

The Intersection of Film Finance and Revised Article 9: A Mystery

Pauline Stevens*

Not long ago, a business lawyer abruptly resigned from her law firm after making an unusual announcement: Not only had she completed the film script that she had been working on for over ten years, but she had a producer for the film and adequate financing available. Her partners assumed that she resigned from her firm so that she could spend time with the crew producing her film, but her unexpected departure left other questions unanswered. Predictably, they questioned how the business lawyer they had known so long could have produced a marketable film script. But even more perplexing to them was how she found financing for the film production – being experienced counsel to the film industry, they knew that finding the financing to produce a film could be excruciatingly difficult. The mystery deepened when the departed lawyer returned after the successful release of her critically acclaimed film, flaunting her newfound wealth. Her former partners began searching in earnest for insight into how she had managed to finance the production of her film without sharing more of the profits with her financing source.

What her partners found surprised them. In the new filmmaker's desk was an incomplete diary covering a period of over ten years containing meticulous notes tracking developments in the secured transactions laws governing film financing and several bar journal clippings from July 2001. The fact that she resigned from her partnership not long before the nationwide adoption of revisions to Article 9 of the Uniform Commercial Code (the "UCC") has led some in her law firm to speculate that she had capitalized on elements of the new law to obtain financing that previously would have been unavailable to aspiring film makers. Being incomplete, the diary merely hints at what

* Partner in the Finance and Infrastructure department at Morrison & Foerster LLP. I wish to thank my colleagues, Jeffrey Kayes and Eric Sanders, for their contributions.

method of financing she actually used, but it does provide insights into a number of recent changes in the law of secured transactions. Perhaps the excerpts from the diary and the journal clippings that are printed here contain clues that will help others solve the mystery of how to finance production of their films.

I. DIARY ENTRY DATED 1989

While I am working on my script, I have begun researching how to finance production of my film in the most cost-effective fashion. I am reluctant to enter into a joint venture, co-production or similar financing structure where a third party will expect to receive a portion of my rights in return for an equity investment. For a variety of reasons, including concerns about the transactional costs associated with financing from outside the United States, I hope to be able to borrow from a traditional domestic lender who will expect only to be repaid principal and reasonable interest. To the extent that the film will be produced offshore or that revenues will be earned from offshore distribution, I will need a foreign currency line of credit¹ as well as a loan. Depending on prevailing interest rates when I borrow, I may want to limit my exposure to interest rate volatility by entering into a hedging transaction.² Typically, banks and other financial institutions that provide foreign currency lines of credit and hedges require their customers to an approval process and pricing considerations similar to the procedure for loans.

Realistically, I know that the best financing terms (for loans, foreign currency and hedging) will be available to me if I can provide a lender with adequate collateral. With sufficient collateral, the lender will know that, even if I default, repayment can be sought by foreclosing on collateral. The less that the lender feels at risk of losing the benefit of its bargain, the better will be the credit terms.

Lenders have no problem financing the construction of large buildings with secured loans, but it is more difficult to finance the production of a film on that basis even though both types of loans have a lot in

¹ In a foreign currency line of credit, a bank or other financial institution agrees with its customer to exchange one currency for another either at a "spot" rate (the rate available for the current purchase or sale of a currency) or a future rate.

² Interest rate hedging transactions, or derivatives, can be structured in a number of ways, including a "swap" (in which the parties agree to exchange with each other the obligation to pay floating or fixed interest on a notional principal amount), a "cap" (in which, often in exchange for an up front payment, one party will agree to make payments to the other if floating interest rates exceed a specified fixed percentage) or "collar" (which, by combining a cap with a floor, protects a party against rising floating interest rates in return for that party giving up some of the savings if floating interest rates fall).

common. In each, a borrower assembles a variety of assets to construct a final, new project. Likewise, construction and completion bonds can give lenders greater certainty that the project being financed will be completed in accordance with the expectations of the parties. One obvious reason why construction loans are more readily available than film production loans is that it is easier for a construction lender to project the value of a building to be built than for a lender to project the value of a film to be made, but that credit issue is not the only difficulty facing lenders financing films.

Instead of being secured by land and construction materials, in which liens generally can be perfected by recording or filing security documents in accordance with real property laws and Article 9 of the UCC, a lender financing a film is secured by intellectual property such as copyrights or licenses of scripts and music, costumes, accounts receivable, bank deposit accounts, talent contracts and miscellaneous other assets, in which security interests are perfected in accordance with Article 9 and, potentially, a variety of other intellectual property laws. If a construction loan borrower defaults, a lender can foreclose on its collateral pursuant to real property foreclosure laws. If a film loan borrower defaults, a lender may foreclose on some collateral pursuant to Article 9 but lacks a blueprint telling it how to foreclose on collateral that may be governed by other laws, such as federal intellectual property laws.

I will have to research how to give a lender the best possible collateral package in order to obtain the best possible financing for my film. Ideally, I would like to be able to give a lender an inexpensive way to perfect a security interest in the rights assembled to make my film and a simple, inexpensive way to foreclose on my film. The simpler the documentation and the surer the foreclosure processes available to a lender, the lower the interest rates they will demand.

II. DIARY ENTRIES VARIOUSLY DATED FROM 1990 TO 1998: THE PROCESS OF MODIFYING THE LAW OF PERSONAL PROPERTY SECURED TRANSACTIONS

1990: The Permanent Editorial Board (“PEB”) for the UCC has begun a study of Article 9 of the Uniform Commercial Code (entitled Secured Transactions; Sales of Accounts and Chattel Paper and hereinafter called “Old Article 9”) to determine whether revisions are appropriate to update state laws relating to security interests in, and sales of,

certain personal property and fixtures.³ Because Old Article 9 is a comprehensive body of law governing security interests in a range of personal property, changes to the article could change how films are financed.

1992–1993: The PEB Study Committee has recommended the establishment of a drafting committee and certain specific changes to Article 9. Many of those changes are designed to facilitate secured financing of intellectual property and are accompanied by a recommendation that state and federal laws governing security interests in copyrights, patents, and trademarks be addressed concurrently by the drafting committee.⁴ While modifications to intellectual property laws are beyond the charge of the drafting committee, the drafting committee is to address the PEB Study Committee's recommendations by working with the American Bar Association's Intellectual Property Section, the Committee for the proposed Uniform Computer Information Transactions Act, and others directly concerned with security interests in intellectual property.⁵ To the extent that the law governing security interests in assets assembled to make a film, including federal copyrights, is overhauled to facilitate secured financing, the transactional costs of financing a film will be driven down.

1998: The American Law Institute and the National Conference of Commissioners on Uniform State Laws have approved the revised version of Article 9 prepared by the drafting committee (hereinafter "Revised Article 9").

2001: All 50 states and the District of Columbia have enacted Revised Article 9. It becomes effective in 46 jurisdictions on July 1, 2001 and by January 1, 2002 in the remaining jurisdictions.⁶

III. DIARY ENTRY DATED JULY 1, 2001: REVISED ARTICLE 9 HAS SIMPLIFIED PROCEDURES FOR PERFECTING SECURITY INTERESTS IN PERSONAL PROPERTY

Like its predecessor, Revised Article 9 provides a set of rules governing a variety of personal property. Among other things, it addresses

³ See Official Comment No. 2 to Rev. U.C.C. § 9-101 of Revised Article 9 (as defined below).

⁴ See Steven L. Harris & Charles W. Mooney, Jr., *How Successful was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1388 (1999) (noting "[W]e are disappointed that interested parties have not yet succeeded in spurring Congress into action.").

⁵ See Steven O. Weise, *An Overview of Revised UCC Article 9*, in THE NEW ARTICLE 9—UNIFORM COMMERCIAL CODE 1 (Corinne Cooper ed. 1999).

⁶ See *Revised UCC Article 9, Secured Transactions (1999)*, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca9.asp (last visited Aug. 21, 2001).

the perfection of security interests, the duties of secured parties, rights of third parties affected by secured transactions, priority of interests in personal property, and the enforcement of security interests. But Revised Article 9 has changed and simplified some of the rules governing personal property transactions. For example, Revised Article 9 governs more types of assets and transactions than were subject to Old Article 9. (Previously, it was not uncommon for secured parties⁷ to be faced with establishing their security interests under legal regimes in addition to Old Article 9.) Revised Article 9 has reduced the number of cases in which this will occur. Unlike Old Article 9, Revised Article 9 can govern security interests in deposit accounts,⁸ health-care-insurance receivables,⁹ and commercial tort claims.¹⁰ Like Old Article 9, Revised Article 9 still covers security interests generally in addition to sales of accounts¹¹ and chattel paper,¹² but it also covers a number of other categories of transactions, including true consignments,¹³ certain transactions with state and governmental units, sales of payment in-

⁷ Rev. U.C.C. § 9-102(a)(72) defines a “secured party” as “[a] person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; (B) a person that holds an agricultural lien; (C) a consignor; (D) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold; (E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or (F) a person that holds a security interest [arising under other sections of the UCC].”

⁸ Rev. U.C.C. § 9-102(a)(29) defines a “deposit account” as “a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.”

