

# Revised UCC Article 9 and the Negative Pick-up Deal

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## I. INTRODUCTION

On July 1, 2001, a revised version of Article 9 of the Uniform Commercial Code, uniform state law governing secured transactions, took effect in nearly all fifty states, the District of Columbia, and the U.S. Virgin Islands, and by January 1, 2002, every state in the Union had adopted new Article 9.<sup>1</sup> Among other changes to the law, new Article 9 contradicts the holding of *In re Peregrine Entertainment, Ltd.*,<sup>2</sup> a bankruptcy case from the Central District of California regarding perfection of security interests in copyrighted material. This is welcome news for the film industry because the change makes it easier to finance a motion picture through a negative pick-up deal or pre-sales, two types of distribution agreements used to finance motion picture production that rely heavily on the ability of a financier to perfect an interest in copyrighted material.

A negative pick-up deal is “[a]n agreement whereby a studio acquires substantial rights (typically, at least Domestic Rights) in a motion picture in consideration for a fixed payment due upon Delivery plus Royalties.”<sup>3</sup> It is “a method of bridge financing whereby a distributor uses a financier’s money to pay for production of a movie and then purchases the completed picture by payment to the financier upon acceptable delivery by the producer.”<sup>4</sup> It is from the idea that the distributor picks up completed film negatives after production has been

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<sup>1</sup> See Uniform Law Commissioners, *A Few Facts About The Revised UCC Article 9, Secured Transactions* (1999), at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ucca9.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucca9.asp) (last visited Nov. 6, 2002).

<sup>2</sup> 116 B.R. 194 (C.D. Cal. 1990).

<sup>3</sup> Schuyler M. Moore, *THE BIZ: THE BASIC BUSINESS, LEGAL, AND FINANCIAL ASPECTS OF THE FILM INDUSTRY* 7 (2000).

<sup>4</sup> See Jay S. Kenoff, “*Negative Pick-Up*” *Deals for Film Production Projects; Getting the Picture*, ENT. L. & FIN., Oct. 1994, at 1.

financed by someone else that the term *negative pick-up deal* is derived.<sup>5</sup>

A *pre-sale* is "a limited distribution agreement for a particular country entered into prior to completion, and often even prior to commencement of production, of the film."<sup>6</sup> Like the negative pick-up deal, the pre-sale is a transaction in which the distributor typically commits to pay the producer a fixed dollar amount upon delivery of a conforming product.<sup>7</sup> The principle difference between the negative-pick up deal and the pre-sale is that the term "negative pick-up" typically refers to acquisition of U.S. rights in a film and "pre-sale" commonly refers to the acquisition of foreign rights in a film.<sup>8</sup>

Both the negative pick-up deal and the pre-sale involve the payment of a fixed dollar amount by the distributor to the producer upon delivery of the film. This promise of payment, known as a *minimum guarantee*, represents a distributor's commitment to pay the producer an advance on royalties from exhibition of the film. Often, the producer will obtain this promise before production even begins.<sup>9</sup> The producer uses the minimum guarantee as collateral to obtain a loan from a financier, which the producer then uses to pay for production of the film.<sup>10</sup> The pre-sale and the negative pick-up deal are increasingly popular methods of financing independent films because they give the independent producer that is unable to find private investors an alternative means of financing film production.

Negative pick-up deals and pre-sales involve multiple secured transactions. A *secured transaction* is a transaction that creates a *security interest*, a "form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given."<sup>11</sup> In order to obtain loans of money or

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The negative pick-up may be used in conjunction with other arrangements to provide financing for a picture. The initial question here is whether the distributor wants (or can exploit) all distribution rights. In a 'split-rights' deal, two distributors may participate, one acquiring domestic distribution rights, the other foreign rights. The domestic distributor can utilize the negative pick-up arrangement, while the foreign distributor may provide an advance which will be used to fund the balance of the budget for production. A producer may also attempt to finance the 'foreign' part of the budget through presales to various foreign territories.

*Id.*; see also *Making Money in Movies*, ECONOMIST, May 10, 1986, at 88, 88.

<sup>5</sup> See Lionel S. Sobel, *Financing the Production of Theatrical Motion Pictures*, 5 ENT. L. REP. 3, 4 (1984).

<sup>6</sup> MOORE, *supra* note 3, at 84.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> Sobel, *supra* note 5, at 5.

<sup>10</sup> *Id.*

<sup>11</sup> BLACK'S LAW DICTIONARY 1365 (7th ed. 1999).

property with which to make a film, a producer often uses rights in the completed film as collateral for its loans. When a producer offers rights in the completed film as collateral for its loans, each lender takes a security interest in the film. In the event of default, lenders' rights in the film and the proceeds from its exhibition are determined according to the priority of their respective security interests. A security interest may be guaranteed priority over competing interests through a process known as *perfection*. Article 9 of the Uniform Commercial Code, uniform state law for secured transactions, says that a security interest may be perfected by filing a financing statement with the Secretary of State in the proper state. However, when perfecting an interest in copyrighted material, the Article 9 filing requirements yield to conflicting federal law because copyright law is an area of federal jurisdiction.

In the 1990 case of *In re Peregrine Entertainment, Ltd.*, the U.S. District Court for the Central District of California interpreted Article 9 of the UCC as saying that the recording requirement of the Federal Copyright Act, which provides that “[a]ny transfer of copyright ownership or other document pertaining to a copyright, may be recorded in the Copyright Office,” preempts the filing requirements of the UCC for perfection of a security interest in copyrighted material.<sup>12</sup> This overlap of state and federal law regarding security interests in copyrighted material has caused quite a bit of confusion among secured creditors.<sup>13</sup> Since *Peregrine*, cautious lenders have made it a practice to both record their security interests in copyrighted material with the U.S. Copyright Office, as directed by the Federal Copyright Act, and file financing statements with the Secretary of State, as directed by the UCC<sup>14</sup>

New Article 9 makes it clear the *Peregrine* court misinterpreted the UCC<sup>15</sup> New Article 9 clarifies the drafters' view that recordation in the U.S. Copyright Office is an alternative, and not a preemptive, method of perfecting security interest in copyrighted material, like a film.<sup>16</sup> This clarification, in conjunction with conforming recent court cases, dramatically changes the way in which security interests in motion pictures

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<sup>12</sup> *In re Peregrine Entm't, Ltd.*, 116 B.R. 194, 198, 201 (C.D. Cal. 1990) (quoting 17 U.S.C.A. § 205(a) (2000) (amended 2002)).

<sup>13</sup> See Marci Levine Klumb, *Perfection of Security Interests in Intellectual Property: Federal Statutes Preempt Article 9*, 57 GEO. WASH. L. REV. 135, 137 (1988).

<sup>14</sup> See Paul A. Baumgarten, *Copyrights As Collateral: Perfection Finally Perfected After Peregrine?*, 71 U. DETROIT MERCY L. REV. 581, 581 (1994).

<sup>15</sup> See *id.*; see also David S. Kupetz, *Perfecting Security Interests in Intellectual Property: Lenders Beware!*, BANKR. STRATEGIST, Apr. 2000, at 4.

<sup>16</sup> See Baumgarten, *supra* note 14; see also Kupetz, *supra* note 15 at 4.

are perfected.<sup>17</sup> In order to show how such a change impacts the negative pick-up deal, this paper will first examine the transaction, identifying the parties involved and their respective security interests, then identify the implications for such a transaction in light of *In re Peregrine Entertainment, Ltd.* and the new law.<sup>18</sup>

## II. THE DEAL

The main players in a negative pick-up deal are the producer, the distributor(s), the financier, and the completion guarantor.<sup>19</sup> Each performs a distinct and important role in bringing a motion picture from conception to completion. An *interparty agreement* sets forth the respective rights and obligations of each party, prioritization and protection of which demand careful consideration of a number of interesting legal issues.<sup>20</sup>

### A. *The Producer*

A producer is a person or company that makes motion pictures. The producer is typically responsible for finding a story, finding a director and talent to make the film, pitching the project to investors and distributors, and seeing that the film is made and delivered according to conditions agreed upon by the parties.

