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Bryan G. Bosta
University of Dayton

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BRINGING ARTICLE 9 UP TO SPEED: THE NEED FOR A NATIONAL FILING SYSTEM

*Bryan G. Bosta**

I. INTRODUCTION

Our society craves up-to-the-minute information. The Internet, 24-hour cable news, cellular phones, and more have allowed individuals and businesses to be constantly updated with happenings in the world. It is said that information is power. Nowhere is this truer than in the business arena. Businesses rely on immediate information to stay ahead of the competition and to better serve their customers.

Companies in the business of lending must be able to find existing transactions between a potential debtor and its creditors efficiently, accurately, and as cost-effectively as possible to protect their legal rights. The current filing system under Revised Article 9¹ of the Uniform Commercial Code (“U.C.C.”) does not facilitate these goals. Although Revised Article 9 created much more lenient filing procedures than the Old Article 9,² the drafters failed to keep pace with a society that relies so heavily upon instant information updates. In a global society, a national U.C.C. filing system would be the most cost-effective, accurate, and efficient manner in which to put lenders on notice that an individual or business has an existing debt.

This Comment will advocate for the institution of a national filing system. Section II will describe what a security interest is and how it is used in our society, the general changes in the filing system instituted by Revised Article 9, and how those changes affect certain types of property. It will then describe the two filing procedures for security interests acquired in intellectual property (“IP”). Section III will advocate for a centralized,

* Staff Writer, University of Dayton Law Review, 2004-2005. J.D., University of Dayton School of Law, May 2005; B.A., Business Administration, Hanover College, May 2002. Member of Virginia State Bar, October 2005.

¹ See U.C.C. § 9-701 (2003) (stating that the effective date of the act is July 1, 2001). Citations to Article 9 will be to Revised Article 9, unless otherwise stated. The drafters of Revised Article 9 attempted to have it adopted by all United States jurisdictions by July 1, 2001. G. Ray Warner, *Lien on Me: Non-uniform Effective Dates and the Transition to Revised Article 9*, 20 Am. Bankr. Inst. J. 22 (July/Aug., 2001).

² Refers to Article 9 of the Uniform Commercial Code as it was presented prior to the Revised version put in place by most jurisdictions on July 1, 2001 and after the first major revision was completed in 1972. See Margit Livingston, *Survey of Cases Decided Under Revised Article 9: There's Not Much New Under the Sun*, 2 DePaul Bus. & Comm. L.J. 47, 47-48 (2003).

national filing system for financing statements, and will argue that a national system will attain the overall goals of efficiency, cost-effectiveness, and accuracy. Section III will further assert that a national filing system should also be applied to security interests in IP, as currently there is confusion as to the appropriate place to file a financing statement covering IP. Section III will conclude by discussing the potential problems and realities of implementing a national filing system. Finally, Section IV will suggest that although Revised Article 9 is widely considered lenient with respect to filing procedures, it is time to move even further and establish a national filing system.

II. BACKGROUND

Prior to advocating a national U.C.C. filing system, some general information concerning secured transactions and Article 9 must be discussed. First, a secured transaction must be defined and its importance in our society explained. Next, the changes instituted by Revised Article 9 will be noted and then the current filing procedures described. Finally, the confusion surrounding where to file security interests in IP will be analyzed.

A. *Secured Transaction Defined*

Revised Article 9 of the U.C.C. governs secured transactions between creditors and debtors.³ In a “secured transaction,” a lender will make a loan to a debtor, and in order to protect itself, the lender will take a “security interest” in some form of collateral.⁴ A security interest is defined as “an interest in personal property or fixtures which secures payment or performance of an obligation.”⁵ Restated, a security interest “is a partial interest taken in a debtor's asset – the collateral – to secure a loan.”⁶ In the event of default by the debtor, the lender may take possession of the collateral and sell it to satisfy the debt.⁷

1. Attachment of a Security Interest

A security interest must “attach” to the collateral in order to become enforceable.⁸ Attachment of the collateral is necessary for the lender to enforce the security interest against the debtor in the event of default.⁹ Under Revised Article 9, a security interest attaches when: (1) the secured party has given “value” to the debtor; (2) the debtor has rights in the collateral; and (3) the debtor has authenticated a security agreement that

³ U.C.C. § 9-101.

⁴ Michael I. Spak, *Filing Nationwide Perfectly or Get with the Trend*, 47 Clev. St. L. Rev. 11, 13 (1999). Article 9 not only covers security interests between lenders of cash and debtors, but it also covers security interests between sellers of goods and debtors. U.C.C. § 9-103.

⁵ U.C.C. § 1-201(37).

⁶ R. Scott Griffin, *A Malpractice Suit Waiting to Happen: The Conflict between Perfecting Security Interests in Patents and Copyrights (a Note on Peregrine, Cybernetic, and Their Progeny)*, 20 Ga. St. U.L. Rev. 765, 772 (2004).

⁷ See U.C.C. §§ 9-609-610.

⁸ Livingston, *supra* n. 2, at 59.

⁹ Spak, *supra* n. 4, at 13.

describes the collateral.¹⁰ Value is generally “any consideration sufficient to support a simple contract.”¹¹ Attachment, however, is only the first step the creditor must take to protect its interest in the collateral; it must also take the perfecting step.

2. Perfection of a Security Interest

A lender will take the perfecting step in order to “assert that its interest ranks before those of other parties with claims to that property.”¹² There are several ways to perfect a security interest in collateral. Certain types of collateral perfect automatically on attachment,¹³ other types of collateral perfect by control,¹⁴ yet others are perfected as long as the creditor retains possession of the collateral.¹⁵ However, the most common way for the secured party to perfect is through filing a financing statement.¹⁶ Revised Article 9 requires that a financing statement be “filed with the Secretary of State in the state where the debtor is located.”¹⁷ Once the interest is perfected, the world is put on notice that the secured party has priority over future lenders on particular collateral of the debtor.¹⁸

B. *Old Article 9 v. Revised Article 9*

Revised Article 9 was made effective on July 1, 2001.¹⁹ With the revisions came some significant changes to the Code. These changes included the scope of Article 9 and the filing procedures for personal property.

