

UNINTENDED CONSEQUENCES: STATE MERGER STATUTES AND NONASSIGNABLE LICENSES

Joshua. G. Graubart¹
Duke University School of Law
jgg7@law.duke.edu

The confused state of most state corporate merger statutes allows many intellectual property licenses to find their way into unintended hands by way of corporate merger, in spite of non-assignment clauses. Clearly a detriment to licensors, corporate licensees too should be wary of depending upon the merger statute; a court ruling may not go their way. The states must clean up their collective act and bring some much needed certainty to a highly unpredictable intersection of corporate and intellectual property law.

INTRODUCTION

¶1 Creators of original works most often protected by copyright, patent, and trademark, allow others to use them by way of licensing agreements. Many of these licenses contain clauses prohibiting the assignment of the license to others without the permission of the licensor. However, inconsistency among the states has fostered continuing confusion regarding the efficacy of such clauses when confronted with the merger of parties. Even within one jurisdiction, sparse and ambiguous rulings often result in inconsistency based on the type of merger involved: forward mergers may constitute an impermissible assignment, while reverse mergers do not. Such uncertainty is conducive neither to sound business decisions nor to the secure licensing of rights; the states should move, as some already have, toward clarifying their merger statutes.

BACKGROUND

¶2 Intellectual property rights, which initially lie with the creator of an original work, may be licensed to others by contract. Publishers pay authors for the right to distribute the authors' works; similarly, businesses pay inventors for the right to manufacture and sell products based on their inventions. These rights are granted by way of a license on the original work in question.²

¶3 A license is a contract whereby the holder of intellectual property rights grants permission for another party to make use of the work. In exchange, the licensed party will furnish the rights holder with some consideration or royalty, usually either a fee or a per unit rate, or some combination thereof.³

¶4 The licensee an inventor chooses to make use of his original work is often exceedingly important to a licensing arrangement. Trade and service mark licensors, for example, will be very careful about who may be

¹ A.B., Dartmouth College, 1998; candidate, J.D./LL.M. (International and Comparative Law)/M.A. (History), Duke University, 2005.

² DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY LAW 274-315 (1994).

allowed to offer goods and services to the public under the aegis of their mark; poor quality goods or services will damage the value of a mark, so a mark holder will want to be certain to retain power to vet licensees. Often this is accomplished by means of a non-assignment provision in the license agreement, forbidding the transfer of the license. However, unless the provision expressly prohibits the license surviving a merger, a company which acquires a licensee via a merger may also succeed to the license agreement without the permission of the licensor.⁴

STATE MERGER STATUTES

¶5 While not an entirely settled question, assignment of patent and copyright licenses is generally held to be matter of Federal common law.⁵ However, whether a merger constitutes an assignment remains a matter of state law.⁶ The language of state merger statutes therefore determines the effect of mergers with respect to assignment of licenses and the states have taken various approaches to the problem of assignment via merger.

¶6 While a number of states have adopted parts of the ABA Model Business Corporation Act (the “Model Act”) at various times, the “effect of merger” provision (currently § 11.07) language has changed over the years. In 1969, it stated that following a merger, the survivor

shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises . . . of each of the merging or consolidating corporations . . . and all and every other interest of or belonging to or due to each of the corporations so merged . . . shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed.⁷

¶7 Alabama and Ohio, for example, have adopted this language.⁸

¶8 The approach of the California legislature is not far removed from that of the 1969 Model Act language. The California statute reads: “the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations.”⁹

¶9 In 1984, the Model Act was revised, and the new provision employed substantially different language: “all property owned by, and every contract right possessed by, each corporation or other entity that

³ *Id.* at 297-98.

⁴ *Id.* at 314-15.

⁵ See Brandon M. Villery, *The Transferability of Non-Exclusive Copyright Licenses: A New Default Rule for Software in the Ninth Circuit?*, 22 HASTINGS COMM. & ENT. L.J. 153, 156-57 (1999).

⁶ *E.g.*, PPG Indus., Inc. v. Guardian Indus. Corp., 597 F.2d 1090 (6th Cir. 1979) (a patent license case); SQL Solutions, Inc. v. Oracle Corp., No. C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097 (N.D. Cal. Dec. 18, 1991) (a copyright license case); Hartford-Empire Co. v. Demuth Glass Works, Inc., 19 F.Supp. 626 (E.D.N.Y. 1937) (a patent license case). See also Villery, *supra* note 5, at 157; Elaine D. Ziff, *The Effect of Corporate Acquisitions on the Target Company’s License Rights*, 57 BUS. LAW. 767, 775 (2002) (Villery and Ziff agree that copyright licenses follow the rules for patent licenses).