#### 1. Finding a Story

The producer may find a story in a number of different ways. The producer may have a screenplay or concept of its own, or it may purchase the concept or screenplay of another. When it finds a concept, the producer purchases an *option* on that concept.<sup>21</sup> The option gives the producer a limited time, typically one year, to find backing for the film without having to worry about someone else stealing the story in the mean time.<sup>22</sup>

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<sup>17</sup> See generally Pauline Stevens, *The New UCC's Security Interest Provisions: How They Affect Intellectual Property*, INTELL. PROP. STRATEGIST, Nov. 2000, at 1. New Article 9 of the UCC first took effect in the states that adopted it on July 1, 2001. *Id.* at 3.

<sup>18</sup> *In re Peregrine Entm't, Ltd.*, 116 B.R. 194 (C.D. Cal 1990).

<sup>19</sup> See Kenoff, *supra* note 4.

<sup>20</sup> See *id.*; see also Matthew C. Thompson, *Production Presale Financing Contracts Form Complex Web of Rights and Obligations*, ENT. L. & FIN., Apr. 2000, at 1 ("The interparty agreement sets forth the relative priority of the parties' security interests in the film, with the bank first, completion guarantor second, sales agent third and producer last.").

<sup>21</sup> See *Making Money in Movies*, *supra* note 4, at 88.

<sup>22</sup> See *id.*

## 2. Selling the Story

Once the producer has a story in hand, it approaches a director and/or talent with the story to see if they are interested in working on the project. The more *bankable* the director or talent that comes on board (i.e., the greater the drawing power a director or actor has), the easier it is for the producer to obtain financing for the film.<sup>23</sup> Of every dollar spent at the ticket box, the exhibitor takes about 10 cents right off the top to cover its expenses and another 9 cents or so as an exhibition fee. Of the remaining 81 cents, about 24 cents cover the distribution fee, 20 cents pay rental, 30 cents cover the costs of production, 5 cents are spent on taxes and miscellaneous expenses, and 2 cents remain as profit.<sup>24</sup> After the producer splits the profit with the distributors, it barely has a penny to its name.<sup>25</sup> This penny must often be shared with bankable talent who agree to make the film.<sup>26</sup>

Once a director or actor has agreed to make a film, the producer approaches potential financiers to see if they are willing to invest in the film. In some cases, production is financed entirely by individual investors, who split the profits with the producer after the principal amount of their investment is repaid in full.<sup>27</sup> In the case of a pre-sale, production is financed with money lent to the producer by a bank after a distributor has promised to pay the producer an advance on exhibition royalties, the minimum guarantee, in exchange for distribution rights to the film.<sup>28</sup> Before agreeing to a pre-sale, the distributor requires the producer to provide it, directly or through a sales agent, with extensive documentation, including a budget, screenplay, shooting schedule, and profiles of the talent and director who will make the film.<sup>29</sup> The producer wants a large minimum guarantee so that he can get a large loan for production. The producer also wants to limit the distributor's ability to reject delivery for nonconformity as much as possible, in order to shift the risk of loss to the distributor. In turn, the distributor tries to shift the risk of loss back to the producer by limiting the amount of the

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<sup>23</sup> See Sobel, *supra* note 5, at 7.

<sup>24</sup> See *Making Money in Movies*, *supra* note 4.

<sup>25</sup> See Sobel, *supra* note 5; see also Howard M. Frumes, *Surviving Titanic: Independent Production in an Increasingly Centralized Film Industry*, 19 LOY. L.A. ENT. L. REV. 523, 543 (1999) ("Residuals are a means for individuals who work on motion pictures to share in the profits reaped by the producer.").

<sup>26</sup> See *Making Money in Movies*, *supra* note 4, at 88.

<sup>27</sup> See Sobel, *supra* note 5.

<sup>28</sup> See Thompson, *supra* note 20, at 6; see also Robert I. Freedman, *U.S. Foreign Coproductions: Putting the TV Deal Together*, ENT. L. & FIN., Feb. 1997, at 1.

<sup>29</sup> See Richard K. Rosenberg, *Deferred Financing on Rise in Film Deals*, ENT. L. & FIN., May 1992, at 1, 1; see also Frumes, *supra* note 25; Thompson, *supra* note 20, at 1, 1.

guarantee and retaining as much discretion as possible in determining whether or not to reject a film for nonconformity.<sup>30</sup>

Once the producer has a minimum guarantee in hand, often in the form of a letter of credit, it takes that promise to a financier, typically a bank, and uses it to obtain a loan to make the film.<sup>31</sup> Depending on the reputation of the distributor and the bank's own assessment of the proposal, reviewing documentation similar to that required by the distributor, it accepts or rejects the producer's loan application.<sup>32</sup> If the producer does receive its loan, it must give the bank a security interest in the film as collateral.<sup>33</sup> Additionally, the bank requires the producer to obtain a completion bond that guarantees that the film will be completed on time and in conformity with the distributor's specifications.<sup>34</sup>

### 3. Making the Film

After financing is obtained, the producer's only responsibility is living up to its contractual obligations, i.e., seeing that the film is completed in such a manner that it will be accepted by the distributor(s) and available in the film lab on time.<sup>35</sup> Even if the producer fails to complete the film, a completion guarantor will ensure that these obligations are met. However, to avoid forfeiting control of production to a completion guarantor or distributor, the producer must make sure that production progresses according to schedule.

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<sup>30</sup> See Matthew C. Thompson, *Triggering the Minimum Film Guarantee Obligation*, ENT. L. & FIN., Mar. 1998, at 1; see also Kenoff, *supra* note 4, stating:

The distributor will seek to impose a variety of requirements concerning cast, director, crew, script and budget that operate as conditions for the distributor to stick to its initial agreement to accept the picture. The producer should seek to ameliorate the requirements so that they are not so restrictive as to abort the production if a particular director or male or female lead cannot be obtained. At a minimum, the producer should try to obtain the distributor's consent to a shopping list of key personnel who will be acceptable.

<sup>31</sup> See Sobel, *supra* note 5, at 5 (“[A] negative pickup commitment assures investors and lenders that the movie will earn back its production costs as soon as it is completed and delivered to the distributor.”); see also *id.* at 6 (“[F]oreign pre-sales are a valuable source of production financing only if the sales agent obtains advances, or commitments backed by a letter-of-credit from a recognized bank, or some other secure guaranty of payment against which someone would be willing to put up necessary production funding.”)

<sup>32</sup> *Id.*

<sup>33</sup> See Steven Weinberger, *Perfection of Security Interests in Copyrights: The Peregrine Effect on the Orion Pictures Plan of Reorganization*, 11 CARDOZO ARTS & ENT. L.J. 959, 960 (1993).

<sup>34</sup> See Sobel, *supra* note 5, at 9.

<sup>35</sup> See Thompson, *supra* note 30, at 1.

## B. *The Distributor*

A distributor is an entity that acquires exclusive rights to exhibit a motion picture in a given territory, generally determined by language (e.g. the exclusive right to distribute *Finian's Rainbow* in French).<sup>36</sup> Rights may also be divided by medium (i.e., theatrical, video, television, etc.). In the case of an independent film, a major studio commonly acts as distributor of the film. Studios like negative pick-up deals because in a negative pick-up deal the studio is not liable for cost overruns in production.<sup>37</sup>

### 1. Acquiring a Film

Before a distributor acquires distribution rights to a film, it must be persuaded that the film will be profitable.<sup>38</sup> To make this determination, the distributor requires the producer to present extensive documentation.<sup>39</sup> Based on its assessment of the film's likelihood of success, taking into consideration elements of the film that are similar to films that have been made in the past, the distributor will agree or refuse to distribute the film. At this early stage of the process, the distributor may even make content suggestions to try and bolster profitability.<sup>40</sup>

If the distributor agrees to distribute the film, it then promises to pay the producer an advance on royalties, the minimum guarantee, if the film is completed by the agreed date in conformity with stipulated conditions. Of course, the distributor wants to negotiate as much discretion as possible in accepting or rejecting the film.<sup>41</sup> Usually, the dis-

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<sup>36</sup> See Thompson, *supra* note 20, at 5. For example:

Grant of Rights. Producer hereby grants and assigns to Distributor, solely and exclusively, the irrevocable right, license and privilege, under copyright and otherwise, to rent, lease, license, exhibit, distribute, reissue and otherwise deal in and with respect to the Picture, and any parts thereof, prints (including but not limited to home video devices, tapes and discs) thereof and trailers thereof and, subject to the limitations hereinafter contained, to license others to do so throughout the universe and all media and languages, for seven (7) years.

