second creditor using the same intangible assets as collateral in which the first creditor already has a security interest. If the second creditor realizes that the chief executive office of the debtor is located in Indiana and searches in the Indiana database, it will not reveal that the assets are already encumbered because the original creditor only filed in Illinois. This creates an undesirable situation for both creditors.<sup>76</sup> The original creditor will need to file a financing statement in the new jurisdiction within four months of the move in order to maintain its priority over the second creditor.<sup>77</sup> If the original creditor fails to realize that the debtor changed locations and does not file in the new jurisdiction within four months of the change, the original creditor will lose some of its rights in the collateral<sup>78</sup> and the second creditor will then have priority.<sup>79</sup>

Under the scenario described above, a privately managed nationwide database would ease the burden on both creditors.<sup>80</sup> The first creditor would be protected because the filing of the financing statement in Illinois would be considered sufficient to put every future potential credi-

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76. U.C.C. § 9-316 cmt. 2 (2001). If the original creditor does manage to re-perfect a security interest before it becomes unperfected, then the original creditor's security interest maintains priority over future creditors. *Id.* Under U.C.C. § 9-316, the second creditor's security interest would still be perfected; however, the second creditor's interest would be inferior to the security interest held by the original creditor. *Id.*

77. U.C.C. § 9-316(b) (2001). The U.C.C. states:

If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value. *Id.*

78. U.C.C. § 9-316 cmt. 3 (2001). The official comment to the U.C.C. states: "[s]ubsection (b) sets forth the consequences of the failure to reperfect before perfection ceases under subsection (a): the security interest becomes unperfected prospectively and, as against purchasers for value, including buyers and secured parties, but not as against donees or lien creditors, retroactively." *Id.*

79. U.C.C. § 9-316(a)(2) (2001); U.C.C. § 9-316(b) (2001).

80. *See infra* Part III.B.2 (discussing how the nationwide database would obtain the financing agreements from the individual states).

tor on notice that the assets in question were encumbered.<sup>81</sup> Searching several different jurisdictions attempting to locate where or whether a debtor's assets are encumbered can become expensive and is very time consuming.<sup>82</sup> A nationwide database would relieve the second creditor of the burden of having to search multiple jurisdictions, and a single search would have informed the second creditor that those assets were encumbered. Therefore, both creditors would be better protected and much of the confusion surrounding the debtor's assets would be eliminated.

Furthermore, if the security interest covering the intangible assets fell under the provision of Article 9 that is preempted by federal law, the original creditor would have likely filed with the appropriate federal registry.<sup>83</sup> This information would also be available to the second creditor by searching the nationwide database.<sup>84</sup> A privately run nationwide database could thus eliminate the problem associated with creditors filing or searching in the wrong location. This would eliminate excessive costs, confusion, and potentially save creditors time and effort in filing or searching.

## 2. Accuracy

In general, a financing statement will be accepted if it correctly contains the basic information required.<sup>85</sup> Currently, however, different states have different filing requirements, and may be more or less leni-

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81. This is not to say that the creditor would no longer have to follow the Article 9 rules, but only that future creditors will be alerted as to the original security interest. Even if the original security interest lapsed under Section 9-316, a second creditor may shy away from taking a security interest in the same collateral because of the potential for problems and the possibility of litigation arising.

82. Spak, *supra* note 32, at 81 (explaining how time and money are consumed by the search process).

83. See *infra* Part III.A.4 (discussing the private, nationwide filing system's ability to maintain the benefits of filing with federal registries, including increases in the overall efficiency of the system).

84. Under the current system, the second creditor must know to search both the local registry and the appropriate federal registry to locate possible encumbrances of intangible assets. This has been a source of confusion in the past because creditors have either searched in the wrong database, or were uninformed, or forgot, that a second database existed. Under those circumstances, the second creditor might unknowingly take a security interest in an encumbered intangible asset, even though that creditor searched what it thought to be the proper database. Under the proposed system, the second creditor could run one search in the nationwide database and the results of all registries will be returned. This prevents the problem of a creditor searching in the wrong database and ensures that the creditor will always receive accurate information regarding the debtor's assets.

85. U.C.C. § 9-502(a) (2001). The U.C.C. states: "[A] financing statement is sufficient only if it: (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement." *Id.*

ent about what is acceptable depending on the jurisdiction.<sup>86</sup> For example, companies are often known throughout the public by a name that is not the registered name of the organization.<sup>87</sup> A company with a lengthy name such as “The Intangible Asset Corporation of Central Illinois” might be known to the public simply as “Intangible Assets Corp.”<sup>88</sup> It is likely that the State of Illinois would accept a financing statement containing the name “The Intangible Asset Corporation of Central Illinois” as the debtor, but, due to the filing requirements in Illinois, a financing statement with the name “Intangible Asset Corp.” may not be accepted. The State of Ohio, however, may accept a financing statement containing the name “Intangible Assets Corp.” as a debtor, even though “Intangible Asset Corp.” and “The Intangible Asset Corporation of Central Illinois” represent the same corporation. This is because different states have enacted different versions of Article 9 and the requirements of one state are not necessarily the same as the requirements of other states.<sup>89</sup> Under the current system, a search in the State of Illinois for “Intangible Asset Corp.” may or may not return the financing statement containing “The Intangible Asset Corporation of Central Illinois,”<sup>90</sup> and the subjectivity of when a financing statement is adequate contributes to blurring the line as to whether or not the requirements of U.C.C. § 9-503 are met.