1. The Scope of Revised Article 9

Article 9, both Old and Revised, does not apply “to the extent that a statute, regulation or treaty of the United States preempts it.”²⁰ Still, the main goal of Revised Article 9 was not to constrict the number of secured

¹⁰ U.C.C. § 9-203(b)(1)-(3).

¹¹ *Id.* § 1-204.

¹² Griffin, *supra* n. 6, at 773.

¹³ U.C.C. § 9-309.

¹⁴ *Id.* § 9-314. For a full explanation of the requirements for control of particular types of collateral see U.C.C. § 9-104 (control of deposit account); U.C.C. § 9-105 (control of electronic chattel paper); U.C.C. § 9-106 (control of investment property); and U.C.C. § 9-107 (control of letter-of-credit right).

¹⁵ U.C.C. § 9-313 cmt. 2 (permitting “a security interest to be perfected by the taking of possession . . . when the collateral is goods, instruments, negotiable documents, money, or tangible chattel paper.”). See also Kenneth Miskin, *Survey of Legislation: Revised Article 9*, 24 U. Ark. Little Rock L. Rev. 415, 417-422 (2002) (giving a general discussion of the different ways to perfect a security interest).

¹⁶ Spak, *supra* n. 4, at 14.

¹⁷ Livingston, *supra* n. 2, at 61. See U.C.C. § 9-301(1) (stating “while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral”). “Article 9 has eliminated dual filing requirements and extinguished county filing, except with respect to certain real-estate related collateral.” Livingston, *supra* n. 2, at 61. See U.C.C. § 9-501(a)(1) (designative the filing office for security interest).

¹⁸ Spak, *supra* n. 4, at 14.

¹⁹ U.C.C. § 9-701. Not every state adopted Revised Article 9 at the suggested date. For a general discussion of this see Warner, *supra* n. 1, at 22-23.

²⁰ *In re AvCentral, Inc.*, 289 B.R. 170, 171-172 (Bankr. D. Kan. 2003). See also U.C.C. § 9-109(c)(1) (stating when article 9 does not apply).

transactions but rather was to expand the Article's coverage.²¹ Revised Article 9 now covers agricultural liens,²² promissory notes,²³ payment intangibles,²⁴ deposit accounts,²⁵ and consignments²⁶ as well as all of the property covered by the Old Article 9.²⁷

2. Filing Procedures for Personal Property

Revised Article 9 made significant changes to the filing rules.²⁸ The filing procedures, in general, have been liberalized.²⁹

a. Filing under the Old Article 9

Under the Old Code, there were three types of filing systems: central filing, dual filing, and local filing.³⁰ If a state utilized a central filing system, that state required the secured party to file all financing statements in one centralized state office.³¹ A dual filing state required the secured party to file in a central office or in the local recording office as determined by the debtor's residence or place of business.³² A local filing system only required the secured party to file in the county of the debtor or debtor's

²¹ Livingston, *supra* n. 2, at 48.

²² U.C.C. § 9-102(a)(5) states:

[A]n interest . . . which secures payment or performance of an obligation for . . . goods or services furnished in connection with a debtor's farming operation; or . . . rent on real property leased by a debtor in connection with its farming operation . . . which is created by statute in favor of a person that . . . in the ordinary course of business furnished goods or services to a debtor in connection with a debtor's farming operation; or . . . leased real property to a debtor in connection with the debtor's farming operation; and . . . whose effectiveness does not depend on the person's possession of the personal property.

²³ "Promissory note" means 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." *Id.* § 9-102(a)(65).

²⁴ "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation." *Id.* § 9-102(a)(61).

²⁵ "Deposit account" means 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." *Id.* § 9-102(a)(29).

²⁶ U.C.C. § 9-102(a)(20) states:

'Consignment' means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and . . . 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; . . . with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery; . . . the goods are not consumer goods immediately before delivery; and . . . the transaction does not create a security interest that secures an obligation.

²⁷ Livingston, *supra* n. 2, at 49. *See also* U.C.C. § 9-109 (defining general scope of Article 9).

²⁸ Livingston, *supra* n. 2, at 60.

²⁹ *Id.* at 74.

³⁰ Spak, *supra* n. 4, at 14.

³¹ *Id.*

³² "To determine which office to file or where to look up the financing statement [in a dual filing system], the person will check based on the type of collateral, on the location of the debtor or debtor's business, and sometimes on the judgment of the secured party." *Id.* at 15.

business.³³ Under the Old Article 9, a financing statement had to include the names and addresses of the debtor and secured party, a description of the collateral, and the debtor's signature.³⁴ The drafters of the Revised Code found the Old Article 9 rules to be too stringent and costly and thus decided to make them more lenient.

b. Filing under Revised Article 9

Revised Article 9 simplified the Old Code's strict rules.³⁵ As mentioned previously, Revised Article 9 requires that the debtor's location control where the filing is made.³⁶ This requirement eliminated the choice of law problems created by the Old Code.³⁷ The Revised Code also abolished the dual filing and local filing systems in favor of a central filing system with the Secretary of State in the state where the debtor is located.³⁸ Finally, the drafters of the Revised Code limited the information needed on the financing statement to "the debtor's name, the name of the secured party or its representative, and an indication of the collateral."³⁹ Compared to the Old Code, these requirements are considerably more liberal.⁴⁰

C. *Security Interests in IP*

"Intellectual property is '[a] category of intangible rights protecting commercially valuable products of human intellect . . . comprised primarily [by] trademark, copyright, and patent rights.'"⁴¹ As stated, Revised Article 9 requires a secured party to file a financing statement with the Secretary of State in the state where the debtor is located in order to perfect the security interest.⁴² However, IP is governed by federal statutes,⁴³ and Article 9 is subordinate to such legislation by U.C.C. § 9-109(c)(1).⁴⁴ This has presented some significant problems for creditors wanting to perfect security interests in IP. Copyrights and patents are governed by the Copyright Act

³³ *Id.*

³⁴ Livingston, *supra* n. 2, at 61.