Rosenberg, *supra* note 29, at 7.

<sup>37</sup> See Stan Soocher et al., *Insiders Discuss Film Studios' Legal Teams; Majors Measure the Bottom Line*, ENT. L. & FIN., Mar. 1992, at 1; see also Kenoff, *supra* note 4 ("[T]he distributor is expected to bear the financial risk of the success or failure of the picture.").

<sup>38</sup> See Freedman, *supra* note 28, at 1 ("[P]rograms featuring internationally recognized talent, most motion pictures, and documentaries about nature, archaeology and other areas of science are prime candidates for international coproduction financing.").

<sup>39</sup> See Rosenberg, *supra* note 29, at 1 ("Creative approval of the script, cast and dailies is normally subject to the approval of the financier or distributor . . .").

<sup>40</sup> Richard Dutcher, Address at the Religious Education Student Symposium at Brigham Young University (Feb. 22, 2001).

<sup>41</sup> See Freedman, *supra* note 28, at 6 ("The foreign coproducer may require a right to screen and approve both the rough cut and fine cut of the program."); see also Kenoff, *supra* note 4.

tributor is given a right to inspect the physical elements of the film before it accepts the film, and the producer is given an opportunity to cure any claimed defect in the film to prevent avoidance of the contract for lack of conformity.<sup>42</sup> In some cases, the distributor may insert a takeover provision that allows it to take over production if the producer cannot fulfill its obligations under the contract.<sup>43</sup> Ultimately, it is the distributor that bears the risk of a box office flop.

A distributor purchases a license in territorial rights to a motion picture for the purpose of exploiting those rights by sublicensing them to exhibitors.<sup>44</sup> The distributor may pre-sell sublicenses to exhibitors in order to raise funds to pay the minimum guarantee.<sup>45</sup> The standard distribution fee is about 30% of the exhibitor's receipts, but this varies with the amount of risk that the distributor assumes.<sup>46</sup> Sublicensees of the product are unwilling to purchase a sublicense to exhibit a motion picture from a distributor to whom the film has not actually been delivered for fear that the film will never be delivered and their licensing fee will be lost.<sup>47</sup> To prevent the producer from delivering the completed film to a third party, the distributor demands exclusive rights to the film as a condition of purchase.<sup>48</sup> This creates a problem for the producer because the financier also insists on taking rights to the film before it will make a loan to finance production.<sup>49</sup> The industry standard for navigating this catch-22 is to give the distributor current rights in the film, with a reversion to the bank should the distributor fail to pay the minimum guarantee.<sup>50</sup>

## 2. Risk Management

Two kinds of risk are involved in making a motion picture. The first is that the film will never be completed; only about 10% of all films started ever reach the silver screen. The second risk is that, even if a film is completed, it may be a failure at the box office. There is no way to tell for certain how successful a film will be until it actually hits the theaters.

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<sup>42</sup> Thompson, *supra* note 20, at 5.

<sup>43</sup> See Freedman, *supra* note 28, at 7.

<sup>44</sup> See Matthew C. Thompson, *Balancing Grants of Film Rights*, ENT. L. & FIN., Oct. 1998, at 1.

<sup>45</sup> See *id.* at 5.

<sup>46</sup> See *Making Money in Movies*, *supra* note 4, at 88.

<sup>47</sup> See Thompson, *supra* note 44.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

The risk that a film will not be completed is delegated to a completion bond company, usually for a fee of about 6% of the film's budget. The risk of box office failure is borne by the distributor.<sup>51</sup> To some extent, the distributor may be able to distribute this risk to licensees who agree to exhibit the film before the distribution agreement is ever signed. Still, the distributor takes a big risk when it agrees to purchase a motion picture that it has never seen. There are two common methods by which distributors try to minimize the risk that a film might be a flop: split-rights deals and multiple film deals.

a. *The Split-Rights Deal*

In a split-rights deal, multiple distributors collaborate to purchase the rights to a single film.<sup>52</sup> Instead of a single distributor bearing the entire financial risk of the film alone, multiple distributors jointly acquire a film, each acquiring rights to distribution in a different territory or medium.<sup>53</sup> For example, a video distributor and a theatrical distributor may split rights to the film.<sup>54</sup> Alternatively, a domestic distributor and a foreign distributor may jointly acquire a film and divvy up the rights by territory.<sup>55</sup> In such a split-rights deal, the producer may use foreign pre-sales to finance production.<sup>56</sup> Foreign distributors are playing an increasingly important role in pre-sale financing.<sup>57</sup>

When distributors acquire rights to a film through a split-rights agreement, the distributors and the producer enter into a co-production agreement that specifies the contributions and rights of each party.<sup>58</sup> The parties commonly form a limited partnership, in which producer profits are split 50/50 between the general partner, the producer, and the limited partners, the distributors, once the distributors have covered their costs.<sup>59</sup> In making its pitch to potential distributors, the producer must make sure that it is not violating any securities laws. Although these limited partnership interests may be exempt from securities registration requirements, a producer should consult an exper-

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<sup>51</sup> See *Update on Gap Financing*, ENT. L. & FIN., Apr. 1998, at 1.

<sup>52</sup> See Schuyler M. Moore, *Using Split-Rights Financing For Motion Picture Productions; The Cooperative Unit*, ENT. L. & FIN., May 1996, at 1, 1.

<sup>53</sup> See Kenoff, *supra* note 4.

<sup>54</sup> See *id.*; see also *Making Money in Movies*, *supra* note 4, at 88 ("Today, video cassettes, video discs, cable and pay-television are seen not merely as residual markets but as key elements in the packaging and financing of a movie.").

<sup>55</sup> See Kenoff, *supra* note 4.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See Freedman, *supra* note 28, at 6.

<sup>59</sup> See Sobel, *supra* note 5, at 8; see also Kenoff, *supra* note 4.

enced securities lawyer to make sure it is complying with applicable securities regulations.<sup>60</sup>

Although it operates as a limited partnership, the co-production cost sharing arrangement of a producer and distributors is not taxed as a partnership in the U.S.<sup>61</sup> Foreign distributor participants are also not subject to U.S. tax for participation in a U.S. business.<sup>62</sup> There was a time when significant tax breaks were offered to individuals who invested in motion pictures.<sup>63</sup> Although investors are still allowed to take depreciation deductions and investment tax credits, U.S. tax incentives to invest in motion pictures are not as great now as they have been in the past.<sup>64</sup> For this reason, many productions are taken off shore to countries with favorable tax shelters and liberal tax breaks for film investors.<sup>65</sup> Even if a producer manages to avoid a hefty U.S. income tax, it must comply with tax laws in the country where the film is made.<sup>66</sup>

#### b. *The Multiple Film Deal*

Another way to minimize the harm that an unsuccessful film can do is to purchase rights to several films at once.<sup>67</sup> By purchasing rights to several films simultaneously, the acquiring entity may diversify its portfolio, thereby minimizing the damage that an individual film can do because, theoretically, even if some films are flops, others will be hits, the gains of the latter offsetting the losses of the former. The difficulty with this strategy is that many independent producers only work on one film at a time and can only provide documentation for the picture that they are currently working on. Moreover, many independent producers do not have a proven track record, and agreeing to purchase several films from an industry neophyte is too risky for most distributors.

Because the distributor assumes the lion's share of financial risk in motion picture financing deals, namely, that the film will be unsuccessful at the box office, it also takes the lion's share of box office receipts.

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<sup>60</sup> See Sobel, *supra* note 5, at 8-9.

<sup>61</sup> See Moore, *supra* note 52, at 6.

<sup>62</sup> See *id.*

<sup>63</sup> See Schuyler M. Moore & Matthew C. Thompson, *Tax Issues for Film Producers, Distributors*, ENT. L. & FIN., Feb. 1997, at 3, 3; see also Schuyler M. Moore & Matthew C. Thompson, *Film Projects Have Special Tax Concerns*, ENT. L. & FIN., Jan. 1997, at 1, 1.