One commenter has pointed out:

When an exact match is not found, the likelihood of the intended party being discovered depends on the judgment and possibly the work ethic of the particular officer performing the search . . . . Thus, the accuracy of a search is partially determined by the individual state employee’s decision on which alternative and variation to use in the search.<sup>91</sup>

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86. Bosta, *supra* note 13, at 33-34. The individual states have the right to accept or reject a financing statement; however, if the financing statement is accepted, it is held to be effective against all other creditors regardless of inconsistencies between jurisdictions.

87. U.C.C. § 9-503(c). A financing statement must contain the name of the debtor by meeting the requirements of U.C.C. § 9-503(a), and a trade name or nickname for the corporation will not suffice. *Id.*

88. U.C.C. § 9-506(a-c). A financing statement sufficiently contains the name of the debtor, under U.C.C. § 9-503, even if there are minor errors or omissions as long as those errors or omissions are not seriously misleading. *Id.* The financing statement is considered not to be seriously misleading if a regular search of the database would return the intended result. *Id.* Therefore, commonly abbreviated words such as “Corp.” being used for “Corporation,” will not be seriously misleading. *Id.* The problem with shortening “The Intangible Asset Corporation of Central Illinois” as “Intangible Asset Corp.” lies not in the fact that “Corporation” is abbreviated, but in the fact that “of Central Illinois” is left out and it is likely that a standard search would not return the intended results. *Id.*

89. Bosta, *supra* note 13, at 33-34. Each state can accept or reject a financing statement based on that state’s requirements. *Id.*

90. Spak, *supra* note 32 (“Currently, the accuracy of the search depends on two subjective factors: the discretion and judgment of the official performing the search and the knowledge and familiarity of the searching party with the U.C.C. office in that area”).

91. *Id.*

Currently, it is necessary to run the search using the debtor's entire legal name in order to ensure that the proper results are returned. This is because of inconsistencies in accurate returns stemming from the subjectivity that is present on the part of the state employee running the search.<sup>92</sup> Furthermore, Article 9 allows the filing office to reject a financing statement; however, this determination is partially subjective.<sup>93</sup> Due to the fact that different states have different filing requirements, some states may be more lenient in what is acceptable. Therefore, a financing statement that is rejected in one state might suffice in a differ-

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92. Under the proposed system of a nationwide database, it is still important to search using the debtor's full legal name; however, the proposed system will be in a better position to return possible matches even if the creditor searches under an abbreviated name or a misspelled name.

93. U.C.C. § 9-516(b). The U.C.C. states:

Filing does not occur with respect to a record that a filing office refuses to accept because:

- (1) the record is not communicated by a method or medium of communication authorized by the filing office;
- (2) an amount equal to or greater than the applicable filing fee is not tendered; (3) the filing office is unable to index the record because:
  - (A) in the case of an initial financing statement, the record does not provide a name for the debtor;
  - (B) in the case of an amendment or correction statement, the record:
    - (i) does not identify the initial financing statement as required by Section 9-512 or 9-518, as applicable; or
    - (ii) identifies an initial financing statement whose effectiveness has lapsed under Section 9-515;
  - (C) in the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or
  - (D) in the case of a record filed [or recorded] in the filing office described in Section 9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;
- (4) in the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;
- (5) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:
  - (A) provide a mailing address for the debtor;
  - (B) indicate whether the debtor is an individual or an organization; or
  - (C) if the financing statement indicates that the debtor is an organization, provide:
    - (i) a type of organization for the debtor;
    - (ii) a jurisdiction of organization for the debtor; or
    - (iii) an organizational identification number for the debtor or indicate that the debtor has none;
- (6) in the case of an assignment reflected in an initial financing statement under Section 9-514(a) or an amendment filed under Section 9-514(b), the record does not provide a name and mailing address for the assignee; or
- (7) in the case of a continuation statement, the record is not filed within the six-month period prescribed by Section 9-515(d). *Id.*

ent state.<sup>94</sup>

A privately managed nationwide database would substantially help alleviate these problems. To begin with, the private company managing the database would be able to alert the individual states as to possible deficiencies with the financing statement. As with the example above, the company managing the database would have the ability to recognize that “Intangible Asset Corp.” and “The Intangible Asset Corporation of Central Illinois” are possibly the same company and alert either the state or the creditor of the potential problem.<sup>95</sup> This is a significant benefit to creditors because it would give creditors the opportunity to correct the financing statement and maintain priority over other creditors.<sup>96</sup>