⁷ Mod. Bus. Corp. Act Ann. § 76(d) (1969) (includes modifications through 1981).

⁸ Ala. Code § 10-2B-11.06 (2003); ORC Ann. 1701.82(3) (2003).

⁹ Cal. Corp. Code § 11.07(a) (2003).

merges into the survivor is vested in the survivor without reversion or impairment”¹⁰ The Delaware statute employs some of this latter language.¹¹

¶10 The official comment to Model Act §11.07 includes the following note: “A merger is not a conveyance, transfer, or assignment. It does not give rise to a claim that a contract with a party to the merger in effect on the grounds of non-assignability, unless the contract specifically provides that it does not survive a merger.”¹²

¶11 In order to ensure the enforceability of this proviso, certain states have modified their statutory language. Colorado’s statute states that following a merger the assets of the constituent corporations are “transferred to and vested in the surviving corporation.”¹³ This language was formerly employed by the Ohio statute, and was interpreted contrary to the official comment proviso, as will be discussed below. To prevent this problem, Colorado has enacted a further provision explicitly providing that “a merger does not constitute a conveyance, transfer, or assignment.”¹⁴

¶12 Similarly, until 1987, the Texas statute was nearly identical; the assets of constituent corporations were “deemed to be transferred to and vested in” the survivor.¹⁵ For the same reasons as Colorado, Texas amended its previous statute.¹⁶ The statute now provides that the assets of constituent corporations are “deemed to be, and without any transfer or assignment having occurred, vested in” the surviving corporation.¹⁷ A few states have thus taken steps to prevent the confusion that might arise following a merger. Most effectively, states such as Colorado and Texas have amended their state statutes to expressly dictate that a merger does not constitute the assignment of a license.

FORMS OF MERGER

¶13 There are two common forms of merger, usually referred to as “forward” or “direct” mergers and “reverse triangular” or “reverse subsidiary” mergers. The form employed in a given transaction can have a serious impact on the outcome in terms the transfer of license agreements.¹⁸

¶14 In a forward merger, an acquired company ceases to exist as it is subsumed by the acquiring company or its subsidiary, which survives the merger. The surviving company then succeeds, by operation of law, to the assets and liabilities of the subsumed corporation.¹⁹

¹⁰ Mod. Bus. Corp. Act Ann. § 11.07(a)(3) (1984) (includes modifications through 1999).

¹¹ 8 Del. Code. Ann. tit. 8, § 259(a) (2002).

¹² Mod. Bus. Corp. Act Ann. § 11.07 cmt. (2000/01/02 supplement).

¹³ Colo. Rev. Stat. § 7-111-106(1)(b) (2003).

¹⁴ § 7-90-204(1)(a).

¹⁵ Tex. Bus. Corp. Act. Ann. art. 5.06A (Vernon 1999), cited in Peter Macaulay, *The Effect of Mergers on Anti-Assignment Provisions in Contracts: A Case Note on TXO Production Co. v. M.D. Mark*, 53 BAYLOR L. REV. 489, 496 (2001).

¹⁶ TXO Production Co. v. M.D. Mark, Inc., 999 S.W.2d 137, 141 n.3 (Tex. Civ. App. 1999).

¹⁷ Macaulay, *supra* note 15, at 496-97.

¹⁸ Ziff, *supra* note 6, at 783.

¶15 By contrast, in a reverse triangular merger, the acquiring corporation sets up a subsidiary corporation. This subsidiary is then merged into the target company, which survives the merger, but which has traded its own stock for that of the subsumed subsidiary, so that the acquiring company now holds the target, which retains its assets, as a wholly-owned subsidiary.²⁰

¶16 Because the target company survives the merger, it has been assumed that such a merger does not fall prey to the uncertainty attending forward mergers with respect to assignments. Indeed, in moving to amend its merger statute, the Texas legislature acted on the belief that reverse mergers were proof against questions of assignment, and therefore it was merely closing a loophole where one type of merger was open to contest but the other was not.²¹

CASE LAW

¶17 The case law²² touching on this question is particularly confusing, not least because the courts so often have deviated from what would appear to be an intuitive reading of the statutory language. The revisions to the Model Act do not appear to have solved the problem; the “vested in” language contained in the 1984 Model Act has been repeatedly construed as denoting an assignment or transfer of contract rights from the constituent companies to the surviving company.