<sup>64</sup> See Sobel, *supra* note 5, at 9; see also Moore & Thompson, *Tax Issues supra* note 63, at 3.

<sup>65</sup> George H. Funk, Address to the BYU Sports and Entertainment Law Club (Mar. 16, 2001); see also Moore & Thompson, *supra* note 63.

<sup>66</sup> See Moore & Thompson, *supra* note 63.

<sup>67</sup> See *Update on Gap Financing, supra* note 51, at 7.

Much has been said of creative Hollywood accounting.<sup>68</sup> It seems unbelievable that gross receipts on a film can exceed \$300 million in the theaters and yet the film can still net a “loss”.<sup>69</sup> What people tend to forget is that under the distribution arrangement, a distributor gets only half of the profit from a successful film because it splits profits with the producer. However, when a film fails at the box office, the distributor alone must bear that loss. Therefore, the distributor makes sure that all of its expenses are completely covered before it will recognize a profit.<sup>70</sup> Because the distributor assumes significant risk, it demands a premium for taking a chance on a film.

### C. *The Financier*

There are various entities that lend producers money to make their films. For the most part, however, producers get their commercial loans from banks.

#### 1. Risk Management

In order to secure a loan from the bank, the producer gives the bank what is essentially a mortgage of the copyright to the proposed film, along with a security interest in the tangible assets of the production.<sup>71</sup> To be able to strike such a deal, the producer must first have some kind of *paper* from a reputable distributor, such as a letter of credit.<sup>72</sup> The paper guarantees that the distributor will pay the producer an agreed price for timely, conforming delivery of the film negatives to a specified lab.<sup>73</sup> Before it makes a loan to the producer, the bank must be convinced that the producer will be able to fulfill its obligations under the pre-sale agreement.

The first consideration when determining whether or not the producer will be able to fulfill its obligations under the pre-sale agreement is whether or not the film will actually be completed and delivered on

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<sup>68</sup> See Victor P. Goldberg, *The Net Profits Puzzle*, 97 COLUM. L. REV. 524 (1997); see also *Making Money in Movies*, *supra* note 4, at 88.

<sup>69</sup> Funk, *supra* note 65.

<sup>70</sup> See *Making Money in Movies*, *supra* note 4, at 88.

<sup>71</sup> See Weinberger, *supra* note 33, at 960.

<sup>72</sup> See *Update on Gap Financing*, *supra* note 51, at 7 (“lenders don’t just look at the territories for selling a film, but who the distributors are”); see also Thompson, *supra* note 20, at 5.

<sup>73</sup> See Rosenberg, *supra* note 29, at 1, stating:

In the traditional negative pickup deal, the rights to a motion picture are presold or licensed to a distributor in exchange for a payment to the producer when the completed film is delivered. If the distributor’s “paper” is creditworthy, the producer can use the distributor’s promise to pay to obtain financing from other sources to complete the film.

See also Sobel, *supra* note 5.

time. For this reason, the bank insists that the producer find a completion guarantor, usually a completion bond company, to guarantee that the film will be completed in accordance with the technical specifications of the distribution agreement and delivered to the distributor on time.<sup>74</sup> In the event that the film is not delivered on time, and the bank has made funds available to the producer as scheduled, the completion guarantor will repay the production loan on behalf of the producer.

A secondary consideration of the bank is whether it is likely that the distributors will try to avoid their contract once they see the finished product or whether they will honor their commitment to distribute the completed film. A related concern is whether the bank will be able to find another distributor should the original distributor go bankrupt. To answer these questions, the bank must determine whether or not it thinks the film will be successful at the box office. To make this determination, the bank carefully examines sales estimates and the same kind of documentation that the producer presented to the distributor in order to pre-sell the distribution rights.<sup>75</sup> Particularly helpful in convincing the bank to grant a loan, and in selling rights to a distributor as well, is the involvement of a *bankable* director or actor.<sup>76</sup> Famous actors, actresses and directors, such as Tom Cruise, Julia Roberts and Steven Spielberg, are recognized for their ability to draw an audience on the power of their name alone.<sup>77</sup> This ability to draw a guaranteed audience makes it easy to obtain financing for a project in which such individuals are involved. Having bankable talent also dramatically increases the cost of making a film because bankable talent commands a large fee for participation.

When the bank is convinced that the producer will be able to fulfill its obligations under the pre-sale agreement with the distributor, it may grant the producer the loan that it seeks. Usually, the bank will not lend the producer any more than the amount of the pre-sale agreement, less a discount that insures the pre-sales will be sufficient to cover the amount of the loan principal, plus interest.<sup>78</sup> Interest rates are generally 2.5% above the prime, commonly determined by the London Inter-Bank Offering Rate.<sup>79</sup> However, in some cases, if the bank believes that a film will be successful, it may lend the producer more than the

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<sup>74</sup> See Bette L. Smith, *The Role of Completion Guaranty Bonds in Independent Motion Picture Production Financing*, ENT. L. REP., Dec. 1986, at 3, 3, 6-7.

<sup>75</sup> See Sobel, *supra* note 5; see also Frumes, *supra* note 25, at 535.

<sup>76</sup> See Sobel, *supra* note 5, at 7.

<sup>77</sup> See *Update on Gap Financing*, *supra* note 51, at 7 (major talent makes it easier to sell films abroad).

<sup>78</sup> See Sobel, *supra* note 5, at 7-8; see also *Making Money in Movies*, *supra* note 4, at 88.

<sup>79</sup> See Sobel, *supra* note 5, at 8; see also Thompson, *supra* note 20, at 6.

amount of its guaranteed pre-sales in exchange for a share of the profits. A bank that decides to engage in such *gap financing* (i.e., granting a loan to cover the difference between the amount of pre-sales and the amount necessary for production) will typically only do so to the extent of 20-25% of the film's budget.<sup>80</sup>

The bank is usually able to eliminate most of its risk in a negative pick-up deal because the distributor assumes the risk of a box office flop and the bank requires the producer to insure the film's completion with a completion bond company. Still, banks regularly lose money on motion pictures. For this reason, they are now less generous with gap financing than they have been in the past. Whereas gap financing used to account for as much as 40% of a film's budget, it now never exceeds 25% of the budget.<sup>81</sup> Additionally, just like distributors, banks try to diversify their portfolio by cross-collateralizing their interests, purchasing the rights to multiple films at once.<sup>82</sup>

#### D. *The Completion Bond Company*

Use of completion guarantors, usually completion bond companies, has increased dramatically recently, as foreign pre-sales of films become an increasingly popular method of financing movie production.<sup>83</sup> For a fee, typically 3% of a film's budget (6% up front with a 50% rebate if there are no claims), the completion guarantor ensures that a film will be completed to specifications on time.<sup>84</sup> A completion guarantor also requires the film's budget to include a contingency factor, usually 10%, but sometimes more for extraordinarily high risk or low budget films.<sup>85</sup> Additionally, the completion guarantor obtains a security interest in the film and all of its constituent parts by execution of a security agreement between the guarantor and the producer.<sup>86</sup> In a case like a foreign pre-sale, where the bank provides a loan to finance the production, the guarantor is particularly careful to see that the bank's interest does not conflict with that of the guarantor. A completion guaranty agreement between the bank and the guarantor spells out their respective interests and obligations.<sup>87</sup>

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<sup>80</sup> See Stan Soocher, *Abundance of Product Gives Buyers Power at AFM*, ENT. L. & FIN., Mar. 1999, at 5; see also *Update on Gap Financing*, *supra* note 51, at 1.

<sup>81</sup> Telephone Interview with Matthew C. Thompson, Stroock & Stroock & Lavan LLP (Feb. 25, 2001).

<sup>82</sup> See Smith, *supra* note 74, at 5; see also *Update on Gap Financing*, *supra* note 51, at 7.

<sup>83</sup> See Smith, *supra* note 74, at 3.

<sup>84</sup> See *id.* at 5.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at 8.

<sup>87</sup> See *id.* at 5.