Furthermore, when a creditor approaches the company managing the nationwide database and inquires as to whether “The Intangible Asset Corporation of Central Illinois” assets are encumbered, the company managing the database would be in a better position to notify the creditor that “The Intangible Asset Corporation of Central Illinois” also goes

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94. U.C.C. § 9-520. The U.C.C. states, “[a] filing office shall refuse to accept a record for filing for a reason set forth in Section 9-516(b) and may refuse to accept a record for filing only for a reason set forth in Section 9-516(b).” *Id.*; U.C.C. § 9-516 cmt. 9 (2001). The official comment of the U.C.C. states, “Section 9-520(a) requires the filing office to refuse to accept an initial financing statement for a reason set forth in subsection (b). However, if the filing office accepts such a financing statement nevertheless, the financing statement generally is effective if it complies with the requirements of Section 9-502(a) and (b).” *Id.* Therefore, the U.C.C. acknowledges that according to the Article 9 rules, although there are only certain circumstances which call for allowing or requiring a filing office to refuse to accept a financing statement, there are occasions when a financing statement will be accepted when it should have been rejected. *Id.*

95. By maintaining a nationwide database, the company managing the database will have access to information such as the names of companies and possible aliases throughout the country. This will put the company managing the database in a much better position to recognize similarities and differences in the names of companies in multiple states, and, thereby, put the company managing the database in a better position to notify creditors of potential problems than the current system allows for.

96. U.C.C. § 9-338. It is important to limit errors in the financing statement as the U.C.C. describes:

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in Section 9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security gives value in reasonable reliance upon the incorrect information; and

(2) a purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral. *Id.*

by the “Intangible Asset Corp.” and those assets are encumbered.<sup>97</sup> This would further protect all creditors.

The original creditor would be alerted about any possible deficiencies in the financing statement so that the statement can be adjusted accordingly. In addition, the second creditor would be alerted to encumbrances that it would not have otherwise found. Because the federal registries also would be included in the nationwide database, this would prevent a creditor from the possibility of accidentally overlooking potential encumbrances filed in these databases or deficiencies in financing statements filed within the federal registry as well. This would ultimately make both filing and searching for financing statements less complicated and more accurate.

### 3. *Monetary Increases for Individual States*

Under the current system, individual states charge the party filing the financing statement a fee.<sup>98</sup> This one-time fee typically perfects the security interest for a five year period unless there is a change that would require the creditor to file a new financing statement, such as a change in the debtor’s location.<sup>99</sup> Typically, the creditor pays these fees to the state.<sup>100</sup>

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97. For example, the nationwide database would receive the filing in the State of Illinois for “The Intangible Asset Corporation of Central Illinois” and the filing in the State of Ohio for “Intangible Asset Corp.” Under the current system, neither creditor would know of the other filing because the two states do not share the information. Under the proposed system, however, a search in the nationwide database for either “The Intangible Asset Corporation of Central Illinois” or “The Intangible Asset Corp.” would return results for both because, unlike the current system, both financing statements are present in the database.

98. U.C.C. § 9-516(b). The U.C.C. states:

Except as otherwise provided in subsection (e), the fee for filing and indexing a record under this part, other than an initial financing statement of the kind described in subsection (b), is [the amount specified in subsection (c), if applicable, plus]:

- (1) \$[X] if the record is communicated in writing and consists of one or two pages;
- (2) \$[2X] if the record is communicated in writing and consists of more than two pages; and
- (3) \$[½X] if the record is communicated by another medium authorized by filing-office rule. *Id.*

99. U.C.C. § 9-515(a) (stating “a filed financing statement is effective for a period of five years after the date of filing”).

100. ILL. ADMIN. CODE tit. 14, § 180.13(a) (2009). According to the Illinois Administrative Code:

a) Filing Fees.

- 1) The fee for filing and indexing a UCC record communicated in a paper-based format or electronically is \$20.
- 2) A fee of \$20 shall be paid for an initial financing statement that indicates that it is filed in connection with a public-finance transaction and a fee of \$20 shall be paid for an initial financing statement that indicates that it is filed in connection with a manufactured-home transaction.

These fees are generally used to maintain the database and provide funding to keep the system operating; however, a nationwide database managed by a private company would give individual states the ability to earn even more commissions. For example, suppose a creditor files a financing statement with the Secretary of State in the State of Illinois. The State of Illinois will charge the creditor a fee to file this financing statement and the records in the State of Illinois will reflect that the debtor's assets are encumbered.<sup>101</sup> Under a national system managed by a private company, the company would come in and purchase this information from the State of Illinois and input the information into the national database. The private company would thereafter be able to recoup this money by charging any party searching for an encumbrance a high enough fee to cover its operating costs.<sup>102</sup>

Therefore, the nationwide system managed by a private company gives the individual states the ability to bring in money on both ends of the transactions. The state will continue to charge the filing fee to the party attempting to file the financing statement, and the state will bring in a second payment because the state now has the ability to resell that information to the private company. This is an ideal system for the states because they get to increase commissions without needing to make any major changes to their current operations. Furthermore, creditors will be willing to pay the fee to the company running the nationwide database for the search in exchange for the comfort of knowing the information is accurate and up-to-date. The nationwide database managed by a private company offers cost-shifting and revenue earning options that make the adoption of this system attractive to the individual states, in addition to the benefits offered to creditors and debtors.