¶18 As long ago as 1939, in *Koppers Coal & Transport Co. v. United States*,²³ the Third Circuit confronted the Delaware statute, which then, as now, provided that when the merger is effected, “the separate existence of all the constituent corporations . . . shall cease” and that property “belonging to each [constituent corporation] shall be vested in the corporation resulting from or surviving” the merger.²⁴ Faced with an argument that constituent corporations do not cease to exist, but rather live on within the surviving corporation, the court dismissed it as “metaphysical” and easily dispelled by the “vested in” language.²⁵ “In short, the underlying property of the constituent corporations is transferred to the resultant corporation upon the carrying out of the . . . merger”²⁶

¹⁹ *Id.*

²⁰ *Id.*

²¹ Macaulay, *supra* note 15, at 496-97 (citing House Comm. on Bus. & Com., Bill Analysis, Tex. H.B. 418, 70th Leg., R.S. (1987)).

²² The ambition of this iBrief is to provide a sketch of the current case law in order to illustrate the problems of interpretation of the various states’ “effect of merger” statutes, in particular as they pertain to licenses. Many important interpretive discussions are not included here, in particular the exhaustive treatment of leases and insurance contracts, and, for the most part, cases involving parent/subsidiary mergers or the merger of subsidiaries of the same parent. For a thorough summary of these cases, please see *TXO Production*, 999 S.W.2d at 139-41; for a complete discussion see Ziff, *supra* note 6.

²³ 107 F.2d 706 (3d Cir. 1939) (quoting Del. Rev. Code 1935, § 2092; the same language persists in 8 Del. Code. Ann. tit. 8, § 259(a) (2002)).

²⁴ *Id.* at 708.

²⁵ *Id.*

²⁶ *Id.*

¶19 Similar language is included in the Alabama “effect of merger” provision, derived from the Model Act.²⁷ The Alabama statute explicitly states that “[w]hen a merger takes effect . . . [e]very other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases.”²⁸ Nonetheless, in 1995 the Alabama Court of Civil Appeals accepted just such a “metaphysical” argument in *International Paper Co. v. Broadhead*.²⁹ Though the new language had been adopted in the meantime, the court confirmed the continued validity of a 1974 ruling by the Alabama Supreme Court, which held that “[i]t is well-settled that the merger of two corporations does not end the existence of either, rather the existence of both continues under the merged status.”³⁰ Therefore, since neither entity has ceased existence, no transfer or assignment is necessary; the contracting party continues to exist and to perform under the agreement.³¹

¶20 Neither of these cases dealt specifically with licenses. *Koppers* related to the transfer of stock shares, and *International Paper* to the survival of tax privileges. However, the principles on which both cases were decided have heavily influenced license-related cases.

PPG Industries: Merger as Transfer

¶21 In *PPG Industries, Inc. v. Guardian Industries Corp.*,³² the Sixth Circuit addressed the transfer, via merger, of a patent license. In spite of a clause in the license forbidding assignment, the licensee merged into another corporation, a competitor of the licensor.³³ This surviving corporation then claimed it had not received the license via assignment, but rather had succeeded to them by virtue of the merger.³⁴ The court noted that the chief precedent cited by scholars on this matter was *Hartford-Empire Co. v. Demuth Glass Works, Inc.*,³⁵ which dealt with licenses which were explicitly assignable.³⁶ Consequently, the Sixth Circuit reasoned that the conclusion reached in *Hartford-Empire*, that the licenses were “conveyed” under New York law to the survivor, owed to their explicit assignability, and not to “any general principle that such licenses pass to the resultant corporation where there is a merger.”³⁷

¶22 Though declining to apply the *Hartford-Empire* precedent, the Sixth Circuit ultimately concluded that the licenses in *PPG Industries* were in fact transferred to the surviving corporation in violation of the non-assignment clause. Citing the Third Circuit ruling in *Koppers*, the *PPG Industries* court based its judgment

²⁷ Mod. Bus. Corp. Act § 11.07(a)(2) (1984) (as amended through October 1999).