### 1. Guaranteeing a Film

Before agreeing to guarantee completion of a film, the guarantor must be convinced that the film will stay within its budget.<sup>88</sup> When foreign sources of financing are involved, the guarantor may require the producer to purchase futures in the foreign currency in order to avoid losses resulting from fluctuations in the exchange rate.<sup>89</sup> It also must be convinced that the film is capable of being completed to specifications on time.<sup>90</sup> If delivery of the film is delayed because financing is not available when it is needed, the guarantor is relieved of its obligation to ensure timely completion of the film.<sup>91</sup>

In most cases, completion and delivery of the film are made without any involvement of the completion guarantor.<sup>92</sup> However, if for bankruptcy or any other reason the producer is unable to complete the film, the completion guarantor will, at its discretion, either assume control of the production and complete the film to specifications on time or reimburse the bank for the amount of its loan.<sup>93</sup> In most cases, there is no need for the completion guarantor to intervene. However, if the completion guarantor feels that a producer will be unable to complete the film properly, it will assume control of production and the production bank account by power of a takeover clause in the security agreement.<sup>94</sup> If it feels that certain an actor or a director are impeding the process, it may replace them. In order to ensure that such substitution does not prevent conformity with the negative pick-up agreement, the completion guarantor may require the producer to get a pre-approved list of replacements.<sup>95</sup>

### 2. Risk Management

The completion guarantor does not promise box office success.<sup>96</sup> The distributor alone bears the risk of a film's popularity. The completion guarantor merely guarantees that the film will be technically proficient and that it will be delivered to the distributor on time.<sup>97</sup> In fact, the completion guarantor itself does not even bear the risk of repayment in the case of failure to complete. Rather, it requires the producer

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 6.

<sup>90</sup> *See id.* at 5.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 8.

<sup>93</sup> *See id.*; *see also* Sobel, *supra* note 5.

<sup>94</sup> *See* Smith, *supra* note 74, at 8.

<sup>95</sup> *See id.* at 5.

<sup>96</sup> *See id.* at 6.

<sup>97</sup> *See id.*

to purchase, for the benefit of the guarantor, insurance policies covering essential elements, errors and omissions, general liability, and negatives.<sup>98</sup> The completion bond company itself purchases reinsurance from an insurance company, such as the Fireman's Fund Insurance Companies.<sup>99</sup>

Sometimes a film is completed and timely delivery is made to the distributor, but the distributor refuses to accept delivery because of some alleged nonconformity between the product and the agreement. When this happens, the producer or completion guarantor usually has an opportunity to cure the defect within a reasonable time, if possible.<sup>100</sup> In the event that performance is justifiably rejected, the distributor's contract with the producer is avoided and the completion guarantor must reimburse the bank for its loan.

### III. THE LAW

When a producer pre-sells distribution rights for a motion picture, the producer, distributor(s), financier, and completion guarantor all take security interests in the film. Prioritization of the respective rights of these parties is a complex process.<sup>101</sup> The distributor usually insists on a present grant of rights.<sup>102</sup> The bank takes a first-position security interest in the film and producer's assets.<sup>103</sup> This includes a security agreement, copyright mortgage, and financing statement.<sup>104</sup> The completion guarantor takes a second priority security interest in the film and assets of the producer, also pursuant to a security agreement, copyright mortgage, and financing statement.<sup>105</sup> When a film is put up as collateral, two types of security interests may be taken: one to the physical elements of the film negative, master materials, and producer's assets, and the other to the proceeds from exploitation of the film.<sup>106</sup> It is this second type of interest, in the intangible elements of a film, that was at issue in *In re Peregrine Entertainment, Ltd.*

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<sup>98</sup> See Thompson, *supra* note 20, at 6.

<sup>99</sup> See Smith, *supra* note 74, at 4; see also Sobel, *supra* note 5, at 9.

<sup>100</sup> See Kenoff, *supra* note 4 ("[U]pon rejection of delivery of the picture, the distributor may have to give notice of the alleged defects and provide the producer with a period of time within which to effect a cure.").

<sup>101</sup> See Thompson, *supra* note 20, at 1.

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> See Mark Litwak, *A Checklist for Indie Film Investors to Minimize Risk*, ENT. L. & FIN., July 1999, at 3, 5.

A. *Perfecting an Interest in Copyrighted Material Under Current Article 9*

Under UCC Article 9, one who loans to another on the basis of trust is known as a *general creditor*. If a general creditor obtains a *security agreement*, a record of the loan that describes the collateral and is authenticated by the debtor, his interest in the collateral, a *security interest*, *attaches* and he becomes a *secured creditor*, having priority over general creditors. Creation of a security interest protects the secured creditor against 1) competing interests of the debtor's claimants and 2) transfer of title by the debtor.<sup>107</sup> Superior in interest to a secured creditor is a *lien creditor*, such as the *trustee in bankruptcy*.<sup>108</sup> In order to avoid preemption by a lien creditor, a secured creditor may *perfect* his security interest in the collateral. The most common method of perfecting a security interest is by filing a *financing statement*, also known as a UCC-1 financing statement, a document identifying the parties to a transaction and the collateral by which it is secured, in a location specified in the Code, generally the office of the Secretary of State for the relevant state. If a secured creditor files a valid financing statement in the appropriate place before the debtor files a petition for bankruptcy, the secured creditor becomes a *perfected secured creditor*, with an interest in the collateral that is superior to that of a lien creditor. Failure to perfect a security interest before a petition for bankruptcy is filed means that a creditor may not only be unable to recover its loan from the debtor, but the creditor may also lose its right to dispose of the collateral with which the debtor secured its loan.<sup>109</sup>

UCC Article 9 covers three types of collateral in personal property: goods, paper, and "ghosts," collateral that is neither goods or paper. One type of ghost under Article 9 is the *general intangible*. Under the old version of UCC Article 9, which was adopted in 1972, copyrights are considered general intangibles "except to the extent that they may be excluded by Section 9-104(a)."<sup>110</sup> Old Section 9-104(a) says that Article 9 does not apply "to a security interest subject to any statute of the United States . . . to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property . . ." <sup>111</sup>

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<sup>107</sup> See Kupetz, *supra* note 15.

<sup>108</sup> See 11 U.S.C. § 544(a)(1) (1992).

<sup>109</sup> See UCC § 9-301(1)(b) (1972) (amended 2000).

<sup>110</sup> UCC § 9-106, cmt. (1972) (amended 2000).

<sup>111</sup> UCC § 9-104(a) (1972) (amended 2000).

By filing a financing statement, a secured creditor may perfect a security interest in tangible property, like the actual film negatives.<sup>112</sup> However, rights in the physical elements of a film are distinct from the right to exhibit that film, which is bound up in copyright law.<sup>113</sup> Under the old UCC § 9-302(1), a creditor could perfect a security interest in intellectual property, including copyrighted material, by filing a financing statement with the Secretary of State in the relevant state, like it would to protect an interest in tangible property.<sup>114</sup> The Federal Copyright Act, a statute of the United States, offers another method of perfecting a security interest in copyrighted material: Recording a *copyright mortgage* with the U.S. Copyright Office.<sup>115</sup> Under § 205 of the Federal Copyright Act, “any transfer of copyright ownership . . . may be recorded in the Copyright Office. . . .”<sup>116</sup>

Old UCC § 9-302(3) states that the filing of a financing statement is not required to perfect a security interest in property that is subject to “a statute or treaty of the United States which provides for a national . . . registration . . . or which specifies a place of filing different from that specified in this Article for filing the security interest. . . .”<sup>117</sup> The Copyright Act both provides for national registration and specifies the U.S. Copyright Office as the place of filing, so it appears to qualify for this filing requirement exemption. In fact, Official Comment 8 to old 9-302 specifically identifies the Copyright Act as the “type of federal statute referred to in paragraph (3)(a).”<sup>118</sup>

Under the old version of Article 9, Section 9-104 enumerated transactions specifically excluded from Article 9. Although the Copyright Act obviously satisfies the national recordation scheme and alternative place of filing requirements of old 9-302(3) to exempt the complying creditor from Article 9 filing requirements, the Copyright Act does not satisfy the old 9-104(a) requirement of “govern[ing] the rights of parties to and third parties affected by transactions in particular types of property. . . .” that would exclude Article 9 from application to a security interest in copyrighted material.<sup>119</sup> The Official Comment

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<sup>112</sup> See Bennett J. Yankowitz, *The Basics of Bankruptcy Preferences in the Entertainment Industry*, ENT. L. REP., Dec. 1991, at 3.