³⁵ *Id.* at 60.

³⁶ *Id.*

³⁷ *Id.* See also U.C.C. § 9-103 (1995). See U.C.C. § 9-301(1) (2003) (establishing the new choice-of-law rules). See also *supra* n. 14 and accompanying text. A typical choice-of-law problem occurs where the collateral is located in state X and the security interest is perfected by filing in state Y. U.C.C. § 9-301 cmt. 7. Revised Article 9 attempts to rectify this problem by applying "the law of the jurisdiction in which the collateral is located." *Id.*

³⁸ Livingston, *supra* n. 2, at 61. See also U.C.C. § 9-501(a)(2) (discussing the proper filing offices for security interests). The accompanying text holds true for almost all personal property, except for fixtures, "as-extracted collateral[, and] timber to be cut," which require filing in the real estate recorder's office. *Id.* at (a)(1).

³⁹ Livingston, *supra* n. 2, at 61. See also U.C.C. § 9-502(a) (discussing the sufficiency of financing statements).

⁴⁰ "New Article 9 demands only the barest minimum of information on a financing statement." Livingston, *supra* n. 2, at 61.

⁴¹ Griffin, *supra* n. 6, at 765.

⁴² See *supra* n. 38 and accompanying text.

⁴³ See e.g., 17 U.S.C. §§ 101-801, 1101 (2000) ("The Copyright Act"); 35 U.S.C. §§ 1-376 ("The Patent Act").

⁴⁴ *AvCentral*, 289 B.R. at 172; U.C.C. § 9-109(c)(1).

and Patent Act, respectively.⁴⁵ The Supreme Court has not specifically answered the question of where to file, but two cases have attempted to address this issue.⁴⁶

1. The *Cybernetic* Approach to IP Filing

One court to address the problem of perfecting a security interest in IP was the Ninth Circuit in *In re Cybernetic Services Incorporated*.⁴⁷ This case involved Matsco taking Cybernetic's patent on a data recorder as collateral.⁴⁸ Matsco filed a financing statement with the Secretary of State of California but failed to file with the United States Patent and Trademark Office ("PTO").⁴⁹ The Ninth Circuit held, based on its reading of the Patent Act, that the statute's registration requirement did not preempt California's version of the U.C.C., and thus national filing was not needed to perfect Matsco's security interest.⁵⁰ As a result of this ruling, lenders taking a security interest in a debtor's patent are only required to file at the state level.⁵¹

2. The *Peregrine* Approach to IP Filing

A different approach to the issue of perfecting security interests in IP was taken in *In re Peregrine Entertainment Limited*.⁵² In *Peregrine*, Capitol Federal Savings and Loan Association of Denver ("CapFed") gained a security interest in Peregrine's library of copyrights.⁵³ The U.S. District Court for the Central District of California held that because CapFed only filed with the Secretary of State of California, and not with the U.S. Copyright Office, the security interest was not perfected.⁵⁴ Thus, the court held that in order to perfect a security interest in a copyright, the secured party must file nationally with the Copyright Office.⁵⁵ While these holdings have caused concern as to where to file a security interest in IP, the Supreme Court has yet to address the issue.⁵⁶ Consequently, creditors retaining interests in IP are unsure where to file their interests.

The *Peregrine* court further expressed its support of a national filing system as follows:

A recording system works by virtue of the fact that interested parties have a specific place to look in order to discover with certainty whether a particular interest has

⁴⁵ Griffin, *supra* n. 6, at 772-774.

⁴⁶ *In re Cybematic Servs., Inc.*, 252 F.3d 1039 (9th Cir. 2001); *In re Peregrine Ent., Ltd.*, 116 B.R. 194 (C.D. Cal. 1990).

⁴⁷ 252 F.3d 1039.

⁴⁸ *Id.* at 1044.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1059.

⁵¹ *Id.*

⁵² 116 B.R. 194.

⁵³ *Id.* at 197.

⁵⁴ *Id.* at 203.

⁵⁵ *Id.*

⁵⁶ Griffin, *supra* n. 6, at 789.

been transferred or encumbered. To 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.⁵⁷

It then stated that “[n]o useful purposes would be served – indeed, much confusion would result – if creditors were permitted to perfect security interests by filing with either the Copyright Office *or* state offices.”⁵⁸ A system where the lender could file in the office of its choosing, the court opined, would be too costly and time consuming.⁵⁹ Therefore, the court found that filing in a national office, in this case the Copyright Office, would be appropriate.⁶⁰ Still, with *Cybernetic* and its progeny in force, secured parties typically will file in both the proper federal office and the state.⁶¹ Thus, the current filing system for interests in IP is frustrating, confusing, and wasteful.

III. ANALYSIS

Given our society’s overwhelming need for up-to-the-minute information, a national U.C.C. filing system is appropriate and should be implemented. This Section will assert three policy reasons for implementing such a system: cost-effectiveness, accuracy, and efficiency. It will then argue that with the problems surrounding where to file security interests in IP, a national filing system consolidating IP interests and personal property interests is proper. Finally, the practicalities and potential hurdles involved in implementing and maintaining a national filing system will be discussed.

A. *Policy Reasons for a National Filing System*

A national filing system would effectuate three policy goals: cost-effectiveness, accuracy, and efficiency. These three policy goals will be discussed in turn.

1. Cost-Effectiveness

With the implementation of a national filing system, searches would be conducted through one database, making the effort more cost-effective. Currently under Revised Article 9, “the only place to file in a state will be the Secretary of State’s or other central filing office.”⁶² The drafters intended that each state have the same form for financing statements;

⁵⁷ *Peregrine*, 116 B.R. at 200.

⁵⁸ *Id.* (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.* at 203.

⁶¹ Griffin, *supra* n. 6, at 789.