#### 4. *Maintaining the Advantages of Filing with Federal Registries*

There are several reasons for filing the financing statement with both the state recording office and the federal registry. First, this will ensure that all future creditors will be put on notice that assets are encumbered if the future creditor searches either place. Second, and perhaps more importantly, a recording with the federal registry may be

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3) UCC search fee. The fee for a UCC search request communicated on paper or in a paper-based format is \$10 per name searched.

4) UCC search - copies. The fee for UCC search copies is \$1 per page. *Id.*

101. The applicable Article 9 rules would still apply, so the creditor would still be required to file in the appropriate jurisdiction. *See* U.C.C. § 9-307.

102. Because an individual state will still be able to offer a search of its individual database, the private, nationwide database will be unable to charge outrageous fees. Creditors would only be willing to pay for the service if it is worth the price, otherwise, the creditors would have no incentive to use the nationwide database and would instead continue to search in individual states.

necessary to cut off rights to subsequent purchasers for value without notice and put potential purchasers of the debtor on notice that the assets are encumbered and the security interest exists.<sup>103</sup>

As suggested above, when a creditor takes an interest in a debtor's intangible assets, including patents, trademarks, registered or unregistered copyrights, websites, or computer programs or other software, it is prudent to file a financing statement with both the state, according to the Article 9 rules of the local jurisdiction, and with the appropriate federal registry.<sup>104</sup> Creditors will have the added security of knowing that subsequent creditors will be put on notice of the existing interest in the intangible asset as collateral because a single search in the nationwide database by a subsequent creditor will return the original financing statement, whether it was filed in the local registry or in the federal registry.

Also, a nationwide database managed by a private company would not interfere with the second goal of putting subsequent or potential purchasers on notice because the original creditor will still be encouraged to file a financing statement with the appropriate federal registry, and the private company managing the database would then purchase this information from the federal registry. Therefore, a nationwide database managed by a private company would not interfere with either of the goals accomplished by filing with the federal registry, and, actually, could help advance those goals by making the information more readily searchable.

With respect to maintaining the advantages of filing financing statements with federal registries, the database managed by a private company makes the system more efficient and more accessible for creditors while maintaining the current benefits to potential purchasers of the intangible assets. Furthermore, the system managed by a private company will not, in any way, disrupt the current process. Ultimately, the nationwide system managed by a private company will continue to the

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103. Karin Peterka and Richard Ormond, *How to Secure an Interest in Intellectual Property*, REMEDIES NEWSLETTER (Buchalter Nemer – A Professional Law Corporation, Los Angeles, Cal.), Nov. 2006, at 2, available at [http://www.buchalter.com/bt/index2.php?option=com\\_content&do\\_pdf=1&id=81](http://www.buchalter.com/bt/index2.php?option=com_content&do_pdf=1&id=81). In discussing where a client should record a security interest in a patent, these practitioners say:

Patents cover inventions of new and useful processes, products or improvements and are governed by federal law. However, no federal statute governs the registration of a lender's security interest in a patent. As a practice, we recommend that our clients record their security interest in a Patent with the USPTO. Recording a lien in the USPTO is necessary to cut off a subsequent purchaser or mortgagee for valuable consideration without notice. In other words, a bona fide purchaser, or mortgagee, that duly records an interest in a patent with the USPTO may defeat a secured creditor that has not recorded their interest in the USPTO. We also recommend that a lender file an appropriate UCC financing statement. *Id.*

104. See *supra* Part II.B.1 (discussing the importance of filing both with the federal registry and with the state according to the rules of the local jurisdiction).

ensure protection for creditors and continue to further the goal of making the process more straightforward.

## B. PRIVATELY MANAGED DATABASE VS. GOVERNMENT MANAGED DATABASE

In general, implementing a privately organized database is much more practical than implementing a database run by the government. The two biggest downfalls with a national filing system run by the government - the cost of implementation and the difficulty implementing the system - are not problems with a national database managed by a private company. Furthermore, after the system would be in place, the privately run database has advantages over the government managed filing system regarding potential future purchasers of encumbered intangible assets. These problems with a government-operated system, and how and why a privately operated system avoids these problems, are major issues to be considered.