⁹ Rev. U.C.C. § 9-102(a)(46) defines a “health-care-insurance receivable” as “an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.”

¹⁰ Rev. U.C.C. § 9-102(a)(13) defines a “commercial tort claim” as “a claim arising in tort with respect to which: (A) the claimant is an organization; or (B) the claimant is an individual and the claim: (i) arose in the course of the claimant’s business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual.”

¹¹ See definition at note 74 *infra*.

¹² Rev. U.C.C. § 9-102(a)(11) defines “chattel paper” in part as “a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods.”

¹³ Rev. U.C.C. § 9-102(a)(20) defines a “consignment” as “a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others; (B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation.”

tangibles¹⁴ and sales of promissory notes.¹⁵ All of this has been accomplished using the basic methodology of Old Article 9.¹⁶

Before a creditor has an enforceable security interest, the security interest must “attach.” In a provision similar to terms contained in Old Article 9, Section 9-203 of Revised Article 9 states that a security interest attaches¹⁷ when (1) value¹⁸ has been given, (2) the debtor has rights in the collateral and (3) either (a) the collateral is in the possession or under the control of the secured party or (b) the debtor¹⁹ has signed a security agreement²⁰ describing the collateral.²¹ As under Old Article 9, debtors generally may grant security interests in property not yet owned.²² Collateral not yet owned is frequently called “after acquired collateral.”

Merely having an attached security interest generally will not give to a secured creditor the most valuable rights available to secured creditors. A security interest that has attached but is not “perfected” is still subordinate to perfected security interests and the interests of persons becoming lien creditors before the earlier of the time the security interest is perfected or a financing statement is filed.²³ Being subordinate to the interests of lien creditors and perfected secured creditors, an un-

¹⁴ Rev. U.C.C. § 9-102(a)(61) defines a “payment intangible” as “a general intangible under which the account debtor’s principal obligation is a monetary obligation.”

¹⁵ Rev. U.C.C. § 9-102(a)(65) defines a “promissory note” as “an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgement by a bank that the bank has received for deposit a sum of money or funds.”

¹⁶ Of course there are limits to the scope of Revised Article 9. *See generally* Rev. U.C.C. § 9-109. One of the most common types of collateral not covered by Revised Article 9 is insurance proceeds. Rev. U.C.C. § 9-109(d)(8) excludes from the scope of Revised Article 9 transfers “of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable.” However, consistent with its prior version of Old Article 9, § 9-109(d)(8) of the California Uniform Commercial Code does not exclude insurance from the scope of Revised Article 9.

¹⁷ Under Rev. U.C.C. § 9-203(a), a “security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral. . . .”

¹⁸ U.C.C. § 1-201(44) states that a person gives “value” for rights if those rights are acquired either in return for a commitment, in satisfaction of a preexisting claim, by accepting delivery or in return for consideration that otherwise would “support a simple contract.”

¹⁹ “Debtor” is defined in Rev. U.C.C. § 9-102(a)(28) as: “(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor; (B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or (C) a consignee.”

²⁰ “Security Agreement” is defined in Rev. U.C.C. § 9-102(a)(73) as “an agreement that creates or provides for a security interest.”

²¹ *See* Rev. U.C.C. § 9-203(b).

²² Rev. U.C.C. § 9-204(a) provides that, except in the case of commercial tort claims and certain consumer goods, “a security agreement may create or provide for a security interest in after-acquired collateral.”

²³ Rev. U.C.C. § 9-317(a)(2).

perfected security interest is also subordinate to the interests of a bankruptcy trustee. Under Section 544(a)(1) of the United States Bankruptcy Code²⁴ (the "Bankruptcy Code"), a bankruptcy trustee may void a transfer²⁵ made by the debtor to the extent that a hypothetical lien creditor could do so. To prevent a trustee in his capacity, as a hypothetical lien creditor, from voiding the transfer of collateral to a secured party, a secured party needs to "perfect" its security interest and obtain priority over lien creditors in accordance with Revised Article 9. Once perfected, a security interest in collateral and, generally speaking,²⁶ in proceeds²⁷ of the collateral has priority over the interests of lien creditors, including bankruptcy trustees, of the debtor and secured parties that perfect security interests by filing subsequent financing statements.²⁸

If a debtor defaults in payment of an obligation secured by a perfected security interest in collateral but does not file for bankruptcy, Revised Article 9 gives to the secured creditor the right to realize value from the collateral by selling or otherwise disposing of the collateral subject to any prior liens and applying the proceeds to the obligations that are secured.²⁹ If the debtor files a case under the Bankruptcy Code, the secured creditor remains entitled to realize the benefit of its

²⁴ 11 U.S.C. § 544 (2000).

²⁵ "Transfer" is defined in the Bankruptcy Code as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *Id.* § 101(55). It is important to note that the definition of "transfer" differs from the other definitions given to that term by the Copyright Act and by Revised Article 9. *See infra* note 43 and accompanying text. As a result of this discrepancy among definitions, parties analyzing their respective rights in copyright interests that have been transferred by a person that has filed a bankruptcy case be faced with assessing their rights under three possible legal interpretations.

²⁶ There are exceptions to the continuing of priority in proceeds. For example, under Rev. U.C.C. § 9-332(a) a transferee of money takes free of the security interest of the secured party unless the transferee acted in collusion with the debtor in violation of the secured party's rights.

²⁷ Rev. U.C.C. § 9-315(c) states that a "security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected." Rev. U.C.C. § 9-315(d) sets forth the necessary conditions to maintain a perfected security interest in the proceeds within 21 days after the security interest attaches to the proceeds.

²⁸ What is called the first to file or perfect priority rule is embodied in Rev. U.C.C. § 9-322(a). Exceptions to this rule are found in (1) Rev. U.C.C. § 9-322(d) which permits security interests perfected by possession or control in deposit accounts, investment property, letter-of-credit rights, chattel paper, instruments, and negotiable documents to have priority over an earlier filing and (2) Rev. U.C.C. § 9-322(e) which permits security interests in proceeds perfected by filing to have priority over an earlier perfected security interest in certain cases.

²⁹ *See* § 9-601 *et seq.*

collateral, although foreclosure may be stayed.³⁰ Because a lender with a perfected security interest can expect to recover payment from collateral even if the debtor is insolvent, the secured lender can afford to make loans that an unsecured lender would be unwilling to make.³¹

Section 9-310(a) of Revised Article 9 gives approximately the same general rule for perfection of a security interest as did Old Article 9. Except in the case of security interests perfected by possession, control or as otherwise specifically provided,³² “a financing statement must be filed to perfect all security interests . . .” However, Revised Article 9 vastly simplifies financing statements and filing requirements: the form of financing statement to be filed under Revised Article 9 no longer has to be signed by the debtor; collateral descriptions in financing statements can now be as simple as “all assets;”³³ and Revised Article 9 requires only one filing in the appropriate office³⁴ rather than multiple

³⁰ Under § 362 of the United States Bankruptcy Code, with certain exceptions, upon the filing of a bankruptcy case, creditors are automatically stayed from taking actions against the debtor or collateral that is part of the bankruptcy estates.

³¹ The economic theory supporting secured lending has been summarized as follows: “(1) granting priority to a secured creditor increases its share of the debtor’s assets in the event of default; (2) this reduces the amount of the loss that the secured creditor will suffer upon default; (3) this allows the secured creditor to charge a lower interest rate; and (4) the debtor can use the interest savings in a more productive fashion.” G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3, 10 [hereinafter *The Anti-Bankruptcy Act*]. A contrary argument is that “(1) the grant of priority to the secured creditor reduces the unsecured creditors’ share of the debtor’s assets upon default; (2) this increases the amount of the loss that the unsecured creditors will suffer upon default; (3) this forces the unsecured creditors to charge higher interest rates; and (4) the debtor’s extra interest expense on its unsecured credit exactly equals the interest savings on its secured credit.” *Id.*

³² Security interest in deposit accounts, electronic chattel paper, investment property and letter-of-credit rights may be perfected by “control” pursuant to Rev. U.C.C. § 9-314. Security interests in negotiable documents, goods, instruments, money and tangible chattel paper may be perfected by possession under Rev. U.C.C. § 9-313(a). Other exceptions to the perfection by filing rule include (1) under Rev. U.C.C. § 9-308(d), security interests in “supporting obligations” for the primary obligations which are perfected by perfecting a security interest in the primary collateral, (2) under Rev. U.C.C. § 9-308(f), security interests in “securities entitlements” held in “securities accounts” which are perfected by perfecting a security interest in the securities account, (3) pursuant to Rev. U.C.C. § 9-312, security interests in goods in possession of a bailee that may be perfected by issuance of a document in the name of the secured party or notice to the bailee issuing non-negotiable documents covering the goods, (4) under Rev. U.C.C. §§ 9-312(e), (f), and (g), security interests in certificated securities, negotiable documents or instruments which are temporarily perfected, (5) under Rev. U.C.C. § 9-315, security interest that are temporarily perfected in proceeds, and (6) under Rev. U.C.C. § 9-316, security interests that are temporarily perfected in collateral after change in the governing law.