⁶² Lawrence R. Ahem, III, “*Workouts*” *Under Revised Article 9: A Review of Changes and Proposal for Study*, 9 Am. Bankr. Inst. L. Rev. 115, 145 (Spring 2001).

however, “some states have modified the form or provided alternative forms.”⁶³ Further, some states still use a paper-based system of filing.⁶⁴ This can be both confusing and costly. Some states have taken the initiative to encourage electronic filing “by charging a lesser fee for electronic filings.”⁶⁵ Still, these steps to achieve a more cost-effective system are not enough to fully effectuate this goal in today’s society.

As discussed in Section II, Revised Article 9 only requires a secured creditor to file in the state office where the debtor is located.⁶⁶ “An individual debtor is deemed to be located at the individual’s principal residence⁶⁷ with respect to both personal and business assets. Any other debtor is deemed to be located at its place of business⁶⁸ if it has only one, or at its chief executive office⁶⁹ if it has more than one place of business.”⁷⁰

Even with Revised Article 9’s new rules on where to file, one can still foresee problems. For example, assume a debtor is officially incorporated in Ohio, but has offices in Indiana and Kentucky. If a creditor wants to secure this debtor’s collateral in Kentucky, the creditor may feel it necessary to search both Kentucky and Ohio’s filing offices for existing security interests, in order to fully protect its interest. This dual search would be costly. A national filing system linked on a large computerized database could remedy this problem. A creditor would simply file an electronic financing statement onto a national database covering the collateral in Kentucky, allowing the creditor to only file once. Moreover, any future creditors wanting to search that particular debtor would only have to conduct one search for any existing encumbrances. This would be less expensive for creditors. In addition, any paper-based filing would be eliminated under this system, further limiting search costs. Thus, a national filing system will help limit the cost of filing and searching the database for other secured transactions.

2. Accuracy

Under the current system, each state has a different filing officer who adheres to different filing procedures in its office. Implementing a national filing system would create uniform searches and filing requirements, thereby encouraging accuracy. “[T]he accuracy of a search depends on two subjective factors: the discretion and judgment of the

⁶³ Hon. John K. Pearson, *Revised Article 9 in Kansas*, 51 Kan. L. Rev. 769, 814 (2003).

⁶⁴ *Id.*

⁶⁵ *Id.* at 815.

⁶⁶ For a discussion of filing requirements for personal property under the old and revised Article 9, see *supra* § II(B)(2)(b).

⁶⁷ “[T]he term . . . is not defined . . . when a doubt arises, prudence may dictate perfecting under the law of each jurisdiction that might be the debtor’s ‘principal residence.’” U.C.C. § 9-307 cmt. 2.

⁶⁸ “As used in this section, a ‘place of business’ means a place where the debtor conducts its affairs[;] . . . [t]hus, every organization . . . has a ‘place of business.’” *Id.*

⁶⁹ “‘Chief executive office’ means the place from which the debtor manages the main part of its business operations or other affairs. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing.” *Id.*

⁷⁰ See generally *id.* (discussing the location of the debtor and its significance).

official performing the search and the knowledge of the familiarity of the searching party with the U.C.C. office in that area.”⁷¹

Under Revised Article 9, the requirements for financing statements have become lenient.⁷² If the debtor’s name is correct, the secured party is identified, and collateral is described, courts will hold that the financing statement is effective.⁷³ However, “[m]isspellings are common occurrences on financing statements.”⁷⁴ Therefore, it falls on individual state employees to make accurate searches, and those employees may fail to find a debtor’s name based on their lack of experience in searching the state’s particular database or simply lack of diligence on the part of the searcher.⁷⁵

Those states that still implement paper systems run a greater risk of inaccuracies by having to search by hand through boxes of financing statements.⁷⁶ Even states that have already instituted electronic filing systems may experience difficulties in their searches. Imagine if Ohio’s filing office accepts a financing statement containing the name “John R. Smith,” while Kentucky’s office accepts a financing statement concerning the same debtor, but listing his name as “J. Ryan Smith.” Smith is a common name, and a creditor requesting a search in both states may only find both of these encumbrances if the employee performing the search is extremely diligent. A national filing system with standard filing requirements would help to alleviate these problems. With today’s advancements in technology,⁷⁷ the database instituted would have a search system advanced enough to mitigate human error or lack of due diligence.

Revised Article 9 allows the filing office to refuse a financing

⁷¹ Spak, *supra* n. 4, at 19.

⁷² Ahern, *supra* n. 62, at 147.

⁷³ *Id.*

⁷⁴ Spak, *supra* n. 4, at 19.

⁷⁵ *Id.*

⁷⁶ *Id.* at 21.

⁷⁷ It is necessary to suggest an advanced search-based technology that could be implemented for a national filing system. For example, Intelligent Search Technology, Ltd. has created four search-based software products that could be used for this system:

NameSearch® - Search and matching software for enterprise systems. By providing intelligence to applications requiring efficient and accurate name and address searching, Intelligent Search Technology is successfully enabling organizations to retrieve and identify information regardless of variations. The NameSearch® software also facilitates the search and matching of other identity fields such as dates of birth, social security and phone numbers. [This technology is currently used by the US Postal Service and would likely be the appropriate choice].

CorrectAddress® - Is (US CASS Certified) software that validates, corrects, and enhances address information.

MerlinMerge® - Is a sophisticated list management tool that performs duplicate record detection, merge/purge operations and can produce house hold link determination.

ISTwatch® - Is software that enables systems to quickly search and match individuals against OFAC and other terrorist lists.

Intelligent Search Tech., Ltd., *Search and Matching Software*, <http://www.name-searching.com/> (accessed Sept. 9, 2005).

statement in certain circumstances under § 9-516.⁷⁸ “[I]f the filing office accepts a filing despite the existence of one of the less important reasons for rejection in 9-516(b),⁷⁹ the filing is still generally effective.”⁸⁰ This creates inconsistencies in each state’s requirements for the financing statement. Some filing officers may be lenient, while others very strict. A national filing system would eradicate any inconsistencies regarding the information creditors must include in a financing statement because this system would have uniform standards, ultimately making searches and filing procedures more accurate.