### 1. *Cost of Implementation*

A nationwide database managed by a private company does not come with any cost to the individual states or federal government during implementation, nor are there any administrative costs for either the individual states or the federal government. The private company would incur all of the initial costs as well as all of the administrative costs. These are significant benefits when compared to the costs associated with implementing a national filing system run by the government.

A national filing system operated by the government would be costly both to establish and to maintain.<sup>105</sup> Depending on exactly how the system is set up, the cost could be placed on either the federal government, or the individual states as one commenter has noted by saying:

The initial, or start-up cost, of the system is an issue that would need to be explored. How to handle these costs would again depend on how the system is implemented. If a national office is created, the federal government would likely use federal funds to create the system. If a state system linked on a national level is implemented, the states would likely have to contribute to the implementation costs.<sup>106</sup>

Therefore, a government run system will likely use either federal funds, state funds, or a combination of both to implement this system rather than using the money on other federal programs. The cost to the government, both federal and state, does not end there. In addition to using taxpayer funds to put the system in place, the state would either

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105. Bosta, *supra* note 13, at 41. "Another argument against the implementation of a national filing system is that it would be costly to establish and maintain." *Id.*

106. *Id.*

be stripped of all of the revenue generated by charging fees to run a search or the state may have to accept less revenue as a result of the new system.<sup>107</sup>

Under the nationwide system managed by the federal government, the fees would go either directly to the federal government or federal government office in charge of operating the system, or the fees would eventually get dispersed to the individual states.<sup>108</sup> Even if the fees were dispersed to the individual states, however, it may turn out that the states would not receive as much of the fee as they would if they were to remain autonomous because some of the fee would need to be allocated to maintaining the database.<sup>109</sup> Therefore, under a national, government-managed system, at best, the states will continue to receive the same commissions they currently do, and, at worst, the states would no longer collect any commissions from financing statement filings.<sup>110</sup>

As discussed previously, the main overall benefit of a national filing system is to increase the efficiency of the system. A nationwide database managed by a private company would provide this same benefit as a government run system, however, with a private system there would be no cost to the government. The private company would foot all start-up costs and all administrative costs. The private company would regain those costs when the company sells the information to creditors who wish to search the database.

Furthermore, the private company would be purchasing copies of the financing statements from either the individual states or the federal re-

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107. *Id.* "The creation of a national system would reduce or remove that revenue from the states." *Id.*

108. Bosta, *supra* note 13, at 39. There are two options available to address this problem:

One option would be to link all state filing offices through a national computer system, while still requiring state filing. In other words, every financing statement in the country could be found by performing a search in any state. This would allow state offices to retain their autonomy, but still allow lenders to search for debtors on a national level. The second would be to create a national office but put in place a revenue sharing program with the states based on where the debtor is located. That is, a creditor taking a security interest in collateral of an Ohio debtor would file nationally, and a portion of that filing fee would go to Ohio. *Id.*

109. Bosta, *supra* note 13, at 39. There is an issue of federalism that also must be dealt with when trying to remove powers from the states and give power to the federal government. *Id.* Currently, states have complete control over its individual registry and complete control over how much to charge to gain access to the system through filing or searching. States are unlikely to easily give up control without a strong incentive to hand over responsibility to the federal government. *Id.*

110. *Id.* The proposed nationwide database managed by the federal government provides little to no incentive to the individual states to relinquish control and, therefore, the individual states would likely not be willing to participate due to the underlying federalism issues.

gistries generating revenue for those entities.<sup>111</sup> A single, nationwide database managed by a private company would likely increase the individual states' overall revenue, which is in stark contrast to the effects on the individual states under the government run system.<sup>112</sup> For these reasons, a nationwide database operated by a private company is far superior to the national filing system run by the government with regards to implementation and administrative costs associated with the system.

## 2. *Ease of Implementation*

A single, nationwide database managed by a private company is incredibly easy to implement. It would require little, if any, legislative changes to the U.C.C, and, in fact, there is already a provision in Article 9 that lays the foundation for implementing this system.<sup>113</sup> Section 9-523(f) of the U.C.C. provides: “[a]t least weekly, the [insert appropriate official or governmental agency] [filing office] shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office.”<sup>114</sup> This Section of Article 9 is understood to be instructions for every adopting jurisdiction to make copies of all Article 9 filings available to the public,<sup>115</sup> and, on occasion, individual states have adopted language that makes the state statute even friendlier to a request for copies of all records in bulk.<sup>116</sup>

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111. The state and federal registries will be losing out on money currently generated by creditors or other interested parties searching the database, however, this revenue is easily recouped. The state and federal registries can charge the company, when purchasing the financing statements in bulk, enough to cover the loss that is created by no longer generating revenue from the searches. Also, the state and federal registries can save money because their operating costs will be much lower because creditors will no longer be requesting individual searches.

112. *See supra* Part III.A.3 (discussing how a private, nationwide database will increase commissions for individual states).

113. *See* U.C.C. § 9-523(f) (2001).