³³ See Rev. U.C.C. § 9-504(2), which states that a “financing statement sufficiently indicates the collateral that it covers if the financing statement provides . . . an indication that the financing statement covers all assets or all personal property.”

³⁴ See Rev. U.C.C. § 9-501.

filings in a single state and sometimes multiple states as had sometimes been required by Old Article 9. Moreover, unlike Section 9-103 of Old Article 9 which varied the state law applicable to perfection of security interests depending on the nature of the collateral and sometimes required many financing statements to be filed to perfect security interests, Revised Article 9 provides, with a few exceptions, that the local law of the jurisdiction where the debtor is "located" governs perfection of security interests.³⁵ According to Section 9-307(e) of Revised Article 9, a debtor that is a registered organization,³⁶ such as a domestic corporation, limited liability company or limited partnership, is located in the state of its registration.³⁷ Revised Article 9 has a similarly simplified filing procedure applicable to individuals and other types of organizations. For example, financing statements for foreign debtors are to be filed in the District of Columbia unless the jurisdiction in which the debtor is organized has a nonpossessory security interest filing system similar to the Revised Article 9.³⁸

Not only will these changes simplify the process of perfecting security interests by filing under Revised Article 9, but after the transition to Revised Article 9 is effective,³⁹ due diligence practices and the process of determining the relative priority of security interests perfected by filing will be streamlined. To the extent that filing multiple financing statements was necessary to perfect a security interest under Old Article 9, due diligence was required to ascertain the location of collateral and priority of interests could be determined only by searching the records in each of the relevant filing offices. Since Revised Article 9 limits the number of offices where filings can be made to perfect a security interest, once the transition to Revised Article 9 is complete,

³⁵ See Rev. U.C.C. § 9-301.

³⁶ "Registered organization" is defined in Rev. U.C.C. § 9-102(a)(70) as "an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized."

³⁷ See Rev. U.C.C. § 9-307(e).

³⁸ See Rev. U.C.C. § 9-307(c). While the ability to perfect a security interest in the assets of a foreign debtor by filing a financing statement in the United States has distinct advantages to secured creditors, there are significant attendant legal issues. See generally Neil B. Cohen & Edwin E. Smith, *International Secured Transactions and Revised UCC Article 9*, 74 CHI.-KENT L. REV. 1191 (1999).

³⁹ During the transition period, creditors will generally be operating under Revised Article 9 for all purposes, but security interests perfected under Old Article 9 will remain effective (and so potentially have priority over new security interests) until they lapse or otherwise cease to be effective. See generally Harry C. Sigman & Edwin E. Smith, *Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing*, 55 BUS. LAW. 1065 (2000) and Harry C. Sigman & Edwin E. Smith, *Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing—Part II*, 55 BUS. LAW. 1763 (2000).

the scope of due diligence and the number of searches that will have to be conducted by secured parties will be more limited than under Old Article 9.

The fact that perfecting security interests in, and performing due diligence regarding, many types of assets has been simplified by Revised Article 9 will reduce the actual out-of-pocket costs and time associated with documenting secured transactions. Anyone hoping to finance a film with secured loans could benefit directly from this simple change in the law, but this modest change will not have its maximum impact unless other changes find their way into the law.

IV. DIARY ENTRY DATED JULY 1, 2001: REVISED ARTICLE 9 HAS NOT RESOLVED PROBLEMS FACED BY CREDITORS SEEKING TO PERFECT A SECURITY INTEREST IN COPYRIGHT INTERESTS⁴⁰

The most valuable types of collateral available to secure loans made to finance films are frequently interests in the films themselves as well as the rights in books, scripts, and music that are incorporated into the films. Those assets have value, in part, because of protections given to their owners by the United States Copyright Act⁴¹ (the "Copyright Act"). Under the Copyright Act, the owner of an original work of authorship fixed in a tangible medium⁴² has the exclusive right to, and to authorize others to, reproduce the work, prepare derivative works, dis-

⁴⁰ Being focused on film financing where copyrights are the primary source of intellectual property value, this article does not often refer to other types of intellectual property protected by federal law such as trademarks, patents, and mask works. The issues facing parties secured by other types of intellectual property are not unlike those discussed in this article, because the governing federal law does not either contain a comprehensive body of law providing for security interests or specifically defer to state law. Because the Patent Act (35 U.S.C. §§ 1–376) and the Lanham Act (15 U.S.C. §§ 1051–1127), which provides federal protection for trademarks, do not contain terms addressing security interests as explicitly as the Copyright Act, case law addressing security interests in patents and trademarks has deferred to state law and generally avoided the issues raised by case law with respect to copyrights. Nevertheless, uncertainty surrounds security interests in these other types of intellectual property as well, and resolution should be welcomed by the film industry as much as resolution to should be welcomed to issues surrounding copyrights. Certainly, there are many valuable trademarks and patents that are important to the industry and could be valuable sources of collateral if the area of the law were more completely settled. See generally Steven O. Weise, *The Financing of Intellectual Property Under Revised UCC Article 9*, 74 CHI-KENT L. REV. 1077 (1999) [hereinafter *Financing of Intellectual Property*]; Thomas M. Ward, *Security Interests in Patents and Trademarks: The Current Structural Dissonance and the Solutions Proposed by the Federal Intellectual Property Security Act [FIPSA]*, available at <<http://www.abanet.org/buslaw/library/com-tran.html>> (last visited Aug. 21, 2001).

⁴¹ 17 U.S.C. §§ 101–810.

⁴² *Id.* § 102.

tribute copies, transfer ownership, to license the work to others, and to display or perform the work.⁴³ To maximize the collateral available to a secured lender financing a film, the producer will have to give to the lender a security interest in rights protected by the Copyright Act.

Recognizing that state law is subject to preemption by federal laws, such as the Copyright Act, Section 9-109(c)(1) of Revised Article 9 provides that it “does not apply to the extent that . . . a statute, regulation, or treaty of the United States preempts this article.” Official Comment Number 8 to this section explains that the purpose of this section is to correct erroneous readings of former law holding that Old Article 9 deferred to federal law even when not specifically preempted by federal law. It has been said that Section 9-109(c)(1) provides that state law will “step back” to permit federal law to govern secured transactions only to the limited extent specifically preempted.⁴⁴ Section 9-311(a)(1) of Revised Article 9 goes into greater detail regarding when and the extent to which federal law will preempt the requirement for filing a financing statement to perfect a security interest. It provides that “the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to . . . 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).”⁴⁵ Official Comment No. 2 says that Section 9-311 cites 49 U.S.C. Sections 44107 to 44111 (which address liens on aircraft) as an example of the types of federal statutes that are meant to preempt Revised Article 9. In contrast, Official Comment 2 notes that, since the federal Assignment of Claims Act does not make provision for a national filing system, it does not preempt state laws requiring filing financing statements.

Revised Article 9 leaves those interested in film finance questioning whether the Copyright Act or Revised Article 9 is intended to govern security interests in copyrights, because the Copyright Act does not fall squarely at either end of the spectrum of federal laws addressed in the official comments. Regardless of the intent of Revised Article 9, the extent to which federal law preempts state law ultimately is, of course, a matter of federal law, not state law, and the effect of Sections 9-109(c)(1) and 9-311(a)(1) of Revised Article 9 on the interpretation

⁴³ *Id.* § 106.

⁴⁴ See Weise, *supra* note 5, at 109.

⁴⁵ Rev. U.C.C. § 9-310(a) provides “Except as otherwise provided in subsection (b) and Rev. U.C.C. § 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.”

of the law of secured transactions in copyrights is more precatory than substantive.

The Copyright Act does not purport to be as comprehensive a body of law governing secured transactions as does Revised Article 9, but it does contain some provision for federal recordation of security interests. First, the Copyright Act defines a "mortgage" to be a type of "transfer of copyright ownership."⁴⁶ The Copyright Act also provides for federal recordation of and priority among transfers of copyright ownership interests.⁴⁷

A line of cases has held, in somewhat inconclusive fashion, that the Copyright Act preempts Article 9 to govern perfection of security interests in copyrights.⁴⁸ One of the earliest in this line of cases, *National Peregrine Inc. v. Capitol Fed. Savings and Loan Assn. of Denver (In re Peregrine Entertainment, Ltd.)*,⁴⁹ further made the highly criticized suggestion⁵⁰ that federal law governs the perfection of security interests in rights to payment arising under licenses of copyrighted works. If the dicta and decision in the *Peregrine* case are read literally, security interests, not only in federal copyrights, but also in accounts arising under those copyrights, are to be perfected in accordance with the requirements of federal law by making appropriate filings with the United States Copyright Office. A secured creditor that merely filed a financing statement in accordance with Revised Article 9 would not have a

⁴⁶ "A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." 17 U.S.C. § 101.

⁴⁷ See 17 U.S.C. § 205.