²⁸ Ala. Code § 10-2B-11.06 (2003).

²⁹ 662 So. 2d 277 (Ala. Civ. App. 1995).

³⁰ *Id.* at 279 (quoting *Birmingham Trust Nat’l Bank v. State*, 294 So. 2d 153 (Ala. 1974)).

³¹ *Id.*

³² 597 F.2d 1090 (6th Cir. 1979) (a patent license case).

³³ *Id.*

³⁴ *Id.* at 1093.

³⁵ 19 F. Supp. 626 (E.D.N.Y. 1937).

³⁶ *PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1094 (6th Cir. 1979).

³⁷ *Id.*

on an interpretation of the Ohio “effect of merger” statute.³⁸ The Ohio statute at the time was based on the 1969 Model Act and stated that all property of constituent corporations would “deemed to be [t]ransferred to and vested in the surviving or new corporation.”³⁹ The Delaware statute construed by the Third Circuit in *Koppers*, by contrast, employs the language later adopted by the 1984 Model Act⁴⁰, to wit, the property “belonging to each [constituent corporation] shall be vested in the corporation surviving or resulting from such merger.”⁴¹ Nonetheless, the *PPG Industries* court, based on the language used by the *Koppers* court – “the underlying property of the constituent corporations is transferred to the resultant corporation”⁴² – deemed the Ohio statute to be semantically equivalent to the Delaware statute, and therefore the merger to have violated the non-assignment clause: “A transfer is no less a transfer because it takes place by operation of law rather than by a particular act of the parties.”⁴³

¶23 This rationale has not been universally accepted. The Texas legislature found it so disturbing that Texas legislators specifically cited it as a result the new statutory language was designed to prevent.⁴⁴

Trubowitch: The Balance of Interest Test

¶24 Courts, too, disapproved of the *PPG Industries* ruling. Citing California Supreme Court Justice Traynor’s finding in *Trubowitch v. Riverbank Canning Co.*⁴⁵ that “if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the non-assignability of the contract,”⁴⁶ in *Syenergy Methods v. Kelly Energy Systems, Inc.*, the Rhode Island Federal District Court chose to qualify the *PPG Industries* decision.⁴⁷

¶25 Based on the fact that, in this particular case, the court could discern “no change in the protected interests of the parties” as a result of the merger, the *Syenergy Methods* court chose to accept that, while the merger might be seen in light of *PPG Industries* as effecting a transfer, it was not a transfer in violation of the non-assignment clauses:⁴⁸ “Defendants cannot be permitted to dispute the terms of a legitimate agreement when no substantial basis exists for such a dispute.”⁴⁹

³⁸ *Id.*, at 1095-96.

³⁹ *Id.*, at 1096.

⁴⁰ *Koppers Coal & Transp. Co. v. United States*, 107 F.2d 706, 707 (3d Cir. 1939).

⁴¹ *PPG Indus.*, 597 F.2d at 1096.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *TXO Production Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137, 141 n.3 (Tex. Civ. App. 1999).

⁴⁵ 182 P.2d 182 (1947).

⁴⁶ *Syenergy Methods*, 695 F. Supp. at 1366 (quoting *Trubowitch*, 182 P.2d at 188).

⁴⁷ 695 F. Supp. 1362 (1988). Interestingly, no mention is made of the merger statute for the jurisdictions involved.

⁴⁸ *Id.*

⁴⁹ *Id.*

¶26 However, the rationale adopted in *Trubowitch* received short shrift in *Council of Better Business Bureaus Inc. v. Better Business Bureau, Inc.*,⁵⁰ a trademark license case. Though, as in *Synergy*, there was no discernable prejudice to the rights of either party following the merger – both parties to the merger held licenses for the same trademark – the court, citing *PPG Industries*, refused to budge from a strict reading of the “explicit language” of the non-assignment clause.⁵¹