114. *Id.*

115. *Id.* § 9-523 cmt. 9 (“Subsection (f), which is new, mandates that the appropriate official or the filing office sell or license the filing records to the public in bulk, on a nonexclusive basis, in every medium available to the filing office”).

116. OHIO REV. CODE ANN. § 1309.523(F) (2000). The Ohio Revised Code provides:

(1) At least weekly, the filing office shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under sections 1309.501 to 1309.527 of the Revised Code, in a medium determined by the secretary of state.

(2) The secretary of state may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the secretary of state, plus special extraction costs, plus ten per cent. The secretary of state may charge for expenses for redacting information, the release of which is prohibited by law.

(3) As used in division (F)(2) of this section:

Based on the wording of U.C.C. 9-523(f), it is possible for a private company to come in and purchase copies of all records in each jurisdiction weekly.<sup>117</sup> The database would then be updated accordingly.<sup>118</sup> The Ohio Revised Code provides a good example of how much each individual state could reasonably charge for the request and possible restrictions that might be placed on the requests.<sup>119</sup> The language of U.C.C. 9-523(f) leaves the door open for a company to step in and begin building a national database.<sup>120</sup>

On the other hand, in order to implement a nationwide filing system operated by the government, it is likely that the language of several stat-

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(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the secretary of state that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the secretary of state, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(4) For purposes of divisions (F)(2) and (3) of this section, "commercial surveys, marketing, solicitation, or resale" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research. *Id.*

117. U.C.C. § 9-523(f) (2001).

118. *Id.* § 9-523 cmt. 8. The official comment to the U.C.C. states:

The utility of the filing system depends on the ability of searchers to get current information quickly. Accordingly, subsection (e) requires that the filing office respond to a request for information no later than two business days after it receives the request. The information contained in the response must be current as of a date no earlier than three business days before the filing office receives the request. *Id.*

119. *See generally* OHIO REV. CODE ANN. § 1309.523(F) (2000).

120. U.C.C. § 9-523(e) (2001). Due to the fact that the U.C.C. requires the filing office to fulfill requests in a timely manner, creditors would have little to worry about regarding a gap in time. *Id.*; U.C.C. § 9-523(f) (2001). Furthermore, the U.C.C. requires that the filing office make the financing statements available in bulk at least weekly. *Id.* Therefore, the private company managing the nationwide database would be in a position to inform creditors of changes regarding a debtor's assets in timely manner as well. *Id.*

utes would need to be amended.<sup>121</sup> When discussing the difficulties of implementing a national filing system run by the government, one commenter said:

A more significant political hurdle might occur if [intellectual property] interests were to be covered under a national filing system. This is because the U.S. Congress would have to amend both the Copyright Act and the Patent Act to legislate national filing for both types of interests in order to perfect.<sup>122</sup>

The most effective way to achieve this goal is to lobby Congress to change the relevant language of the Patent Act,<sup>123</sup> the Copyright Act,<sup>124</sup> and the Lanham Act,<sup>125</sup> so that the three Acts are all read the same way and are all interpreted as meaning that security interests in either a patent, trademark, or copyright should be filed under the national filing system and not with the respective federal registry.<sup>126</sup>

For these reasons, a nationwide database managed by a private company has a great advantage over a government run database. Article 9 already has the groundwork in place to establish a privately operated nationwide database,<sup>127</sup> whereas, in order to establish a government operated national filing system, legislative action must be taken and would require heavy lobbying of Congress.<sup>128</sup> Therefore, it is much more practical to implement the privately run nationwide database because the implementation is easier and more cost effective than establishing a national filing system operated by the government.

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121. See *supra* Part II.B.1 (discussing the different ways the relevant language of the Copyright Act, the Patent Act, and the Lanham Act have been interpreted by the courts); Bosta, *supra* note 13, at 41-42. “The biggest impediment to establishing a national filing system would likely be the need for legislative action.” *Id.*

122. Bosta, *supra* note 13, at 42.

123. See 35 U.S.C. § 1-376 (2000).

124. See 17 U.S.C. § 101-1332 (2000).

125. See 15 U.S.C. § 1051-1141 (2002).

126. Bosta, *supra* note 12, at 42. “Therefore, the only way to change the current system is to lobby Congress to change the Patent Act’s language to state that secured interests in patents must be filed nationally. This would require significant pressure on Congress and is not likely to be embraced.” *Id.*

127. BLACK’S LAW DICTIONARY 939 (8th ed. 2004) (defining a nonexclusive license as: “[a] license of intellectual property rights that gives the licensee a right to use, make, or sell the licensed item on a shared basis with the licensor and possibly other licensees”).

128. This is operating under the assumption that the phrase “sell or licenses to the public on a nonexclusive basis” of U.C.C. § 9-523(f) would be similarly interpreted as BLACK’S LAW DICTIONARY defines a “nonexclusive license.” The private company, as licensee, would be able to use the acquired financing statements to compile a nationwide database that is accessible by the general public. There is no reason to believe that a private company with the intent of making the information more readily available would be excluded from the definition set forth in Section 9-523(f).