⁴⁸ See *National Peregrine, Inc. v. Capitol Fed. Savings and Loan Ass'n of Denver (In re Peregrine Entertainment, Ltd.)*, 116 B.R. 194 (C.D. Cal. 1990) (holding that a filing with the Copyright Office is required to perfect a security interest in copyrights and suggesting that federal filing was also required as to receivables from copyrights) [hereinafter, *Peregrine*]; *Official Unsecured Creditors Comm. v. Zenith Productions, Inc. (In re AEG Acquisition Corp.)*, 127 B.R. 34 (C.D. Cal. 1991) (holding that a security interest in a copyright must be perfected by filing with the Copyright Office); *In re Avalon Software Inc.*, 209 B.R. 517 (Bankr. D. Ariz. 1997) (security interest in copyrights, proceeds and copyrightable material subject to conditions precedent of registration and federal filing) [hereinafter, *Avalon*]. *But see Aerocon Engineering, Inc. v. Silicon Valley Bank, (In re World Auxiliary Power Co.)*, 244 B.R. 149 (Bankr. N.D. Cal. 1999), *aff'd* (N.D. Cal. 2000), *appeal docketed* No. 00-16550 (9th Cir. Aug. 18, 2000) (limiting the foregoing cases to registered copyrights).

⁴⁹ 116 B.R. 194 (C.D. Cal. 1990).

⁵⁰ See, e.g., Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645, 1681, 1693 (1996) ("*Peregrine's* assertion of federal copyright law control over receivables is seriously flawed. . . . [T]he extension of the Copyright Act's preemptive reach to copyright receivables is not defensible in terms of either federal or state law.") [hereinafter *Insecurity Interests*]. See also *MCEG Sterling, Inc. v. Phillips Nizer Benjamin Krim Ballon*, 646 N.Y.S.2d 778 (N.Y. Sup. Ct. 1996).

perfected security interest. Moreover, based on the holding in the later *Avalon* case,⁵¹ a secured creditor could not perfect a security interest under any law unless the copyright were registered with the Copyright Office, even though registration is not required for the owner to be entitled to protection under the Copyright Act.⁵² *Aerocon*, a recent case, limited the foregoing statement by ruling that an unregistered copyright can only be perfected by compliance with Article 9.⁵³ Even with the holding in *Aerocon*, any protection provided by a mere UCC filing would immediately disappear upon registration in the Copyright Office. Thus the cumbersome task of dual filing is required to maintain priority.

Because of these cases, financing a film with secured lending becomes more cumbersome and expensive. Secured lenders financing film production feel compelled to comply with both federal law, to perfect security interests in federal copyrights and rights to payment arising under copyrights, and with Revised Article 9, to perfect security interests in other assets. Even more distressing to a producer seeking to finance a film is that some valuable copyright interests simply cannot be used as collateral, because a security interest cannot be perfected in them. For example, a film could be construed as an original work of authorship worthy of federal copyright protection at any number of points during its production, but, according to the *Avalon* case, a security interest cannot be perfected in the film until the copyright had been recorded. As a result, a secured party cannot perfect security interests in copyrights in film while the films are in production, unless the producer takes the unprecedented step of recording incomplete versions of the film with the Copyright Office. Similarly, a film producer cannot enhance the value of a collateral package given to a lender by granting a security interest in copyrights to be acquired by the producer in the future, because secured creditors cannot perfect "floating liens" on federal copyrights from time to time owned by debtors as they can under Revised Article 9.⁵⁴

⁵¹ *Avalon*, 209 B.R. at 517.

⁵² See 17 U.S.C. § 408.

⁵³ See *Aerocon Engineering, Inc. v. Silicon Valley Bank*, (*In re World Auxiliary Power Co.*), 244 B.R. 149 (Bankr. N.D. Cal. 1999), *aff'd* (N.D. Cal. 2000), *appeal docketed* No. 00-16550 (9th Cir. Aug. 18, 2000) [hereinafter *Aerocon*].

⁵⁴ Rev. U.C.C. § 9-204(a) provides: "Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral." Subsection (b) provides that "A security interest does not attach under a term constituting an after-acquired property clause to: (1) consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value; or (2) a commercial tort claim" Cf. Steven Weinberger, Note, *Perfection of Security Interests in Copyrights: The Peregrine Effect on the Orion Pictures Plan*

The Copyright Act further hinders the ability of film producers to capitalize on the value of copyrights because it permits certain unrecorded transfers to take priority over recorded interests. Section 205(d) of the Copyright Act⁵⁵ permits a transfer recorded within one month after its execution in the United States or within two months after its execution outside the United States to have priority over subsequent transfers that are recorded earlier. Contrast this provision with Section 9-317 of Revised Article 9. That section generally gives priority to the first secured party to file a financing statement or otherwise perfect.⁵⁶ Under state law, a secured lender can file a financing statement, search the relevant records, and make a loan in reliance on the search results within a short period of time. Under the Copyright Act, a secured party theoretically could not determine the priority of its filing for two months. In fact, the delay in determining lien priority encountered by secured parties is actually longer than two months because of delays by the Copyright Office in recording filings and in responding to search requests.

V. DIARY ENTRY DATED JULY 1, 2001: REVISED ARTICLE 9 MAY HAVE PAVED THE WAY FOR CHANGES TO THE COPYRIGHT ACT THAT WILL FACILITATE SECURED FINANCING FOR FILMS

Seeking to facilitate financing secured by intellectual property, the Section of Intellectual Property Law and the Section of Business Law of the American Bar Association (under a proposed Federal Intellectual Property Security Act ("FIPSA")) and the Commercial Finance Association ("CFA") (under a proposed interim measure) have made so far unsuccessful legislative efforts to conform the Copyright Act with Article 9 practice. Under FIPSA, a secured party would make a federal filing to establish the priority of its lien "with respect to subsequent bona fide purchasers for value and all other subsequent transferees of ownership interests, excepting only security interests. Recordation of security interests in all intellectual property in the relevant state agency under Article 9 of the Uniform Commercial Code would perfect the security interest and establish priority as against other secured parties and lien creditors."⁵⁷ In other words, security interests in copyrights

of Reorganization, 11 CARDOZO ARTS & ENT. L.J. 959 (1993) (discussing the impact of the absence of floating liens on secured creditors).

⁵⁵ See *supra* note 47.

⁵⁶ See *supra* note 23 and accompanying text.

⁵⁷ *Oversight Hearing on Intellectual Property Security Registration Before the House Comm. on the Judiciary, Subcomm. on Courts and Intellectual Prop.* (June 24, 1999) (joint

generally would be governed by state law, but federal filing would be necessary in respect of ownership interests and transfers. Among the provisions of the Copyright Act that would be amended by FIPSA to bring the Copyright Act in line with Article 9 are the provisions of Section 205(d), which permit transfers of copyright interests to have effect up to two months after delivery.⁵⁸ Under the CFA's interim proposal, the Copyright Act would be amended only modestly to permit perfection of security interests under Article 9 with transfers being governed by federal law. In contrast to these two Article 9 based proposals, the American Film Marketing Institute ("AFMI"), citing concerns about the integrity of the federal copyright system, has proposed a purely federally based system for creating and perfecting security interests in copyrights.⁵⁹

Basing a secured transaction regime covering copyrights on Revised Article 9 has certain advantages over the purely federal system proposed by AFMI. Most secured lenders are accustomed to the requirements of Revised Article 9, because they are accustomed to perfecting a security interest in personal property pursuant to Revised Article 9. They know their rights and how to evaluate collateral in which a security interest is perfected under Article 9. In fact, secured lenders financing a film almost inevitably will be perfecting a security interest in other collateral pursuant to Revised Article 9. Among the personal property in which a film producer might grant a security interest to a secured lender are accounts, deposit accounts, and other personal property, such as costumes, all of which would be governed by Article 9. If a secured transactions regime based on Revised Article 9 were applied to copyrights, a producer should find that financing is more readily available because of (1) the elimination of additional due diligence and filing requirements imposed on lenders by a system requiring compliance with both local and federal law to perfect a security interest in the elements comprising a film and (2) the relative comfort level achievable by lenders dealing with a known body of law governing secured transactions.

AFMI's initial preference for a purely federally based system for perfecting security interests in copyrights grew out of concerns based, in part, on characteristics unique to Old Article 9, not Revised Article

statement of G. Larry Engel, ABA Section of Bus. Law, and Susan Barbieri Montgomery, ABA Section of Intellectual Prop. Law), available at <http://www.house.gov/judiciary/mont0624.htm> (last visited Aug. 27, 2001).

⁵⁸ See generally *Financing of Intellectual Property*, supra note 40; Ara A. Babaian, *Comment: Striving for Perfection: The Reform Proposals for Copyright-Secured Financing*, 33 LOY. L.A. L. REV. 1205 (2000) [hereinafter *Striving for Perfection*].

⁵⁹ See generally *Striving For Perfection*, supra note 58.

9. Testimony in support of AFMI's proposal praised those parts of Old Article 9 that were beneficial to borrowers, including the ability of secured parties to obtain a floating lien on after-acquired copyrights, but expressed concern about the way in which Old Article 9 had evolved into a less than uniform system.⁶⁰ Perhaps because Revised Article 9 was intended to address problems that had arisen under Old Article 9 that gave rise to non-uniform provisions, the versions of Revised Article 9 adopted recently were far more uniform than were the versions of Old Article 9 previously in effect in the same jurisdictions.⁶¹ As a result, nationwide consistency in the law of secured transactions applicable to copyrights now could be largely addressed through a hybrid Article 9-federal system, such as FIPSA, rather than a purely federal system.