<sup>113</sup> See *id.*

<sup>114</sup> Elise B. May, *Where Your Priorities Should Be: Analysis of the Perfection and Priority of Security Interests in Copyrights as it Affects Bankruptcy*, 11 BANKR. DEV. J. 509, 511-512 (1994/1995) (internal notes omitted).

<sup>115</sup> See *id.* at 512.

<sup>116</sup> *Id.* at 519 (quoting 37 C.F.R. § 201.4 (1992) and Recordation of Transfers and Other Documents, 53 Fed. Reg. 122 (1988) (internal notes omitted)).

<sup>117</sup> UCC § 9-302(3)(a) (1972) (amended 2000).

<sup>118</sup> UCC § 9-302, cmt. 8 (1972) (amended 2000).

<sup>119</sup> UCC § 9-104(a) (1972) (amended 2000).

to old 9-104 expressly states that “the Federal Copyright Act . . . would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article.”<sup>120</sup> As to the filing requirement, the Official Comment to old Section 9-104 stipulates, “[t]he filing provisions under [the Federal Copyright Act, 17 U.S.C. §§ 28, 30] . . . are recognized as the equivalent to filing under [Article 9].”<sup>121</sup> Recordation of a security interest in copyrighted material under the Copyright Act has all the consequences of filing a financing statement under Article 9.<sup>122</sup> Under the 1972 Code, filing under the Copyright Act appears to be a parallel method, not a preemptive method, of filing.

Because a creditor can perfect its interest in a copyrighted work under both state and federal law, there has been some confusion about how to perfect a security interest in copyrighted material.<sup>123</sup> A 1990 bankruptcy case from California raised the question: “Is a security interest in a copyright perfected by an appropriate filing with the United States Copyright Office or by a UCC-1 financing statement filed with the relevant secretary of state?”<sup>124</sup>

## B. *The Law Under In re Peregrine Entertainment, Ltd.*

### 1. The Case

In June 1985, Capitol Federal Savings and Loan Association of Denver (Cap Fed) gave American National Enterprises, Inc. (ANE) a six million dollar line of credit secured by “a library of copyrights, distribution rights and licenses to approximately 145 films, and accounts receivable arising from the licensing of these films to various programmers.”<sup>125</sup> Cap Fed attempted to perfect its security interest in the copyrighted material by filing financing statements covering the collateral with the secretaries of state in California, Colorado, and Utah, but did not record its security interest with the U.S. Copyright Office.<sup>126</sup> ANE then assigned its interest in the films to National Peregrine, Inc. (NPI), and NPI filed a voluntary petition for bankruptcy. In April 1989, NPI filed a complaint against Cap Fed, claiming that as a debtor in possession it had a judicial lien on the film copyrights and receivables. NPI argued that its interest as a lien creditor was superior to Cap Fed’s be-

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<sup>120</sup> UCC § 9-104, cmt. 1 (1972) (amended 2000).

<sup>121</sup> *Id.*

<sup>122</sup> *See* UCC § 9-302, cmt. 9 (1972) (amended 2000).

<sup>123</sup> *See* May, *supra* note 114, at 518.

<sup>124</sup> *In re Peregrine Entm’t, Ltd.*, 116 B.R. 194, 197 (C.D. Cal. 1990).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 198.

cause Cap Fed failed to record its interest with the Copyright Office and was therefore unperfected.

The United States District Court for the Central District of California found in NPI's favor, declaring that "federal law preempts state methods of perfecting security interests in copyrights and related accounts receivable."<sup>127</sup> The court recognized a conflict between his ruling and the commentary to UCC § 9-104, which states that federal copyright law does not "exclude security interests in copyrights from the provisions of [Article 9]," but dismissed this conflict on the grounds that the commentary, which was drafted in 1972, had been superseded by the 1976 expansion of the Copyright Act's priority scheme.<sup>128</sup> The court explained, "The portion of the commentary [to UCC § 9-104] stating that federal copyright law does not 'exclude security interests in copyrights from the provisions of this Article' probably referred to priorities between conflicting holders of security interests and liens, rather than methods of perfection."<sup>129</sup>

Recognizing the conflict between his ruling and the language of the UCC, The *Peregrine* court chose to base his reasoning on principles of economic efficiency. The court argued, "[T]o the extent there are competing recordation schemes, this lessens the utility of each; when records are scattered in several filing units, potential creditors must conduct several searches before they can be sure that the property is not encumbered."<sup>130</sup> In order to streamline the filing process, the *Peregrine* court decided that "federal law preempts state methods of perfecting security interests in copyrights and related accounts receivable."<sup>131</sup> As one scholar has put it, the *Peregrine* court found "implicit federal preemption as a matter of public policy."<sup>132</sup>

## 2. Problems with *Peregrine*

The *Peregrine* court misinterpreted § 205 of the Copyright Act. According to one U.S. Senator, "Congress' intent in enacting section 205 [of the Copyright Act] was not to preempt state procedures for protecting secured creditors' rights."<sup>133</sup> The Copyright Office agrees.<sup>134</sup>

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<sup>127</sup> *Id.* at 199.

<sup>128</sup> *Id.* at 203 n.11 (quoting UCC § 9-104, cmt. 1 (1972) (amended 2000)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 200.

<sup>131</sup> *Id.* at 199.

<sup>132</sup> Kupetz, *supra* note 15, at 4 ("The court stressed the need for uniformity in the recording and perfection scheme at issue. It cited the benefit of a single place where an interested third party can go to determine whether a particular copyright is encumbered.").

<sup>133</sup> Joel R. Glucksman, *Pre-empting the Uniform Commercial Code: How to Perfect Security Interests in Copyrights and Copyrighable Material*, 159 N.J. L.J. 482, 483 (2000).

Before the *Peregrine* decision, "the customary practice for perfecting security interests in film copyrights was to file financing statements under the UCC and, where possible, to file with the Copyright Office."<sup>135</sup> Under the rule in *Peregrine*, security interests in copyrights could only be perfected by registration with the U.S. Copyright Office.<sup>136</sup> There are significant differences between the requirements of the state and federal perfection laws regarding things like filing statement indexing, grace periods for perfection, and place of filing.<sup>137</sup> For the most part, filing requirements have become much more burdensome under the rule in *Peregrine* than they were before. *Peregrine* has increased the cost and risk of perfecting an interest in copyrighted material to creditors in three ways: 1) making it impossible for a lender to perfect its interest in a film until after funds are disbursed, 2) increasing the expense and inconvenience of filing and searching recorded interests, and 3) increasing uncertainty of creditor priority.<sup>138</sup>

a. *Inability to Perfect Until After a Loan Is Made*

One particularly troubling outcome of the *Peregrine* decision for film industry lenders is that a lender may not be able to perfect its security interest in a film until after the loan funds have been disbursed.<sup>139</sup> This is because creditors hoping to perfect an interest in copyrighted material or its proceeds are now required to record their interest with the Copyright Office at the Library of Congress.<sup>140</sup> However, under § 205(c) of the Copyright Act, a security interest in copyrighted material cannot be recorded until after the copyrighted material has been registered.<sup>141</sup> Obviously, copyrighted work cannot be registered until after it has been produced. Production of a film cannot begin until funds are made available. This means that it is either impossible for a producer to obtain financing before production begins or that the financier must lend to the producer before it is able to perfect its security interest in the copyrighted elements of the film, and the proceeds from distribution. This puts the lending bank in a financially precarious position.

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<sup>134</sup> See *id.*

<sup>135</sup> Weinberger, *supra* note 33, at 980.

<sup>136</sup> See Yankowitz, *supra* note 112; see also May, *supra* note 114, at 526; *Film Company Protects Copyrighted Works From Creditor's Claim Because Creditor Did Not Record Security Agreement With Copyright Office*, ENT. L. REP., Oct. 1990, at 2.