### 3. *Result of Implementation*

Once a nationwide database managed by a private company is set up, it will almost seamlessly integrate with the current Article 9 filing rules, while resolving confusion surrounding much of the current system.<sup>129</sup> In contrast, a nationwide database managed by the government has many problems that the privately operated database would not encounter.<sup>130</sup> For instance, when the government is operating the database, the goal of putting both future potential purchasers and creditors on notice of a security agreement will not be achieved.<sup>131</sup> Thus, one of the main benefits and goals of requiring creditors to currently file financing agreements in federal registries is hindered.

A national filing system run by the government that replaces the current Article 9 filing requirements and takes over as the proper place to file financing statements concerning intangible assets would disrupt the goal of putting future potential purchasers on notice of a security agreement. Creditors would no longer have a reason to file a financing statement with the federal registry that governs the asset in question, and potential purchasers would not be put on notice of the security interest based on the documentation located in the federal registry.<sup>132</sup>

The privately managed database would provide benefits to creditors, debtors, and potential purchasers of the encumbered intangible assets. Conversely, the system managed by the government would interfere with a creditor's goal of securing its interest against future creditors and potential purchasers. Therefore, the privately managed database is far superior to the government run national database in terms of benefits provided to all parties.

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129. By resolving the inconsistencies in the current system, secured creditors will feel safer about extending credit, and, therefore, small start-up companies will have easier access to the capital that they desperately need.

130. *See supra* Part II.A.4 (discussing the benefits of requiring security interests in intangible assets to be filed in the appropriate federal registry and how the nationwide database managed by a private company will maintain those benefits).

131. *See supra* note 128.

132. Currently, a potential purchaser of an intangible asset will check with the appropriate federal registry prior to purchase to verify that the seller does, in fact, own the intangible asset in question. At this point, due to creditors filing financing statements in the federal registry, the purchaser would be notified that the intangible asset is encumbered and being used as collateral. If there were a government managed national registry, however, creditors would no longer have a reason to file financing statements in the federal registry. Therefore, the federal registry would not maintain any information regarding security interests and a potential purchaser may unknowingly purchase an encumbered intangible asset. This would create more problems for purchasers by forcing them to now search several areas in order to verify that the intangible asset is actually owned, free and clear, by the seller.

### C. THE PROBLEMS AND PRACTICALITIES

The reality of actually implementing a nationwide database is difficult, and there are a few issues that could hinder implementation that need to be resolved. One problem with implementing a nationwide database is the notion that a nationwide database probably will not solve all of the problems creditors face with initial filings without some sort of legislative action, and a second problem is the issues that arise based on the debtor's concern over privacy. The privacy issues involved stem from the debtor's concerns that this information may become too readily available and that sensitive information that was not previously available will now become available.

#### 1. *Unresolved Issues Regarding Where Creditors Should File*

Although a nationwide database will ease the burden on creditors attempting to determine whether a debtor's assets are already encumbered, it will not resolve lingering issues about where to file a financing statement. Article 9 will still require that the financing statement be filed in the local jurisdiction of the debtor,<sup>133</sup> unless it is preempted by federal statute. Therefore, a nationwide database, without legislative reform, would not relieve the burden on the creditor of the need to determine the proper location of the debtor to ensure that the security interest is properly perfected.<sup>134</sup>

This is not, however, as big of a problem as it may seem. The benefits of a nationwide database managed by a private company far outweigh this problem. First, a nationwide database which is managed by a private company will have access to all available records and the company can use this to its advantage. For example, suppose a creditor files a financing statement in the State of Illinois providing the name of the debtor as "Encumbered Intangible Assets." When the company managing the database receives this financing statement and attempts to insert the financing statement into the national database, the company managing the database would be alerted that "Encumbered Intangible Assets" already is listed as the debtor on several financing statements from the State of Florida. The company managing the database would then have the ability to either inform the State of Illinois or directly inform the creditor that the financing statement may be filed incorrectly and that the creditor should double check the location of the debtor.

Furthermore, the nationwide database would have preemptively corrected the mistake made in the above problem by putting in place a system to better inform the creditor that "Encumbered Intangible As-

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133. U.C.C. § 9-301(1) (2001) (explaining that the law governing perfection of security interests is the law of the jurisdiction of the debtor's location).

134. See U.C.C. § 9-307(b)(1)-(3) (2001).

sets" is listed as the debtor on financing statements out of Florida when the creditor searched for the debtor in the nationwide database. The creditor would have known to double check the location of the debtor because the search returning the results from Florida would have been red flags to the creditor that the debtor's location may not be Illinois. This would prevent creditors from extending credit to a debtor whose assets are already encumbered, and, thus, creditors are better protected. These benefits may not directly solve the problem; however, implementing a nationwide database does naturally eliminate some of the inconsistencies in the current system.