Another concern giving rise to AFMI's support for a purely federal system for perfecting security interests in copyrights arose out of concern about the costs that lenders would incur under Old Article 9 in searching records to determine lien priorities. Testimony submitted to Congress on behalf of AFMI noted that some states require dual filing to perfect a security interest and that, as a result, the cost of due diligence searching of records to ascertain conflicting interests could be prohibitive.⁶² Unlike Old Article 9, Revised Article 9, as proposed by the Drafting Committee, did not give states the option to require dual filing in order to perfect most security interests. Rather, a central filing location is specified for all financing statements except in the case of real property fixtures, as-extracted collateral (minerals) and timber to be cut.⁶³ Jurisdictions that have adopted Revised Article 9 have followed the lead of the Drafting Committee, and, as a result, the poten-

⁶⁰ (Statement of Lorin Brennan, Am. Film Mktg. Ass'n and Affiliated Fin. Insts., available at <http://www.house.gov/judiciary/bren0624.htm> (last visited August 27, 2001)). "'Variations from state to state are legion; some are authorized by alternative versions of the [Uniform Commercial] Code itself; others are local frolics.' (Barkley Clark, *The Law Of Secured Transactions Under The UCC*, ¶ 2.12[1] (1994 Rev. Cum. Ed.))" *Id.* "At the same time, we acknowledge that the current system of secured copyright financing needs improvement, especially for 'floating liens' and 'after-acquired property.' We have advocated the need for constructive change to the Administration, the Copyright Office, and now Congress. We support the goal of FIPSA, but cannot in any way support its methods." *Id.*

⁶¹ U.C.C. Rep. Serv. (CBC), State UCC Variations binder 123.

⁶² "This burden will be enormous . . . There are several state variants regarding the place to file a security interest. For a general intangible like a copyright, 26 states only require filing in the Secretary of State, while 14 others can also require an additional filing in the county where the debtor is located. (Hawkland, Lord & Lewis UCC Series, §§ 9-401 et. seq. (1997 ed.)) According to one major searching service, there are 6,400 potential filing jurisdictions in the United States. How will our production lender find all prior lien filings, an how much will it cost?" Brennan statement, *supra* note 60, at ¶ 2, pp. 3-4.

⁶³ Rev. U.C.C. § 9-501(a).

tial number of filing jurisdictions in which records would have to be searched in order to ascertain conflicting liens on assets has been exponentially reduced.

Still, if Revised Article 9 were to govern perfection of security interests in copyrights, some have argued that it would not streamline the process of taking security interests in copyrights as much as would a purely federal system. In support of a federal system, AFMI argued to Congress that an Article 9 based system such as FIPSA governing security interests in copyrights would impose a terrible burden on secured creditors. Where chains of title to copyrighted works are complex, including derivative works, licenses, and sub-licenses, it was argued that lenders would benefit from searching only one record, the federal record, rather than having to search for conflicting claims under the Article 9 system, because parties with potentially conflicting claims could be located in any number of jurisdictions.⁶⁴

If a federally based system governing security interests in copyrights should be adopted because it would help secured lenders ascertain conflicting claims when chains of title are complex, then it can be argued, for the same reason, that security interests in licenses of copyrights also should be governed by federal law. In fact, the argument could be extended to support establishing a federal law of secured transactions for patents, trademarks, mask works, and other licenses, but, as a practical matter, it is difficult to imagine a groundswell of support for creating such a new body of federal law when Revised Article 9 presents a workable alternative. At present, parties to secured transactions cannot be sure whether state or federal law governs security interests in copyright licenses,⁶⁵ and so borrowers incur the costs of the secured lenders attempting to perfect security interests under both laws, just as they do with respect to copyrights themselves. Unlike the Copyright Act, though, Revised Article 9 contains some specific provisions addressing the relative rights of creditors secured by licenses of intellectual property. Moreover, even if the Copyright Act were to

⁶⁴ See Brennan, *supra* note 60. "FIPSA provides that the relative priority between secured lenders and lien creditors is determined solely by state law. Copyrighted works often have complex chains of title, with many tiers of derivatives works, licenses, sublicenses and sub-sublicenses. Under Article 9, foreclosure by a senior secured creditor anywhere higher up in the 'chain' wipes out a junior interest. This makes its critical for a lender to find any senior interests before it makes a loan. Under current law, the lender can conduct a single search of the records in the Copyright Office to find all prior copyright liens. Under FISPA, a lender will now need to search the UCC filing systems maintained in the fifty states." *Id.*

⁶⁵ See generally *Insecurity Interests*. See also *Broadcast Music, Inc. v. Hirsch*, 104 F.3d 1163 (9th Cir. 1997) (assignment of a right to royalty was not a transfer of copyright ownership or pertaining to copyright to be recorded under the Copyright Act) [hereinafter *Broadcast Music*].

govern security interests in copyright licenses, producers seeking to finance films would still incur transactional costs associated with secured lenders researching chains of title to other assets in which a security interest must clearly be perfected pursuant to Revised Article 9.

As a general rule, Revised Article 9⁶⁶ permits (as did Old Article 9⁶⁷) security interests in collateral created by prior owners to continue in the collateral after its disposition unless the secured party authorized the disposition free of its security interest. In other words, a party acquiring assets takes its rights subject to security interests created by prior owners, and the security interest of a lender could be subordinate to security interests created by prior owners.⁶⁸ To permit parties acquiring assets to acquire the ownership rights that they expect as a reasonable commercial matter, there are limitations on this general rule. For example, Sections 9-320(a)⁶⁹, 9-321(c)⁷⁰ and 9-321(b)⁷¹ of Revised Article 9 describe circumstances in which collateral subject to pre-existing security interests may be transferred free of those liens to a “buyer in ordinary course of business,”⁷² “licensee in ordinary course of business,”⁷³ or “lessee in ordinary course of business.”⁷⁴ While Sec-

⁶⁶ Under Rev. U.C.C. § 9-315, “a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien.”

⁶⁷ The Official Comments to Rev. U.C.C. §§ 9-316, 9-317, and 9-320 indicate that they are based, in part, on §§ 9-103(a)(d), 2(b) and 3(e), 9-301, and 9-307, respectively, of Old Article 9.

⁶⁸ Rev. U.C.C. § 9-325(a) generally provides that “a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if: (1) the debtor acquired the collateral subject to the security interest created by the other person; (2) the security interest created by the other person was perfected when the debtor acquired the collateral; and (3) there is no period thereafter when the security interest is unperfected.”

⁶⁹ Rev. U.C.C. § 9-320(a) states that “a buyer in ordinary course of business . . . takes free of a security interest created by the buyer’s seller” even if the security interest predated the sale.

⁷⁰ Rev. U.C.C. § 9-321(c) states, “a lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.”

⁷¹ Rev. U.C.C. § 9-321(b) states, “a licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.”

⁷² § 1-201(9) of the UCC defines “buyer in ordinary course of business” in part as “a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course . . . of selling good of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.”

⁷³ § 2A-103(15) of the UCC defines “lessee in the ordinary course of business” in part as “a person who, in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the

tion 9-321 of Revised Article 9 provides that exclusive licensees take their rights in general intangibles subject to security interests created by prior licensors, nonexclusive licensees take their rights free of security interests created by their licensor.

In sum, Revised Article 9 contains a comprehensive body of law establishing rules for determining when security interests created by prior owners of assets will have priority over subsequent security interests, and secured lenders are accustomed to researching public records to ascertain conflicting interests on the basis of that body of law. A federally based system for security interests in copyrights such as that proposed by AFMI would facilitate reviewing chains of titles to copyrights but would neither limit the due diligence required of lenders secured by assets in addition to copyrights nor, absent implementation of a comprehensive body of federal law dealing with other aspects of secured transactions law, replace the role of Revised Article 9 in addressing issues such as the relative priority of security interests created by exclusive and nonexclusive licensors and the rights of licensees in the ordinary course of business.

The cost of obtaining secured financing for films will not be minimized until the law governing security interests in copyrights is clarified and streamlined. Rather, the uncertainties abounding in the area support the costly practice of performing due diligence and structuring transactions as though both federal and state laws governed lenders' rights. Since many of the concerns that have been expressed about extending the application of Article 9 to security interests in copyrights have now been addressed by Revised Article 9, those interested in minimizing the transactional costs associated with financing films should now consider supporting amendments to the Copyright Act that permit security interests to be perfected under a Revised Article 9 based system rather than under a purely federal system. Not only would a Revised Article 9 based system build on an existing body of law, it would avoid the necessity of creating a large new body of law at the federal level. Both film producers and secured parties would be the beneficiaries of such a change in the law.

goods, leases in the ordinary course of business of selling or leasing goods of that kind, but does not include a pawnbroker."

⁷⁴ Rev. U.C.C. § 9-321 defines "licensee in ordinary course of business" as "a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices."