<sup>137</sup> See May, *supra* note 114, at 524-25.

<sup>138</sup> See Baumgarten, *supra* note 14, at 594.

<sup>139</sup> See Weinberger, *supra* note 33, at 960.

<sup>140</sup> See Litwak, *supra* note 106, at 5.

<sup>141</sup> See Weinberger, *supra* note 33, at 960.

b. *Expense and Inconvenience of Filing*

The *Peregrine* decision burdens motion picture financiers because recording requirements are much more cumbersome under the Copyright Act than they are under the UCC<sup>142</sup> Registering and recording a copyright with the Copyright Office is a considerably more expensive process than is filing a financing statement under the UCC.<sup>143</sup> In addition, recording under the Copyright Act requires each work to be identified individually by its registration number or title.<sup>144</sup> Under the Copyright Act, recordation is required in order to facilitate title searches through a chain of title from the author, so recordation is done by registration number of the copyrighted work, not by legal name of the author.<sup>145</sup>

Requiring each work to be registered by number not only significantly increases the cost and inconvenience to filers, who, under the UCC, were able to perfect a security interest in several works at once by filing a financing statement containing a generic collateral description that covered existing and after-acquired works, but to searchers as well, who must search for multiple records.<sup>146</sup> The chief gripe of lenders in this area is that under *Peregrine* they are no longer able to file a floating lien, attaching to all of the debtor's assets at once, or to have after-acquired property automatically attached.<sup>147</sup> As one scholar explains:

Because copyright subsists automatically in original works as they are created, this means that debtors who may be constantly producing copyrighted works as their stock in trade must register all material works, even those in intermediate stages of production, if they are to be viable as mortgageable assets. This is obviously burdensome. Moreover, it ignores the fact that for a lender, a key need is to obtain a perfected security interest in assets that may *not* have been identified; given a choice, a lender will always want to take an interest in a global set of assets rather than a particularized set which may omit property that later proves to be valuable. Requiring the registration of all copyrights intended as collateral therefore creates practical

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<sup>142</sup> See *id.* at 959.

<sup>143</sup> See Baumgarten, *supra* note 14, at 593.

<sup>144</sup> See Weinberger, *supra* note 33, at 984.

<sup>145</sup> See *id.* at 973.

<sup>146</sup> See *id.* at 983-84.

<sup>147</sup> See Lorin Brennan, *Prepared Statement of Lorin Brennan on Behalf of AFMA (The American Film Marketing Association) and AFMA Affiliated Financial Institutions Before the House Judiciary Committee Courts and Intellectual Property Subcommittee*, FED. NEWS SERV., June 24, 1999.

problems that outweigh the presumed advantages of registration or the presumed clarity and efficiency resulting from "uniformity."<sup>148</sup>

c. *Uncertainty in Determining Priority*

Under old UCC 9-312(5)(a) and new UCC 9-322(a), security interest priority generally is awarded to the first in time to file a financing statement with the Secretary of State.<sup>149</sup> Under the Copyright Act, the first in time to execute a transfer gets priority, as long as it files within the relevant grace period.<sup>150</sup> This grace period is one month after execution if in the United States, two months if executed outside the United States.<sup>151</sup> For a lender, this creates disturbing uncertainty that can only be avoided by waiting for two months after recording a security interest to see if there is a competing interest. Motion picture production is a time-sensitive endeavor and two months is often too long to put production on hold while waiting for production funds to become available. Compound this two-month lag with the requirement of continually recording interests in copyrightable material from intermediate stages of production and nothing will ever get done.

3. *Peregrine Distinguished*

In the Northern District of California in the 1999 bankruptcy case *Aerocon Engineering Inc. v. Silicon Valley Bank*,<sup>152</sup> Judge Leslie J. Tchaikovsky attempted to correct some of the problems created by *Peregrine* by distinguishing the *Peregrine* holding on the grounds that it applied only to copyrighted material that was registered with the U.S. Copyright Office.<sup>153</sup> As Judge Tchaikovsky ably noted, "a security interest in an unregistered copyright may be perfected by filing a UCC-1 financing statement with the UCC Office."<sup>154</sup> As Tchaikovsky explained, "federal law preempts state law only to the extent that it contains provisions that govern the rights of the parties."<sup>155</sup> "The Copyright Act contains no express provision prohibiting a secured creditor from perfecting its security interest in an unregistered copyright in accordance with state law. Therefore, the filing provisions of

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<sup>148</sup> Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645, 1694 (1996) (footnotes omitted).

<sup>149</sup> See Weinberger, *supra* note 33, at 966; see also Baumgarten, *supra* note 14, at 581.

<sup>150</sup> See Weinberger, *supra* note 33, at 966.

<sup>151</sup> See Baumgarten, *supra* note 14, at 593.

<sup>152</sup> 244 B.R. 149 (N.D. Cal. 1999).

<sup>153</sup> *Id.* at 153.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 154.

Article Nine of the Commercial Code do not conflict with federal law.”<sup>156</sup>

However, under old Article 9, security interests in copyrighted material registered with the Copyright Office were expressly required to be perfected by recording with the Copyright Office. This is because Section 9-302 of old UCC Article 9 states:

The filing of a financing statement otherwise required by this Article is not necessary or effective to perfect a security interest in property subject to . . . a statute or treaty of the United States which provides for a national or international registration . . . and a security interest in property subject to the statute . . . can be perfected only by compliance therewith.<sup>157</sup>

Official Comment 8 to old UCC § 9-302 states specifically that “the type of federal statute referred to . . . [includes] the provisions of 17 U.S.C. §§ 28, 30 (copyrights). . . .”<sup>158</sup> Therefore, it was clear that a security interest in material registered with the Copyright Office had to be recorded with the Copyright Office. For all other copyrighted material, however, filing of a UCC-1 financing statement with the Secretary of State in accordance with the provisions of Article 9 of the UCC was a valid method of perfection.

At face value, recognition by the federal courts that the drafters of the Uniform Commercial Code did not intend for the Copyright Act to invalidate perfection of security interests in unregistered copyrights seemed to help filmmakers in a couple of ways. In the first place, it enabled a filmmaker to offer a financier a security interest in copyrighted material that had not yet been produced, which would allow a lender to perfect its security interest in the material before making a loan. Secondly, it solved the after-acquired property problem that the recording requirements of the Copyright Act created. Because several versions of material that is ultimately copyrighted are generated in the course of the production process, to protect its interest in the final product, a lender would be required to perfect a security interest in each subsequent version of a particular copyrighted work. Relieving the lender of the burden of having to register each version separately gives the lender added certainty that its interest is continuously secured throughout the production process and also relieves the lender of the inconvenience and expense of recording multiple copyrights in different versions of the same work.

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<sup>156</sup> *Id.* at 155.

<sup>157</sup> UCC § 9-302(3)(a)(4) (1972) (amended 2000).

<sup>158</sup> UCC § 9-302, cmt. 8 (1972).

Unfortunately, the law under old Article 9 did not actually achieve either of these ends. Tchaikovsky suggested that although security interests in registered copyrighted material, "permitting a security interest in an unregistered copyright to be perfected by filing a UCC-1 financing statement with the UCC Office . . . serves as a supplement or backup to the Copyright Act recordation scheme."<sup>159</sup> As Tchaikovsky conceded:

[P]erfection in this manner would be vulnerable to invalidation if a copyright were later registered and a competing security interest in the copyright had been recorded in the Copyright Office. For that reason, a prudent secured creditor would record its security agreement in the Copyright Office at the same time it filed its UCC-1 financing statement in the UCC Office.<sup>160</sup>

In other words, it makes no practical difference whether or not security interests in unregistered copyrights may be perfected under the provisions of the UCC if the Copyright Act preempts UCC perfection for registered copyrighted material. As a UCC-1 filing is ineffective against a subsequent Copyright Office recordation, lenders still must register copyrights and record their security interests with the Copyright Office or risk having their interests become unperfected. Even after the holding in *Aerocon*, lenders were still unable to adequately protect their security interest in copyrighted material before making a loan and a security interest in after-acquired property, although perfected, could be preempted by a subsequently recorded copyright mortgage. Holders of security interests in copyrighted material continued to be troubled by the insecurity, uncertainty, inconvenience and expense created by conflicting provisions of UCC Article 9 and the Copyright Act.