3. Efficiency

A national filing system would facilitate efficiency by providing up-to-the-minute updates of new secured transactions in the system. This would help limit fraud by debtors.⁸¹ Revised Article 9 governs the rights of creditors to a debtor’s collateral in the event that the debtor defaults on its loan.⁸² Debtors typically enter into transactions with different lenders, but use the same collateral as security. For example, a large piece of equipment valued at \$100,000 could be used to gain two separate loans from two different lenders. The problem occurs when the debtor enters into separate transactions at or around the same time, and borrows from both lenders the full value of the equipment making the debtor’s overall loan \$200,000. This is not a problem if both creditors understand who has priority, but a problem arises where neither creditor knows of the other’s interest.

A paper system would certainly be problematic under this situation. It could take a few days before each financing statement is filed into the database, making it impossible to know which creditor actually entered into the transaction first in the event that the debtor defaults.

Even in a state using an electronic filing system, problems can arise. The example discussed in Section III(A)(1), in which a creditor takes a security interest in the debtor’s collateral existing in Kentucky, but has

⁷⁸ See U.C.C. § 9-516(b) (discussing when a financing statement can be refused by a filing office).

⁷⁹ Generally, a filing office can refuse to accept a record if: (1) the record is not communicated in a method used by the filing office; (2) the filing fee is not tendered; (3) the financing statement does not list the debtor’s name or an amendment or correction statement does not identify the original financing statement or the record does not provide a description of the real property it concerns; (4) the record does not provide a name or mailing address of the secured party; (5) the record fails to provide a mailing address of the debtor, states whether the debtor is an individual or organization or if the debtor is an organization, the type, jurisdiction and organizational number of that organization; (6) in an assignment, if the record does not provide a name or mailing address of the assignee; and (7) if a continuation statement is not filed within the six months required by § 9-515(d). *Id.*

⁸⁰ Ahern, *supra* n. 62, at 147.

⁸¹ The problems of identity theft and fraud are major issues in lending. No system will completely eliminate identity theft; however, the goal is to always limit the ability of criminals to steal one’s identity. An example of when fraud can occur is where a debtor secures more than one loan with the same collateral by deceiving those creditors; this problem is also difficult to control. It is hoped that a national filing system will help control, if not eradicate these problems.

⁸² See generally U.C.C. §§ 9-601-624 (discussing a creditor’s rights to the debtor’s collateral in case of default by the debtor).

corporate offices in Ohio, can be used to illustrate this problem.⁸³ Assume that the first creditor (“Bank 1”) filed its security interest in Ohio, as prescribed by Revised Article 9.⁸⁴ Then assume a subsequent creditor (“Bank 2”) wants to take a security interest in the same collateral. If Bank 2 only searches for the debtor in Kentucky’s database, Bank 2 would not realize that it would be junior to Bank 1’s interest in the debtor’s collateral if it enters into the transaction. This is because Bank 1’s interest existed before Bank 2’s, even though Bank 2 had no knowledge of the transaction, since there would be no record of the interest in Ohio.⁸⁵

A national system would eliminate the scenarios described above: the first, where a debtor gains two loans from separate creditors with the same collateral through deception; and the second, where a creditor secures an interest in a debtor’s collateral in Kentucky, but has corporate offices in Ohio.⁸⁶ In the first scenario, there would be no need for a paper-based system, and therefore transactions that occur around the same time will be immediately uploaded onto the database. Lenders could simply e-mail their financing statements to a national database and have their interests time stamped. Under the second scenario (involving the Bank 1 and Bank 2 priority battle), collateral existing outside of the debtor’s location⁸⁷ would not create problems since all financing statements would be sent to one particular office, regardless of the location of the collateral. Therefore, under a national filing system, lenders would be provided with up-to-the-minute information concerning a debtor’s existing encumbrances. This system would effectuate an overall policy goal of efficiency.

B. *Consolidating IP and Personal Property Interests*

Allowing IP and personal property security interests to be filed under one national system furthers the goal of receiving up-to-the-minute information in the realm of secured transactions. Specifically, consolidating the filing procedures for both interests will achieve three important objectives. First, it would remove the confusion surrounding where to file a security interest in IP. Second, because one goal of Revised Article 9 was to govern more interests, requiring lenders to file all IP interests on a national level will accomplish the drafters’ intent. Finally, implementing a national filing system will decrease litigation concerning where to file an IP interest, thereby encouraging judicial efficiency.

1. Removing the Confusion of Where to File a Security Interest in IP

Current case law addressing IP security interests forces lenders to

⁸³ For a discussion of the cost effectiveness of a national filing system, *see supra* § III(A)(1).

⁸⁴ U.C.C. § 9-307 cmt. 2.

⁸⁵ While Bank 2 is not entirely blameless, this example still evidences the problems with the current system.

⁸⁶ For a discussion of the efficiencies of a national filing system, *see supra* § III(A)(3).

⁸⁷ *See* U.C.C. § 9-307 (discussing the location of the debtor).

file with the particular IP national office and the state. Consolidating IP interests and personal property interests will facilitate the overall policy goals stated previously, and remove confusion of where to file.

With decisions such as *Cybernetic* and *Peregrine* still in force, creditors will typically file their security interests in both the national office⁸⁸ and the respective state office.⁸⁹ “Under existing law, where to register a security interest in IP is at best a little confusing and at worst a malpractice suit waiting to happen.”⁹⁰ With creditors increasingly using IP interests as collateral, it is vital that uniform rules be created.⁹¹

If a nationalized system is established, this confusion could be eliminated, at least insofar as filing procedures are concerned. Revised Article 9 does contain provisions that describe when federal law preempts it,⁹² but with enough political pressure, uniform filing procedures could be made part of the Copyright Act and Patent Act by the U.S. Congress. Under a national filing system, security interests in IP would be filed in one place, removing the need to file nationally and in the respective state office. It would also effectuate the policy goals described in Part A of this Section⁹³ by limiting search costs, providing instant updates on secured transaction filings, and encouraging accurate searches for IP financing statements.