VI. VARIOUS DIARY ENTRIES DATED 1990 AND ON: FILMS CAN BE FINANCED THROUGH SECURITIZATION

Securitization is a form of financing that can, depending on its structure, permit a debtor to borrow against assets without having recourse liability. This allows the debtor to enhance its balance sheet by indirect borrowing that does not appear on its balance sheet, borrow at lower interest rates, access new sources of capital, or achieve other accounting or tax goals.⁷⁵ In a securitization, assets that generate revenues available to repay obligations are transferred from the owner and insulated in a special purpose entity (“SPE”) from the effect of any insolvency of the transferor. By selling assets to an SPE that borrows on the strength of those assets, the seller reduces the risk that the assets would be included in the seller’s estate if it files a case under the Bankruptcy Code. As a result, lenders expecting to be repaid from those assets are not subject to having their collection actions stayed pursuant to Section 362(a) of the Bankruptcy Code.⁷⁶ Frequently, counsel to the transferor is expected to deliver an opinion that the assets were sold in a true sale and would not be property of the transferor’s estate or potentially subject to the Bankruptcy Code’s automatic stay if the transferor filed a bankruptcy case.

Typically, in a film securitization, the sponsor will transfer to the SPE virtually all of the assets associated with the films being securitized, including the copyrights, distribution rights, and revenues to be derived from the films. The SPE can then license back to the sponsor or another party the right to distribute and contract for sub-distribution of the films. The SPE may take a security interest in the related assets, including distribution rights granted by it, accounts, general intangibles, and other revenues realized from the films. In addition, revenues from the films may be channeled through bank accounts in which the SPE has a security interest as well. To enhance the creditworthiness of the SPE, insurance, indemnities, and other credit support (such as letters of credit) may also be provided. Holders of debt issued through an SPE

⁷⁵ It has been reported that, in a \$55 million unprecedented securitization of music royalties in 1997, David Bowie received proceeds for an average life of 10 years at a fixed interest rate of 7.9% although the actual cost of the financing also reflected credit enhancement supplied by EMI Music. See Nicole Chu, *Bowie Bonds: A Key to Unlocking the Wealth of Intellectual Property*, 21 HASTINGS COMM. & ENT. L.J. 469, 470-71 (1999). According to another source, film securitizations in years 1996 through 2000 amounted to 2.1, .33, .38 and 1.00 Billion Dollars, respectively. See Asset-Backed Securitization Overview: Royalty Income, Trademark Licensing, Sports Facility and Franchise Securitization, Issuance by Year 1996-2000, available at <http://www.cakucc.com/sportsissuance.html> (last visited Aug. 27, 2001).

⁷⁶ See *supra* note 30.

expect that the revenues flowing to the SPE will be adequate to pay interest regularly and principal according to an amortization schedule. To the extent that the sources of repayment are dependent on actions by the SPE's sponsor, film distributor, or other parties, holders of SPE debt may expect those parties to abide by certain covenants. If there is a breach of a covenant or if revenues received by the SPE are insufficient to make payments, the SPE and its creditors will have remedies that include the right to terminate licenses and distribution agreements for the films sold to the SPE and the right to exercise the rights of a secured party in its collateral.

The ideal film securitization structure from the point of view of investors is not necessarily the ideal form from the point of view of those seeking financing. For example, rather than create an SPE with a known set of assets that can be evaluated by investors, studios and producers may want to retain the right to substitute films or to reacquire films owned by the SPE. While investors may want the comfort that distribution agreements are static sources of payment, studios and producers may want to retain the flexibility to modify those agreements. Introduction of these structural elements into a securitization throws into question the ownership rights of the SPE.⁷⁷ All of these conditions provide fodder for the argument that the transferor has retained rights in the assets transferred to the SPE so that the bankruptcy of the transferee could impair the integrity of the SPE and its ability to liquidate assets for the benefit of creditors.⁷⁸ Further, if the transfer is intended to evade creditors, it could be deemed a fraudulent transfer. Despite

⁷⁷ See Standard & Poor's Ratings Services, *Structured Finance Ratings: Asset Backed Securities (New Assets 1998): Are the Cameras Ready to Roll on Securitizing "The Movies"*, NEW DEVELOPMENTS IN SECURITIZATION 1998 (PLI) at 554 *et seq.*

⁷⁸ The ability of a bankruptcy trustee to assert rights over assets sold to an SPE in a securitization transaction was addressed in the case of *In re LTV Steel Co., Inc.* No. 00-43866 (Bankr. N.D. Ohio 2001). In that case a group of affiliated companies that had filed a bankruptcy case were given the right to use as "cash collateral" proceeds of inventory and accounts owned by special purpose vehicles created in connection with two securitizations. The debtors argued that assets had not been sold to the special purpose vehicles but rather had been transferred in connection with a financing. In support of that argument, the debtors pointed to indicia of continued ownership, including the fact that the debtors continued to have control over the transferred inventory and receivables and that the special purpose vehicles were not consistently treated as separate legal entities. Based on these arguments, the court issued an interim order permitting the debtor to use the "cash collateral," but the issue was never fully decided, because debtor in possession financing was eventually agreed upon that vitiated the issue. The integrity of securitization vehicles that was attacked in this case would be preserved if legislation pending in Congress in connection with what is known as the Bankruptcy Reform Act of 2001. § 912 as worded in Senate Bill 220 of that act would amend § 541 of the Bankruptcy Code to exclude from the estate of a bankrupt what are defined as "eligible assets" transferred by the bankrupt in connection with an "asset-backed securitization." The legislation has attracted both avid supporters and detractors. See *Sec-*

these issues, billions of dollars of film securitizations have been completed in the last few years, and Revised Article 9 is expected to facilitate future securitizations by providing a new legal framework within which to assess and limit risks to investors in SPEs.⁷⁹ In fact, the agencies that assign ratings to debt issued in securitizations have already changed some underwriting criteria in light of Revised Article 9.

Rating agencies such as Moody's Investors Service, Inc., Fitch Investors Service, L.P. and Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies ("Standard & Poor's"), assign investment ratings to debt issued by SPEs to assist investors in assessing the degree of risk associated with an investment. The higher the rating assigned to the investment, the lower the perceived risk, and the lower the interest rate borne by the investment instrument. To facilitate rating investments, these agencies establish underwriting criteria that securitizations are expected to follow. Regardless of whether a rating is sought in a securitization, the criteria for rating securitizations promulgated by rating agencies provide constructive insight into how securitizations are evaluated by investors. Standard & Poor's has indicated that, in evaluating the creditworthiness of a film securitization, it considers a number of specific factors that it considers to be predictive of the income flow to be anticipated by an SPE. Those factors include the historical performance of films produced by the SPE's sponsor, the nature of any deductions from gross film revenues that will be made before receipt of revenue by the SPE, and the availability of the "portfolio effect" realized when the revenues to be received by an SPE are from a slate of six to ten films.⁸⁰

Recently, Standard & Poor's loosened some of its underwriting criteria for securitizations as a result of the adoption of Revised Article 9. Noting that Revised Article 9 has extended its reach to cover new types of collateral and transactions and simplified the procedure for perfecting security interests, Standard & Poor's concluded that it was no longer necessary for it to require opinions of counsel with respect to

tion 912: 'Potentially Evil' 37 BCD NEWS AND COMMENT 12 (Mar. 28, 2001); *Section 912: 'Good Law'* 37 BCD NEWS AND COMMENT 12 (Mar. 28, 2001).

⁷⁹ The fact that Revised Article 9 can facilitate securitizations has not gone without criticism. See, e.g., Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 242 (2000) (criticizing the joint effect of Revised Article 9 and pending revisions to the bankruptcy act that facilitate securitization because of their potentially adverse effect on third parties, including unsecured creditors deprived of securitized assets that otherwise would have been available for distribution in bankruptcy).

⁸⁰ See Standard & Poor's, *Structured Finance: Legal Criteria*, at <http://www.standardandpoors.com/ResourceCenter/RatingsCriteria/StructuredFinance/Articles/pdf/Legal 2000r.pdf.117 et seq.> (Apr. 2000).

perfection of security interests in assets subject to a securitization. Specifically, Standard & Poor's said that

“[g]iven the limited scope of the security interest opinions typically delivered in structured finance transactions . . . and in light of the revisions to Article 9 becoming effective beginning July 1, 2001, Standard & Poor's has concluded that these opinions will not add significant value to the structured finance rating process for many types of assets. . . . To the extent that issues relating to creation, perfection, or priority of a security interest in a particular type of asset are not governed by Article 9 . . . , Standard & Poor's existing legal criteria continue to apply”⁸¹

Based on this statement by Standard & Poor's, it appears that opinions of counsel will continue to be required in film securitizations because of the uncertainty surrounding the law regarding security interests in copyrights and proceeds of copyrights.

The transactional costs associated with film securitizations will be reduced as a result of changes in the law effected by Revised Article 9 that are discussed elsewhere herein, but the savings could be greater if film securitizations could benefit from the same changes in rating agency policies reflecting Revised Article 9 practice as are being applied to other securitizations. To realize the same cost saving from Revised Article 9 as other securitization formats, though, sponsors of film securitizations would have to be able to convince rating agencies that perfecting security interests in copyrights and their proceeds is as simple as perfecting security interests in other personal property pursuant to Revised Article 9. That argument cannot be won until the Copyright Act is amended to more effectively address secured transactions.