¶27 The *Trubowitch* doctrine turns up again in *SQL Solutions, Inc. v. Oracle Corp.*⁵² However, in this case the federal court determined that the balance of interest test was unnecessary.⁵³ Considering a software license dispute, the facts of which were remarkably similar to those in *PPG Industries* (a licensee merged with a competitor of the licensor; the license contained a non-assignment clause) the court, citing *Trubowitch*, held that “California courts have consistently recognized that an assignment or transfer of rights does occur through a change in the legal form of ownership of a business.”⁵⁴ Citing *Koppers*, the court endorsed the proposition that “a transfer of rights is no less a transfer because it occurs by operation of law in a merger.”⁵⁵ Despite taking explicit note of Justice Traynor’s *Trubowitch* principle – that the validity of an assignment depends on its effect on the interest of the parties – the *SQL Solutions* court concludes that copyright licenses are not assignable as a matter of Federal law, and so the transfer, though it might otherwise survive an analysis under the *Trubowitch* test, is forbidden under Federal law.⁵⁶

The Reverse Triangular Merger Problem

¶28 The *SQL Solutions* decision is notable for another reason. Excepting *Hartford-Empire*, for which the record is unclear,⁵⁷ all of the cases previously discussed involved forward mergers. *SQL Solutions* involves a reverse triangular merger.⁵⁸

¶29 With respect to the *Hartford-Empire* decision, the *PPG Industries* opinion comments that “[i]t is also noteworthy that the surviving corporation following the merger in *Hartford-Empire* was the original licensee, whereas in the present case the original licensee was merged into [the survivor].”⁵⁹ Furthermore, the Texas

⁵⁰ No. 99-CV0282, 1999 WL 288669, at *1 (N.D.N.Y. Mar. 30, 1999).

⁵¹ Ziff, *supra* note 6, at 785-86 (quoting *Better Business Bureau*, 1999 WL 288669, at *3).

⁵² No. C-91-1079 MHP, 1991 WL 626458, at *1 (N.D. Cal. Dec. 18, 1991).

⁵³ *Id.* at *12.

⁵⁴ *Id.* at *8 (citing *Trubowitch*, 182 P.2d at 188).

⁵⁵ *Id.* at *11.

⁵⁶ *Id.* at *12.

⁵⁷ *Hartford-Empire Co. v. Demuth Glass Works, Inc.*, 19 F. Supp. 626, 627 (E.D.N.Y. 1937). All that is said in the opinion is that the resulting corporation took the name of the acquired company, but it is not clear whether or not this was a proper reverse triangular merger or merely a forward merger accompanied by a name change. See Ziff, *supra* note 6, at 787 n.130.

⁵⁸ *SQL Solutions, Inc. v. Oracle Corp.*, No. C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097, at *4 (N.D. Cal. Dec. 18, 1991); see also Ziff, *supra* note 6, at 787 (noting that *SQL Solutions* is “the lone recent case addressing the effect of a reverse subsidiary merger”).

⁵⁹ *PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1094 (6th Cir. 1979); see also Ziff, *supra* note 6, at 787 (contending that the language of the *PPG Industries* opinion – the clause quoted immediately above in conjunction

legislature, in amending the Texas statute in 1987, expressed the opinion that “a merger may now be effected without raising the issue [of assignment by merger] by means of a “reverse triangular merger.”⁶⁰ However, the *SQL Solutions* decision casts doubt on the certainty of this conclusion. Although the court was undoubtedly aware of *PPG Industries*,⁶¹ it took no interest in the mechanics of the merger, concluding that under established California doctrine, an assignment occurs through a change in the legal form of ownership of a business.⁶² Evidently, a reverse triangular merger qualifies as a “change in the legal form of ownership,” under the doctrine of *Trubowitch*.

TXO Production: The Efficacy of the Texas Statute

¶30 By deviating from the Model Act language, Texas has had better luck than many other states in drafting a statute sufficiently lucid on this point to make deviation by its courts practically impossible. Its 1987 revision was put to the test in 1999 in *TXO Production Co. v. M.D. Mark, Inc.*⁶³ Here, the Texas Court of Civil Appeals overturned a ruling by the trial court, which held that a nonassignable license to use proprietary data was improperly transferred by operation of a merger.⁶⁴

¶31 On appeal, the court considered the arguments favoring the precedent of *PPG Industries* but dismissed them on several grounds.⁶⁵ First, the court held that *PPG Industries* is distinguishable from *TXO Production* because the former case involved a merger between unrelated entities, while the latter was between a parent and subsidiary, and therefore merely a change of form.⁶⁶ Texas therefore seems not subscribe to Judge Traynor’s assertion that a change in the legal form of ownership of a corporation is sufficient to effect a transfer.