2. Allowing Revised Article 9’s Filing Provisions to Govern More Property Interests

The drafters of Revised Article 9 intended the U.C.C. to govern a broader range of security interests.⁹⁴ Although some aspects of IP are governed by Revised Article 9, creating a national filing system would allow it to exclusively govern IP filing.

“One of Revised Article 9’s stated goals was to bring within its fold a greater number of secured transactions.”⁹⁵ However, the drafters left in place the provisions deferring to state and federal statutes covering specific transactions.⁹⁶ Still, the drafter’s goal of bringing more types of security interests under Revised Article 9’s coverage would be accomplished through a national filing system covering IP interests. Again, Congress would have to be lobbied in order to amend the current federal statutes governing IP, but ultimately, the system would make Revised Article 9’s umbrella larger,

⁸⁸ U.S. Copyright Office or PTO, depending on the interest taken; i.e., a copyright interest will be filed with the U.S. Copyright Office and a patent will be filed with the PTO.

⁸⁹ Griffin, *supra* n. 6, at 789.

⁹⁰ *Id.* at 787.

⁹¹ *Id.* at 788.

⁹² See U.C.C. § 9-311 (discussing preemption). Also, this is not simply an Article 9 problem: “[t]he Supremacy Clause of the United States Constitution provides Congress with the ability to supersede state law in certain circumstances.” Jennifer Sarnelli, *Grasping for Air: Revised Article 9 and Intellectual Property in an Electronic World*, 11 UCLA Ent. L. Rev. 103, 113 (2004).

⁹³ For a discussion of the policy reasons for a national filing system, see *supra* § III(A).

⁹⁴ Livingston, *supra* n. 2, at 49.

⁹⁵ *Id.*

⁹⁶ U.C.C. § 9-311.

creating uniform filing rules to cover more secured transactions.

3. Limiting Disputes Concerning IP Filing Procedures

One goal of courts is to increase judicial efficiency. Creating a national filing system would nearly eradicate disputes concerning where to file an IP interest. This would increase judicial efficiency and eliminate litigation.⁹⁷ The rulings expressed in *Cybernetic* and *Peregrine*⁹⁸ would be moot, as all filing procedures would be uniform under a national filing system. Again, under the current system, these two decisions force creditors to file in the particular interests' national office and the state office.⁹⁹ A national filing system would eliminate the current interpretation of how the IP statutes pre-empt Revised Article 9 insofar as filing procedures are concerned, which would ultimately create judicial efficiency and limit costs.

C. *The Practicalities and Problems with Implementing a National Filing System*

Implementing a national filing system would present some significant problems and political hurdles. Therefore, the realities of creating a national filing system must be discussed. First, there are potential federalism problems associated with relieving the states of the duty to control security interest filing. Also, issues of identity theft and cost must be considered. Finally, certain political hurdles could block a national filing system covering IP interests, and must be addressed.

1. Problems with Relinquishing State Control over Filing

Implementing a national filing system would remove direct responsibility from the states. Anytime a power is taken from the states, issues of federalism arise; hence, this problem must be addressed first. Second, there is the issue of how state filing fee revenues will be handled under a national filing system.

a. Issues of Federalism¹⁰⁰

Federalism does not involve a struggle between the nation and the states, but rather a struggle among interests who have favorable access to one of the two levels of government, and . . . the cry of "states' rights" can become an important part of the struggle among pressure groups.¹⁰¹

⁹⁷ See Jason A. Kidd, Student Author, *Casnote: The Ninth Circuit Falls Short While Establishing the Proper Perfection Method for Security Interests in Patents* in *In Re Cybernetic Services*, 36 Creighton L. Rev. 669, 715 (2003) (describing the large amount of litigation that the bankruptcy courts will see if a clear rule as to where to file an interest in IP is not created).

⁹⁸ For a discussion of security interests in Intellectual Property, see *supra* § II(C).

⁹⁹ Griffin, *supra* n. 6, at 789.

¹⁰⁰ "As James Madison wrote in The Federalist No. 10, federalism reflects the notion that state governments and the national government should serve different functions." Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83, 150 (1993).

¹⁰¹ *Id.* at 149-150.

Federalism creates “different levels of government to more effectively deal with different types of issues: national representatives address issues of concern to the nation as a whole, whereas state representatives address issues of interest to a particular state.”¹⁰² The idea is that at some point certain issues must be removed from the states and handled on a national level.¹⁰³ In the business world, the point exists where “business interests find that a single state’s law is ineffective in providing the climate that they need for efficient commercial interaction.”¹⁰⁴

Considering the preceding material, one can see how states would object to relinquishing certain responsibilities. However, “to the extent the uniform laws process is effective . . . it . . . can delay the creation of national policy.”¹⁰⁵ Given the purpose¹⁰⁶ and overall policy goals¹⁰⁷ of the U.C.C., vesting the filing procedures with the states is not appropriate. Again, although federalism issues are important and this issue should be debated, the goals of the U.C.C. are not being fully effectuated in our technologically driven society. A national filing system would achieve those goals.

b. Removing Filing Fee Revenue from the States

Currently, each state receives a filing fee when a creditor files a financing statement in the particular state office.¹⁰⁸ In Ohio, for example, the filing fee is “\$12 regardless of the number of debtors or secured parties or how much collateral is indicated.”¹⁰⁹ Amendments are also \$12 and termination filings are free.¹¹⁰ The State of Ohio does generate a certain amount of revenue from these filing fees every year.¹¹¹ The creation of a national system would reduce or remove that revenue from the states.¹¹²

¹⁰² *Id.* at 150.

¹⁰³ *Id.* at 151.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 154.