VII. BAR JOURNAL CLIPPING DATED JULY 2001: PURCHASES OF FILM REVENUES HAVE BEEN FACILITATED BY REVISED ARTICLE 9 AND CASE LAW

Borrowers with accounts receivable often obtain financing by either borrowing against the security of those accounts or selling those accounts. Both secured financings and sales of accounts can be relatively inexpensive sources of working capital for borrowers not only because of the self-liquidating nature of transactions and the use of standard documentation but also because they benefit from the straightforward procedures of Revised Article 9.⁸² Perhaps surprising

⁸¹ See Standard & Poor's, *Ratings Criteria*, available through <http://www.standardandpoors.com/resourcecenter/index.html> (last visited Aug. 18, 2001).

⁸² See generally, Susanne, Wealey, et al., *Working Capital Financing in the New Economy: Current Legal Issues and the Need for Federal Legislative Reforms*, BUS. LAW NEWS, Summer 2001 (official publication of the State Bar of California's Business Law Section).

to some is that, like its predecessor, Revised Article 9 governs both purchases of accounts and security interests in accounts.⁸³ Official Comment No. 5 to Section 9-109(a)(3) explains that Revised Article 9 uses secured transaction terminology as a convenience without distinguishing between sales and secured transactions: "Use of terminology such as 'security interest,' 'debtor,' and 'collateral' is merely a drafting convention adopted to reach this end [of covering both sales and secured transactions] and its use has no relevance to distinguishing sales from other transactions."

Of particular potential interest to the film industry is a change in the scope of sales transactions governed by Revised Article 9 that has been effectuated by changing the definition of "accounts." Under Old Article 9, an "account" was "any right to payment for goods sold or leased or for services rendered"⁸⁴ This definition would not permit payments on account of copyrights to constitute accounts, because rights to payments on account of copyrights would be rights to payment for use of copyrights (which would be classified as "general intangibles"⁸⁵), not for goods sold or leased or services rendered. Revised Article 9 has expanded the definition of "accounts" to include rights to payment for "property" that has been "licensed."⁸⁶

⁸³ Rev. U.C.C. § 9-109(a) provides, in part, that "Except as otherwise provided in subsections (c) [addressing exclusions from Revised Article 9 by reason of such matters as federal preemption] and (d) [describing certain types of transactions excluded from Revised Article 9 such as landlord's liens], this article applies to: . . . (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes"

⁸⁴ Old Article 9 § 9-106.

⁸⁵ Rev. U.C.C. § 9-102(a)(42) defines a "general intangible" in part 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." An example of a "general intangible" given by Official comment 5d. to Rev. U.C.C. § 9-102 is "intellectual property."

⁸⁶ Rev. U.C.C. § 9-102(a)(2) defines "account" as "a right to payment of a monetary obligation, whether or not earned by performance, (i) for the property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter of credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card."

As noted above, the *Peregrine* case contains dicta suggesting that, not only are security interests in copyrights to be perfected under federal law, but so are security interests in accounts receivable under copyrights. To the extent that they are persuaded by that dicta, secured lenders will not change their practices under Revised Article 9 but, rather, will continue attempting to perfect their security interests under both federal law and Revised Article 9. As a result of the increased documentation and due diligence undertaken by lenders obtaining security interests in film revenues, the transactional costs incurred in connection with financings secured by film revenues will continue to exceed the costs borne by borrowers under financings secured by other types of accounts in which security interests are governed solely by Revised Article 9. However, purchases of accounts (as opposed to the secured financing addressed by the *Peregrine* case) are a different matter.

In *Broadcast Music, Inc. v. Hirsch*⁸⁷ (“*Hirsch*”), the Ninth Circuit Court of Appeals held that an assignment of, as distinguished from a security interest in, royalties that was not recorded with the Copyright Office was still effective as against a subsequent tax lien that would be effective as against other copyright interests. The court said that the *Peregrine* case did not require a different result, because *Peregrine* dealt with security interests and not sales. The holding in the *Hirsch* case is important to owners of royalties, because if tax liens against owners of a copyrights cannot reach royalties that have been sold, then purchasers of royalties should also be protected from the claims of other creditors of their sellers, including the hypothetical liens of the bankruptcy trustees of the copyright owners.

Hirsch permits law other than the Copyright Act to govern the relative rights of the parties in royalties that are purchased. Since royalties are accounts under Revised Article 9, the rights of buyers and sellers of royalties are subject to being analyzed under Revised Article 9. Section 9-318 of Revised Article 9 contains specific language protecting a buyer of accounts from any residual claims by a seller: “a debtor that has sold an account . . . does not retain a legal right or equitable interest in the collateral sold.”⁸⁸ Official Comment No. 2 to

⁸⁷ 104 F. 3d 1163 (9th Cir. 1997).

⁸⁸ This section directly addresses the issue raised in *Octagon Gas Systems Inc. v. Rimmer*, 995 F. 2d 948 (10th Cir. 1993) in which a court concluded that treatment of both security interests and sales by Old Article 9 of using the same terminology meant that sellers retained rights in transferred assets. For a more comprehensive discussion of Revised Article 9 on the holding in this case, see Steven L. Harris and Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. (2001) 85; G. Ray Warner, *Lien on Me: Asset Securitization Under Revised Article 9*, 2000 ABI JNL Lexis

this section even more explicitly says that the seller of accounts retains no interest “whatsoever in the property sold.” The fact that the language of secured transactions is used in describing sales of accounts does not mean that sellers of accounts (or their creditors) have residual rights. As pointed out in Official Comment No. 5 to Section 9-109, Revised Article 9 rejects the suggestion contained in cases decided under Old Article 9 that the seller of accounts nevertheless retained certain residual rights.

The holding in the *Hirsch* case permits owners of copyrights to sell their rights to payment without recording the sale with the Copyright Office. To the extent that lenders are willing to rely on this decision (recognizing that even a decision by the Ninth Circuit Court of Appeals is not necessarily definitive law), the film industry can sell accounts receivable arising from the exploitation of films without incurring the transactional costs and other burdens associated with complying with the Copyright Act. In so doing, the film industry will be capitalizing on a traditional financing mechanism that has benefited other industries for decades under Old Article 9.

VIII. BAR JOURNAL CLIPPING DATED JULY 2001: REVISED ARTICLE 9 PERMITS BORROWERS TO CAPITALIZE ON THEIR RIGHTS IN ACCOUNTS, CONTRACTS AND OTHER LICENSES BY GRANTING A SECURITY INTEREST IN THOSE RIGHTS EVEN IF THE CONTRACTS CONTAIN TERMS PROHIBITING ENCUMBRANCE

Revised Article 9 enhances the collateral value of assets owned by borrowers by limiting the enforceability of contractual prohibitions on encumbrance of accounts and on the rights of licensees. While it may come as a surprise to some, there is considerable precedent for such statutory limitations on contractual terms. Section 9-318(4) of Old Article 9 rendered ineffective restrictions on assignments of rights to payment under accounts and the creation of a security interest in a general intangible for money due or to become due.

The statutory successor to Section 9-318(4) of Old Article 9, Section 9-406(d), applies a similar principal to contracts under which the more broadly defined “accounts” arise. It provides that, with certain

73 (Sept. 2000); Lawrence R. Ahern, III, “*Workouts*” Under Revised Article 9: A Review of Changes and Proposal for Study, 9 AM. BANKR. INST. L. REV. 115 (2001); C. Scott Pryor, *How Revised Article 9 Will Turn the Trustee’s Strong-Arm into a Weak Finger: A Potpourri of Cases*, 9 AM BANKR. INST. L. REV. 229 (2001); Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167 (1999).

limited exceptions, provisions in contracts between an account debtor⁸⁹ and an assignor are “ineffective”⁹⁰ to the extent that they limit assignment.⁹¹ Explaining how this section is intended to work, Official Comment 5 discusses terms in a manufacturing contract that impair the assignment of accounts by requiring the debtor to set aside and use prepayments solely to manufacture designated equipment. The Comment concludes that the effectiveness of such terms depends on whether a court would conclude that the terms had a plausible business purpose other than impeding assignment. Terms in contracts limiting assignment of contracts will not be enforced unless they have another business purpose.

Section 9-406(d) is not the only provision of Revised Article 9 that enhances the value of assets that a debtor can encumber by limiting the enforceability of contractual limitations. Section 9-408 of Revised Article 9 renders ineffective restrictions on the transfer of a licensee’s rights under a license to the extent that the restriction interferes with the creation, attachment or perfection of security interests. As a result, a license term that terminates the license upon encumbrance by the licensee would be ineffective. Unlike Section 9-406(d), this section does not limit the effectiveness of restrictions on the enforcement of security interests in licensee’s rights. For example, a license term providing that the license terminates if a secured party seeks to foreclose would be enforceable.

Official Comment No. 8 to Section 9-408 makes it clear that the purpose of this section is to maximize credit available to debtors.⁹² A debtor could not give a lender a security interest under Old Article 9 in

⁸⁹ “Account debtor” is defined in Rev. U.C.C. § 9-102(a)(3) as “a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.”