¶32 Second, the court noted that Texas legislators, in promulgating the 1987 statute revision, had expressly named the ruling in *PPG Industries* as a result they were attempting to prevent.⁶⁷ Third, the court observed that *PPG Industries* involved a patent license, and was based therefore in part on “a strong public policy against the implied assignment of patent licenses.”⁶⁸ *TXO Production*, by contrast, involved a license to use data; the licensor attempted to argue that the data constituted a trade secret, and might therefore be

with the finding that the *Hartford-Empire* court had *not* found an assignment to have been made (*see supra*, ¶ 21) - indicates an express distinction, but the use in the *PPG Industries* opinion of the distinctly unemphatic phrase “it is . . . noteworthy” cautions against such a positive assertion).

⁶⁰ Macaulay, *supra* note 15, at 496-97 (quoting House Comm. on Bus. & Com., Bill Analysis, Tex. H.B. 418, 70th Leg., R.S. (1987)).

⁶¹ *But see PPG Industries*, 1991 WL 626458, at *11.

⁶² *SQL Solutions*, 1991 WL 626458, at *9.

⁶³ 999 S.W.2d 137, 137 (Tex. Civ. App. 1999).

⁶⁴ *Id.* at 143.

⁶⁵ *Id.* at 140-42.

⁶⁶ *Id.* at 141.

⁶⁷ *Id.* at 141 n.3.

⁶⁸ *Id.* at 141 n.4.

analogous to a patent license, but failed to convince the court.⁶⁹ This third contention by the court seems distinctly questionable. While the *PPG Industries* opinion does make mention of this federal policy, it notes that the district court had concluded that it was not germane to the case, since it needed first to determine, via state law, whether there had been a transfer.⁷⁰ There is nothing to suggest that the Sixth Circuit Court of Appeals took issue with this ruling by the trial court; its opinion appears to have been based on this determination, focusing on the mechanics of the merger under state law.

¶33 Even so, the final distinction is the most significant. The court concluded that the Texas, Ohio, and Delaware statutes, being all derived in some measure from the Model Act,⁷¹ are sufficiently similar to be interchangeable.⁷² Explicitly rejecting the conclusion reached in *PPG Industries*, it instead chose to reinterpret all three statutes, reading them - without explicit textual analysis - to result in the surviving corporation's succession to the rights of the constituent corporations without a prohibited transfer.⁷³

CONCLUSION

¶34 To feel secure in their rights, licensors must be able to make an accurate assessment of who may ultimately come into possession of the licenses they grant. Careful drafting of license agreements – the inclusion of an explicit bar to mergers or, alternatively, explicit permission, in non-assignment clauses – is still the best way to prevent surprises like the sort seen above. Many existing licenses, however, and no doubt many yet to come, do not contain clauses addressing this point. It would behoove the states to make their merger statutes as pellucid as possible to avoid these problems.

¶35 While direct textual analysis of the Texas statute is absent from the opinion in *TXO Production*, Texas's adoption of a provision explicitly barring mergers from being interpreted as assignments has clearly shown the benefits to be gained by enactment of much-needed legislative guidance. California's more ambiguous language seems to have been almost entirely ignored by the courts, as evidenced by the opinion in *SQL Solutions*. Worst of all, the language of the current Model Act, as embodied in Delaware's statute, has been the most inconsistently interpreted of all.

¶36 The explicit statement included in the official comment to the Model Act is obviously not effective unless, as Texas has done, it is included within the body of the statute. Other states, especially those employing the “vested in” language of the current Model Act, and most especially Delaware and New York,

⁶⁹ *Id.*

⁷⁰ *PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1093 (6th Cir. 1979). At no time in the discussion is the contention put forth by the appellate court that the trial court erred in pursuing its analysis via state merger law.

⁷¹ This is a dubious claim in the case of Delaware, whose statutory language, as noted *supra* ¶ 18, is substantially the same as it was in 1937.

⁷² *TXO Production*, 999 S.W.2d at 141-42.

⁷³ *Id.* at 142.

the main centers of American corporate law and practice, must seriously consider following Texas and adopting the comment language into the text of their statutes.

¶37 These states need not adopt Texas's stance on assignment. It will suffice if they dictate the alternative: that a merger is an assignment. However, the situation can only be improved by shedding some legislative light on this very murky corner of jurisprudence where fundamental principles of intellectual property protection merge with increasingly important trends in corporate law.