¹⁰⁶ “[Provide] a comprehensive scheme for the regulation of security interests in personal property and fixtures.” U.C.C. § 9-101 cmt. 1.

¹⁰⁷ For a discussion of the policy reasons for a national filing system, *see supra* § III(A).

¹⁰⁸ U.C.C. § 9-525.

¹⁰⁹ Ohio Sec. of St. Bus. Servs. Div., *Online UCC Filing* 16, <http://www.sos.state.oh.us/sos/ucc/filing.pdf> (accessed Sept. 20, 2005).

¹¹⁰ *Id.*

¹¹¹ For example, a search of the last name “Smith” conducted on September 7, 2005 returned 4,565 financing statements. Ohio Sec. of St., *Debtor Information*, http://serform2.sos.state.oh.us/pls/porthope/DEV.SAP_RPT_DEBTOR_SEARCH_I.show (accessed Sept. 7, 2005). While the revenue issue is important, it must also be placed in proper perspective. In the fiscal year 2006 Ohio budget proposed by Governor Taft, the budget for the Secretary of State’s Business Services Operating Expenses, which administers this program, is about 13.7 million dollars. Ohio Off. of Budget and Mgt., *Executive Budget for FYs 2006 and 2007* 5, http://www.obm.ohio.gov/budget/executive/0607/e_sos.pdf (accessed Sept. 20, 2005). This represents .05% of the state’s 25.4 billion dollar budget for 2006. Ohio Off. Budget and Mgt., *Executive Budget Fiscal Years 2006 and 2007: The Executive Budget Briefing Document For Governor Bob Taft’s Budget* 11, http://www.obm.ohio.gov/budget/executive/0607/bb0607_brief.pdf (accessed Sept. 20, 2005).

¹¹² The issue of where the revenue would flow is a question of how the national system would be implemented. That is, if a national office is created, the revenue would flow to the federal government;

There are two possible ways to address this problem.¹¹³ One option would be to link all state filing offices through a national computer system, while still requiring state filing. In other words, every financing statement in the country could be found by performing a search in any state. This would allow state offices to retain their autonomy, but still allow lenders to search for debtors on a national level. The second would be to create a national office but put in place a revenue sharing program with the states based on where the debtor is located. That is, a creditor taking a security interest in collateral of an Ohio debtor would file nationally, and a portion of that filing fee would go to Ohio. Both of these options still allow the states to retain some of their revenue, but at the same time, the problems with the current system would be rectified by implementing a national filing system.¹¹⁴

2. Problems of Identity Theft and Cost

Two more potential problems with a national filing system are identity theft and the cost of implementing and administering a national filing system.

a. Identity Theft

The problem of identity theft is an on-going one. "Identity theft occurs when someone uses your personal information such as your name, Social Security number, credit card number or other identifying information, without your permission to commit fraud or other crimes."¹¹⁵ Critics of a national filing system argue that it would provide thieves an outlet to steal one's identity with more ease than the current system. This is because under a national filing system, given that every financing statement in the country would now be filed on a national level, creditors would likely need more information than simply the debtor's name to make a search of the filing records. One way to help distinguish debtors would be to list their Social Security number along with their name. This, however, is not the correct way to handle the problem. Although identity theft is a problem that cannot be completely eradicated, providing an avenue for thieves is not appropriate and therefore must be limited as much as possible.

There are two ways to approach this issue. One option is to use a less invasive identifier for the debtor, and the other would be to allow only organizations to file nationally. Under this option, the creditor searching for the debtor's current encumbrances must be able to distinguish that debtor from others. For example, a search of John Smith on a national level would

whereas, if a state system linked nationally is created, that revenue could possibly stay with the states. This comment does not advocate for either option, but the possibility of removing revenue is a concern, and needs to be addressed.

¹¹³ The suggested options are simply two offered by the author and should not be considered the only two options available. All potential avenues to the implementation of a national filing system should be considered.

¹¹⁴ Again, this comment does not advocate for the implementation of *either* a state system linked nationally *or* a federally-operated national office. Rather, both are viable options that must be weighed in terms of their advantages and disadvantages.

¹¹⁵ Fed. Trade Commn., *ID Theft*, <http://www.consumer.gov/idtheft/> (accessed Sept 6, 2005).

probably turn up thousands of debtors. Using the debtor's address would be likely to alleviate the situation somewhat, but people move and this will not completely solve the problem. Another means of identification could be an individual's driver license number. Most individual debtors are going to have a driver license if they have entered into a secured transaction. Finally, one's birth date could also be used to identify a debtor. These alternatives cannot alleviate the problem individually, but all three used in conjunction with a high powered search engine, given modern technology, should help creditors find debtors without encouraging identity theft.

The second option is more drastic. It would keep individual debtor filings on a state-level, while implementing a national filing system solely for organizations.¹¹⁶ A national system covering only organizations would allow creditors to search debtor-organizations using their Employer Identification Number ("EIN").¹¹⁷ The IRS requires almost all business organizations to apply for an EIN.¹¹⁸ A search of Acme Company, for example, would not be a problem as a creditor could search for that debtor using its EIN. Thus, the issue of identity theft would not be a problem on a national level because only organizations would file nationally. Again, this is a drastic move to limit identity theft, but it is an option and should be considered.

b. Implementation and Administrative Cost

Another argument against the implementation of a national filing system is that it would be costly to establish and maintain. While the initial cost¹¹⁹ may be high, this is outweighed by the fact that once implemented,

¹¹⁶ Once again, this comment only advocates for the implementation of a national filing system. The suggestions provided are not to be read as the only ways to handle the problems discussed in this Part. The reality is that the notion of a national filing system must be considered by our policy-makers and they should not discount any options available.

¹¹⁷ "An Employer Identification Number (EIN) is also known as a federal tax identification number, and is used to identify a business entity. Generally, businesses need an EIN." IRS, *Employer ID Numbers (EINs)*, <http://www.irs.gov/businesses/small/article/0,,id=98350,00.html> (accessed Sept. 6, 2005).