⁹⁰ Official Comment No. 5 to this section explains what it means when a term is rendered “ineffective:” “The quoted term means that the clause is of no effect whatsoever; the clause does not prevent the assignment from taking effect between the parties and the prohibited assignment does not constitute a default under the agreement between the account debtor and assignor. However, subsection (d) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, subsection (d) reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might ‘impair’ an assignment in fact.”

⁹¹ “(1) prohibits, restricts, or requires the consent of the account debtor . . . to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account. . . ; or (2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account. . . .”

⁹² Official Comment 9408.

all of the assets assembled to produce a film. Licensed rights that prohibited encumbrance would be excluded. If the debtor filed a bankruptcy case, the lender's security interest would be honored but would be inadequate to insure the availability of assets necessary to complete the film. Rather, the bankruptcy trustee would have rights in those assets that would be used to maximize amounts available to pay unsecured creditors and other claims against the bankrupt estate.

Under Revised Article 9, the same secured party would be able to prevent the trustee from benefiting from licensed rights in which a security interest had been perfected even though, because of the limited scope of Section 9-408, the secured party might not be entitled to foreclose on the license. The secured creditor is put in the position of negotiating with the licensor, rather than the bankruptcy trustee, for the use of the licensed rights. By eliminating the bankruptcy trustee from the negotiations, Section 9-408 eliminates the extraneous economic demands of one party and improves the likelihood that a satisfactory arrangement can be negotiated so that a film can be completed. Thus, the interests of the secured party, not the interests of the bankruptcy trustee, are served.⁹³

In light of the *Peregrine* case, it is conceivable that federal law could preempt application of Sections 9-406 and 9-408 of Revised Article 9 to security interests in accounts arising under copyrights. However, to the extent that the *Peregrine* case is not applicable, particularly in the case of purchases of accounts as contemplated by the *Hirsch* case, these sections permit the film industry to capitalize on assets that previously could not be financed. With these changes in the law in mind, parties negotiating and drafting film licenses will want to do so with particular care. Depending on the interests of the parties, they will either want to maximize collateral values or minimize assignability under Revised Article 9.

IX. BAR JOURNAL CLIPPING DATED JULY 2001: THE VALUE OF COLLATERAL AVAILABLE TO SECURE FINANCING HAS BEEN ENHANCED BY REVISED ARTICLE 9'S EXPANSION OF THE DEFINITION OF "PROCEEDS"

Among the most valuable assets on which borrowers in the film industry can capitalize when negotiating secured financing are future revenue streams from films, but the value of those revenue streams in

⁹³ Lenders relying on this provision can expect to run into some significant resistance. This section of Revised Article 9, in particular, has been referenced as "bankruptcy-targeted insolvency value reallocation rules masquerading as neutral principals of state commercial law." See *The Anti-Bankruptcy Act*, *supra* note 31.

the eyes of secured lenders has been limited by the concern that the rights to payment arising after a debtor files a bankruptcy case will not remain subject to the security interest of the creditor. Under Section 552 of the Bankruptcy Code, "property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before commencement of the case." However, Section 552(b) honors security interests in "proceeds" of collateral received after the filing of a bankruptcy case if (1) the collateral was subject to a security interest before the filing (2) the security agreements and "applicable non-bankruptcy law" extend the security interest to proceeds⁹⁴ and (3) the court does not otherwise order on the basis of "the equities of the case." Even when carefully perfecting their security interests and including "proceeds" within the definition of the collateral, secured lenders to the film industry have worried, for example, that revenues received from licenses entered into after a debtor files a bankruptcy case may not be "proceeds" of their collateral.

Under Old Article 9, "proceeds" generally were limited to property received upon "disposition" of original collateral. Revised Article 9 expands the definition of "proceeds"⁹⁵ to include property and other rights derived from the licensing or other disposition of original collateral as well as related claims. In a provision similar to that contained in Old Article 9, Section 9-315 of Revised Article 9 provides that a security interest in collateral generally attaches to identifiable proceeds of collateral and is perfected if the security interest in the original collateral was perfected. To maintain its perfected security interest, a se-

⁹⁴ Despite the language of § 552 deferring to state law regarding the scope of "proceeds", the extent to which state law can define the interpretation of "proceeds" as that term is used in the Bankruptcy Code is subject to some debate. See, e.g., *In Re Bumper Sales, Inc.*, 907 F. 2d 1430 (4th Cir. 1990) (suggesting that Congress intended the Bankruptcy Code to defer to state law); *James Cable Partners, L.P. v. Citibank, N.A.*, 141 B.R. 772 (Bankr. M.D. Ga. 1992) (finding that the Bankruptcy Code definition is not delineated by state law). A number of other cases have suggested that perfected security interests in contracts executed prior to a bankruptcy filing or accounts under contracts executed prior to a bankruptcy filing extend to payments under those contracts. See, e.g., *In re Sunberg*, 729 F. 2d 561 (8th Cir. 1984); *J. Catton Farms, Inc., v. First Nat'l Bank of Chicago*, 779 F.2d 1242 (7th Cir. 1985). See generally *The Anti-Bankruptcy Act*, *supra* note 31.

⁹⁵ "Proceeds" is defined in Rev. U.C.C. § 9-102(a)(64) as: "the following property: (A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; (C) rights arising out of collateral; (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or (d) to the extent the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral."

cured party may be required to take additional steps in accordance with the other requirements of Revised Article 9 within twenty days. A secured party's security interest in proceeds is treated as perfected from the date that its security interest was perfected in its original collateral in accordance with Section 9-322(b) (1) of Revised Article 9. That section provides that "the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in the proceeds."⁹⁶ By expanding the definition of "proceeds" of collateral in which a secured party can have a perfected security interest dating from the time of original perfection or filing, Revised Article 9 expands the assets that, pursuant to Section 522 of the Bankruptcy Code, remain subject to a pre-existing security interest after the filing of a bankruptcy case by the debtor.

The expansion of the definition of "proceeds" of Revised Article 9 permits debtors to give to their secured creditors greater assurance that security interests in films will extend to future revenue streams from those films. Unless the *Peregrine* case is read to say that federal law preempts state law in this area, in the long run, the effect of this greater assurance could be expanded availability of credit and new credit structures.

X. POST SCRIPT

How the author of these diary pages found financing for her first film remains something of a mystery, but increased access to less expensive credit facilitated by Revised Article 9 is the prime suspect. The time and cost of structuring film financing have been reduced in any number of ways. For example:

- Revised Article 9 has reduced the cost of perfecting many security interests by streamlining the procedures for perfecting security interests in (and conducting due diligence searches regarding) most types of personal property;

⁹⁶ While beyond the scope of this article, the fact that revenues payable on account of films may be payable under executory contracts that may be assumed or rejected upon the bankruptcy of a party to the contract raises particular issues in structuring film securitizations. A distribution agreement is often considered to be an "executory contract," because there are at virtually all times undischarged obligations by each party to the contract. Under § 365 of the Bankruptcy Code, a bankruptcy trustee has the right to assume or reject executory contracts. Accordingly, if the only rights transferred to an SPE were the right to receive royalties under distribution agreements and one of those agreements were rejected upon the bankruptcy of the SPE sponsor or distributor, the source of repayment for the SPE's obligations could be eliminated. To avoid this result, copyrights generally are transferred into an SPE together with the royalties and rights under distribution agreements. If a distribution agreement is rejected, as owner of the copyright, the SPE could enter into new licenses.

- Revised Article 9 has reduced the costs that will be incurred in addressing secured transactions laws in addition to Revised Article 9 because of the expansion of Revised Article 9's scope to cover more types of collateral (such as deposit accounts) that previously were governed by other state law;
- Revised Article 9 has reduced the costs that will be incurred in addressing personal property sales laws in addition to Revised Article 9 because of the expansion of Revised Article 9 to cover not only security interests in, but also sales of, accounts arising out of general intangibles;
- Revised Article 9 has reduced the costs of counsel in some cases, because, as evidenced by the recent announcement made by Standard & Poor's, the requirement for opinions of counsel will be eliminated or modified in some financings;
- Revised Article 9 has reduced the costs incurred in negotiating changes to licenses prohibiting encumbrance by rendering certain of those prohibitions ineffective; and
- Revised Article 9 made the extension of secured film financing more attractive by expanding the definition of "proceeds" that are to be subject to security interests and have priority over the interests of a bankruptcy trustee.

Whatever financing structure she used, the author of this diary must have been hampered in finding financing by the uneasy relationship between Revised Article 9 and the Copyright Act. As a result of *Peregrine* and its progeny, she could not give to a lender an opinion that its security interest in the copyright in her film was subject to its security interest until the copyright was registered with the Copyright Office. Until then, her lender's collateral package was limited to the assets in which a security interest can be readily perfected under Revised Article 9. If she were to have filed a bankruptcy case before registering the copyright, the lender could have realized the benefit of rights in which it had perfected its security interest, but the potential crown jewel of rights, the copyright, would have been free of encumbrance and available to satisfy other obligations. As a result, perhaps the author was forced to give others interests in her film in return for their economic support of her production. If so, the attorney-film producer who penned this diary may become one of many who supports changes to the Copyright Act to benefit film production in the near future.