### C. *Changes Under New 9*

In 1998, after eight years of preparatory work, the American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a revised version of Article 9 of the UCC to replace the old Article 9, which was adopted in 1972.<sup>161</sup> Revised Article 9 has now been adopted by all 50 states, the District of Columbia, and the U.S. Virgin Islands. It took effect in most states on July 1, 2001.<sup>162</sup> Although revised Article 9 is more complex than the old

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<sup>159</sup> *Aerocon Eng'g Inc.*, 244 B.R. at 154.

<sup>160</sup> *Id.* at 154 n.11.

<sup>161</sup> JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE*, 6 (5th ed. 2000).

<sup>162</sup> *Id.*

Article 9, it is also more certain.<sup>163</sup> As legal scholars have been quick to point out, “[c]ertainty, like uniformity, has great value to repeat actors in a market.”<sup>164</sup> “Large banks and frequent credit users may find the added certainty of the new Article 9 attractive. . . .”<sup>165</sup>

One area of improved certainty in new Article 9 is that regarding federal preemption of UCC filing requirements for copyrighted works. New Section 9-109(c), replaces old Section 9-104, the language that the *Peregrine* court dismissed in finding that the Copyright Act preempted UCC-1 filings in copyrighted material.<sup>166</sup> Like old Section 9-104, new Section 9-109 says, “[T]his article does not apply to the extent that: (1) a statute, regulation, or treaty of the United States preempts this article.”<sup>167</sup> Speaking to the *Peregrine* case, Official Comment 8 to 9-109 clarifies that:

Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. Subsection (c)(1) recognizes explicitly that this Article defers to federal law only when and to the extent that it must— i.e., when federal law preempts it.<sup>168</sup>

Simply, this clarification means that the *Peregrine* court was wrong. Section 9-104 of the old Article 9 means precisely what it says, that contrary to the holding of *Peregrine*, the portion of the commentary to UCC § 9-104 stating that federal copyright law does not “exclude security interests in copyrights from the provisions of this Article” does in fact refer to methods of perfection.<sup>169</sup>

Another change in new Article 9 is that security interests in material with a registered copyright no longer expressly require registration with the Copyright Office. The portions of Section 9-302 in the old code that were relied on in *Aerocon* have been replaced by Section 9-311 of the new code.<sup>170</sup> New UCC 9-311 still states that “the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to . . . a statute . . . of the United States whose requirements for a security interest’s obtaining priority . . . preempt [perfection by filing a financing statement].”<sup>171</sup> However, unlike old 9-

<sup>163</sup> *Id.* at 710.

<sup>164</sup> Larry T. Garvin, *The Changed (And Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 343 (1999).

<sup>165</sup> *Id.*

<sup>166</sup> See UCC § 9-109, cmt. 1 (2000); see also *In re Peregrine Entm’t, Ltd.*, 116 B.R. 194, 203 n.11 (C.D. Cal. 1990).

<sup>167</sup> UCC § 9-109(c) (2000); see also Glucksman, *supra* note 133, at 482.

<sup>168</sup> UCC § 9-109, cmt. 8 (2000).

<sup>169</sup> UCC § 9-104, cmt. 1 (1972) (amended 2000).

<sup>170</sup> See UCC § 9-311, cmt. 1 (2000).

<sup>171</sup> UCC § 9-311(a) (2000).

302, new the Official Comment to new 9-311 makes no reference to the Copyright Act.<sup>172</sup> Moreover, the language of the Copyright Act itself that addresses the recording of security interests in copyrighted material does not state that such interests must be recorded with the Copyright Office. Rather, it states that such interests “*may* be recorded in the Copyright Office.”<sup>173</sup> Drafters of the Copyright Act have even stated that it was not Congress’ intent that Section 205 of the Copyright Act preempt UCC procedures for protecting security interests in copyrighted material.<sup>174</sup>

The conspicuous absence of any reference to copyrights in new Article 9, coupled with the permissive language of the Copyright Act itself and the lack of Congressional intent that the Copyright Act preempt UCC filing requirements, seems to indicate that filing a UCC-1 financing statement with the Secretary of State is an appropriate and effective way to perfect a security interest in copyrighted material. The correct answer to the question raised in *Peregrine*, “[I]s a security interest in a copyright perfected by an appropriate filing with the United States Copyright Office or by a UCC-1 financing statement filed with the relevant secretary of state?” is “yes.”<sup>175</sup> A security interest in a copyright may be perfected by either method.

The drafters of new Article 9 specifically reject federal preemption of Article 9 filing requirements as a matter of public policy. The added certainty of new Article 9 encourages market efficiency at least as much as uniformity would. But the legal community still hopes to achieve uniformity. The *Peregrine* court was right that it is inefficient to require holders of security interests in copyrighted material to complete two searches for conflicting interests, one with the Copyright Office and one with the relevant state office. Legal scholars “hope the federal laws on intellectual property will be modified by Congress after general adoption of the 1999 version of Article 9.”<sup>176</sup> The recording requirements of the Copyright Act should be modified, so that creditors with interests in copyrighted material may benefit from cooperative state and federal law that is both certain and uniform.

As a practical matter, revised Article 9 itself changed nothing. Because the Uniform Commercial Code is neither legislation nor case law, it only has legal weight to the extent that it is adopted by the several states. Moreover, the portions of the new code that are relevant to the

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<sup>172</sup> See UCC § 9-311, cmt. (2000).

<sup>173</sup> 17 U.S.C.A. § 205(a) (2000) (emphasis added).

<sup>174</sup> See Glucksman, *supra* note 133, at 483.

<sup>175</sup> *In re Peregrine Entm't, Ltd.*, 116 B.R. 194, 197 (C.D. Cal. 1990).

<sup>176</sup> WHITE & SUMMERS, *supra* note 161, at 746.

*Peregrine* problem are contained in the Official Comments, which are only helpful in interpreted the plain meaning of the text. Nothing in the text of new Article 9 expressly rebuts the *Peregrine* decision. In so far as revised Article 9 has been adopted by the several states, it has become state law, but until another case is brought challenging *Peregrine*, or statute overturns it, it is still good law. Moreover, should a court decide that, despite the UCC drafters' protests, the Copyright Act preempts state filing requirements under new Article 9, *Peregrine* will remain good law. State legislatures should expressly allow interests in copyrighted material to be perfected by filing a financing statement with the Secretary of State, Congress should amend the Copyright Act so that its recording requirements more closely mirror those of the UCC, and the first court that gets a chance should overturn the holding in *Peregrine* so that holders of security interests in copyrighted material and can stop filing security interests with both the secretary of state and the Copyright Office.

When the existing law on secured transactions in copyrighted material changes in accordance with new Article 9, motion picture financiers will be able to perfect their security interests before dispersing funds to the producer.<sup>177</sup> Filing will become less complicated and expensive; under new Article 9, perfection is easier, filing costs are lower, and rules about filing locations are clearer than even under the old Article 9.<sup>178</sup> Priority under new Article, governed by new sections 9-317 through 9-338, will also be determined with greater certainty.<sup>179</sup> For the independent producer, this means that pre-sale financing and negative pick-up deals will be a little easier to come by.

#### IV. CONCLUSION

In lieu of the recent changes to Article 9 of the UCC, the rules for perfecting a security interest in copyrighted material should soon change, overturning the holding of *In re Peregrine Entertainment, Ltd.* Such a change would enable lenders to perfect security interests copyrighted material with greater ease and certainty than they currently do. As it becomes easier to perfect a security interest in copyrighted material, banks, distributors and completion guarantors should have fewer reservations about lending money to producers on a pre-sale or negative pick-up basis, making it easier for independent producers to obtain financing for their motion pictures.

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<sup>177</sup> See Garvin, *supra* note 164, at 344.

<sup>178</sup> See *id.*

<sup>179</sup> J. Mark Fisher & Jonathan Friedland, *Nuts and Bolts of Revised Article 9: Resolving Many of the Current Ambiguities*, BANK STRATEGIST, Feb. 2000, at 4, 4.