¹¹⁸ If the taxpayer answers "yes" to the following questions, the IRS requires that taxpayer to apply for an EIN:

- Do you have employees?
- Do you operate your business as a corporation or partnership?
- Do you file any of these tax returns: Employment, Excise, or Alcohol, Tobacco and Firearms?
- Do you withhold taxes on income, other than wages, paid to a non-resident alien?
- Do you have a Keogh plan?
- Are you involved in any of the following types of organizations?
 - Trusts, except certain grantor-owned revocable trusts, IRAs, Exempt Organization Business Income Tax Returns
 - Estates
 - Real estate mortgage investment conduits
 - Non-profit organizations
 - Farmers' cooperatives
 - Plan administrators

IRS, *Employer ID Numbers (EIN) – Do You Need an EIN?*, <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html> (accessed Sept. 6, 2005).

¹¹⁹ The initial, or start-up cost, of the system is an issue that would need to be explored. How to handle these costs would again depend on how the system is implemented. If a national office is created, the

on-going costs would be limited by the efficiency of the system. Currently, with some states still using a paper-based system, and states with a computer-based system using out-dated technology, a national system will dramatically increase efficiency and as a result, decrease cost. Those states using paper-based systems would no longer need to spend money on the upkeep, organization, and storage of paper financing statements. In fact, as stated in Part A of this Section, a national system would eliminate the need for a paper-based system.¹²⁰ Moreover, a national database and search engine would be powered by the most advanced technology available.¹²¹

Ultimately, the cost of implementing and maintaining a national filing system is outweighed by the increase in efficiency and decrease in cost after its implementation.

3. Political Hurdles Impeding a National Filing System Covering IP Interests

The biggest impediment to establishing a national filing system would likely be the need for legislative action. The first problem addressed in Part C of this Section was the reduction and/or removal of revenue and control of secured transaction filing from the states.¹²² While this may result in significant political lobbying from certain groups, there are ways to alleviate this problem.¹²³

However, a more significant political hurdle might occur if IP interests were to be covered under a national filing system. This is because the U.S. Congress would have to amend both the Copyright Act¹²⁴ and the Patent Act¹²⁵ to legislate national filing for both types of interests in order to perfect. Currently, “[t]he Copyright Act provides that ‘any transfer of copyright ownership or other document pertaining to a copyright’ may be recorded in the United States Copyright Office.”¹²⁶ Courts have interpreted this to mean that in order to perfect a security interest in a copyright, a creditor must file nationally.¹²⁷ The Patent Act states that “[a]n assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the [PTO] within three months from its date or prior to the date of such subsequent purchase or mortgage.”¹²⁸ This language has been interpreted “not [to] apply to a security interest because no assignment or transfer of ownership or title occurred.”¹²⁹ Therefore, “the proper way to perfect a

federal government would likely use federal funds to create the system. If a state system linked on a national level is implemented, the states would likely have to contribute to the implementation costs.

¹²⁰ For a discussion of the cost effectiveness of a national filing system, see *supra* § III(A)(1).

¹²¹ See *supra* n. 77.

¹²² For discussions concerning relinquishing State control over filing and problems of identity theft and cost, see *supra* §§ III(C)(1) and (2).

¹²³ *Id.*

¹²⁴ 17 U.S.C. §§ 101-801, 1101.

¹²⁵ 35 U.S.C. §§ 1-376.

¹²⁶ *Peregrine*, 116 B.R. at 198.

¹²⁷ *Id.* at 203.

¹²⁸ 35 U.S.C. § 261.

¹²⁹ Griffin, *supra* n. 6, at 774.

security interest in a patent is through an Article 9 filing with the appropriate state.”¹³⁰ This conflict creates the need for a uniform system.

Unfortunately, there are only two ways to effect a change in the current system. One way would be to urge the U.S. Supreme Court to establish a clear rule on this issue. This is probably not a viable option, however, because the Court denied *certiorari* the last petition.¹³¹ Therefore, the only way to change the current system is to lobby Congress to change the Patent Act’s language to state that secured interests in patents must be filed nationally. This would require significant pressure on Congress and is not likely to be embraced. That said, filing IP interests nationally is appropriate and with enough pressure, Congress may ultimately approve the system.

If this is achieved, there will be some options available to make IP filing on a national level. One is to create a national office where *all* security interests are filed.¹³² Here, Congress could prescribe that IP interests be filed in this national office along with all personal property interests. Another way to achieve a national system would be to link the Copyright Office and PTO with the state offices through a large national computer database.¹³³ This would allow one to search for all security interests, IP, and personal property alike, by linking them together on a national level. Under these two options, any creditor gaining a security interest in IP could simply search the national office or state offices for existing security interests in IP, instead of the Copyright Office or PTO database. Either way, a creditor would still only need to make one search. Therefore, if these significant political hurdles could be overcome, IP filings could be made on a national level as well.

IV. CONCLUSION

The current filing system is not sufficient to satisfy our society’s need for up-to-the-minute information. The drafters of Revised Article 9 attempted to create a more lenient filing system, and while their efforts helped greatly in that regard, it has been five years since Revised Article 9 was instituted and the business landscape has changed immensely in that time period. With the current advancements in technology and an ever-expanding global economy, there is a need for further improvements to Revised Article 9. A national filing system would satisfy that need.

Implementing a national filing system would encourage cost-effectiveness, accuracy, and efficiency. Further, allowing IP to be covered under a national system would eliminate the confusion surrounding where to file a financing statement covering such interests. Although some political and practical problems may impede a national filing system, these problems

¹³⁰ *Id.* at 786.

¹³¹ *Moldo v. Matsco, Inc.*, 534 U.S.1130 (2002).

¹³² For a discussion of removing filing fees from the States, *see supra* § III(C)(1)(b).

¹³³ *Id.*

can be solved.

As our society becomes larger and the world begins to feel smaller, updates to Revised Article 9 will need to be made. Now is the right time to effect change. A national filing system must be implemented in order to keep pace with the needs of our society.