## 2. *Privacy Issue*

A second problem with implementing a nationwide database is the concern of privacy among debtors. Debtors may object to the amount of information about their outstanding security agreements becoming available to the public. Furthermore, there may be objections to a third party having more readily available access to the debtor's information although that party has little or no interest in the general agreement between debtor and creditor.

While these may be legitimate concerns, they should not prevent the implementation of a nationwide database. First, the wording of Section 9-523(f) already gives third parties the right to access the debtor's information contained in the security agreement.<sup>135</sup> Second, financing statements containing this information are currently readily available to creditors that request the financing statements through the state.<sup>136</sup> Therefore, the private company is not allowing access to any information that is not already available to a searching party.

Another possible solution is to revise Article 9 to include a clause allowing for insertions and deletions in the original filing statement when providing a copy to a third party. The version of Article 9 adopted in Ohio provides an example of statutory language that offers additional

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135. See U.C.C. § 9-523(f) (2001).

136. U.C.C. § 9-523(c) (2001). The U.C.C. states:

The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that:

(A) designates a particular debtor [or, if the request so states, designates a particular debtor at the address specified in the request];

(B) has not lapsed under Section 9-515 with respect to all secured parties of record; and

(C) if the request so states, has lapsed under Section 9-515 and a record of which is maintained by the filing office under Section 9-522(a);

(2) the date and time of filing of each financing statement; and

(3) the information provided in each financing statement. *Id.*

protection for the debtor.<sup>137</sup> Specifically, the Ohio Revised Code explicitly states, “[t]he Secretary of State may charge for expenses for redacting information, the release of which is prohibited by law.”<sup>138</sup> Provisions such as this would provide debtors with some extra security, allowing certain portions to be redacted if it is deemed particularly detrimental to the privacy of the debtor. According to provisions such as these, debtors should be less worried about sensitive information becoming widely available to the public and should put to rest some of their other concerns.

Once again, what originally appeared to be a problem with a nationwide database turns out to be a minimal issue. The Ohio Revised Code provides just one example of how debtors are easily protected and provides an example of how to prevent sensitive information about debtors from becoming more readily available. The information contained on the financing statements is currently available to the public by running a search in the appropriate state. Creditors frequently access this information; however, creditors are met with confusion when attempting to determine whether a debtor’s intangible assets are encumbered due to the language of Article 9. Therefore, while a nationwide database would not be making any new information available, it would make the information more readily available to searching parties. This would be beneficial to creditors because it would decrease the amount of time and effort spent searching multiple databases by allowing the searching creditor to find all of the necessary information in one search on the nationwide database.

#### IV. CONCLUSION

Currently, there is a lack of creditors in the market and start-up companies are suffering because they are unable to secure the capital needed to get their business off the ground. The lack of creditors in the market is due to a multitude of factors, one of which is that the current system is confusing to both creditors and debtors. The drafters of Article 9 intended to make the system easier for both lenders and creditors, but the improvements have been shown to be far from perfect. One of the most glaring problems and the source of much confusion, the rules regarding the securitization of intellectual property and other intangible assets, can easily be improved upon by implementing a nationwide database of financing statements managed by a private company.

Implementing a nationwide database would lessen the investigative strain placed on creditors willing to enter the market. Furthermore, a nationwide database would promote the Article 9 drafters’ goal of mak-

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137. OHIO REV. CODE ANN. § 1309.523(F) (2000).

138. *Id.*

ing the system less complicated and more uniform. By implementing a nationwide database, the system would become more efficient, more accurate, and increase revenue for individual states, all while maintaining the advantages of filing with federal registries when federal law governs the intangible asset in question. These are unique traits that are only possessed when a private company manages the nationwide database.

Additionally, a nationwide database managed by a private company is far superior to a national filing system run by the government when it comes to the cost and ease of implementing the system. The government run system would be burdensome to implement, including lobbying Congress for legislative action, but Article 9 already has a provision in place to establish a privately managed nationwide database. Another advantage of setting up a privately managed nationwide database over a government run national filing system is that a privately managed nationwide database would not cost the government anything to set up. The private company would be responsible for all start-up and administrative costs. The state and federal registries are the beneficiaries of all of these improvements to the current system.

Although the proposed nationwide database managed by a private company may not resolve every issue facing filers of Article 9 financing statements, the privately managed nationwide database will provide vast improvement over the current system and minimize the remaining problems. Moreover, the potential privacy concerns of debtors can easily be eliminated by redacting any sensitive information from the copies of the financing statements.

Implementing a single, nationwide database managed by a private company is the first step towards bringing more creditors into the market. Creditors will more easily be able to determine whether a debtor's assets are encumbered, and, in turn, the creditors will be more willing to lend to a debtor. Therefore, the simplest way to remove some of the confusion surrounding security agreements covering intangible assets, and to bring creditors back into the market to begin lending money to technology and software start-ups, is to set up a privately managed nationwide database.