APPENDIX 14 - APPLICATION OF PRIORITY RULES

1. Secured Party vs. Lien Creditor

Under current section 9-301(1)(b), a security interest in intellectual property is subordinate to the interest of a person who becomes a lien creditor with respect to that intellectual property before the security interest is *perfected*.[1] Under this rule the creditor with a judicial lien on intellectual property should prevail over subsequent secured parties, as well as existing but unperfected secured parties.[2] The contest between a *prior* secured party

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[1] U.C.C. § 9-301(1)(b)&(3). *Compare* U.C.C. [Revised] § 9-317(a)(2)("a person who becomes a lien creditor before the security interest...is perfected *and before a financing statement covering the collateral is filed*."). The added italicized language extends a secured party's effective protection from the point of filing as it presently exists in section 9-301(1)(b). Even under the current language of 9-301(1)(b), a prior secured party with *an existing* and properly filed security interest covering after-acquired property is effectively protected against the lien creditor from the time of a proper filing. This result follows because a person cannot "become" a lien creditor until the debtor has rights in the collateral that enable the attachment of the judicial lien. U.C.C. § 9-301, cmt. 3. At the moment that the debtor acquires sufficient rights, however, the prior filed secured party with an effective after acquired property clause is immediately perfected in the acquired property. The best the "becoming" lien creditor can do is tie the filed secured party with an existing agreement covering after-acquired property. But, in order to subordinate the secured party under the present section 9-301(1)(b) language, the lien creditor must "become" a lien creditor *before* perfection. A tie goes to the existing secured party, so a lien creditor is effectively closed out of priority as soon as the secured party with an after-acquired property clause files a proper financing statement. *See* Grain Merchants of Indiana, Inc. v. Union Bank and Savings Co., 408 F.2d 209, 212 (7th Cir. 1969)("Thus we are presented with a situation where as soon as an account receivable comes into existence and is sought to be attached by a lien creditor, it has already become subject to a perfected security interest.") The language of the Revisions carries the protective effect of filing a financing statement vis-a-vis the lien creditor one step further, however. Under the language of Revised section 9-317(a)(2), a lien creditor loses to a secured party who did not even have an agreement covering the property at the time the competing judicial lien arose, as long as there was a filed financing statement "covering" the collateral. The new rule essentially gives the secured party a first-to-file priority over the lien creditor applicable even when the secured party has no existing security agreement covering the collateral at the time the competing third party "becomes" a lien creditor.

[2] Compare: T.Ward, *Ordering theJudicial Process Lien and the Security Interest Under Article Nine: Meshing Two Different Worlds,* 31 ME. L. REV. 223, 231 (1981) with D. Board, *The Scope of Article Nine Is Only One Quarter as Great as Is Commonly Supposed*, 47 U. MIAMI L. REV. 951, 981-87 (1993).

and a *subsequent* lien creditor is certainly the most important application of section 9-301(1)(b) because "perfection" in this scenario has major implications under the Bankruptcy Code.

The bankruptcy trustee who is charged with administering the estate and distributing available assets to creditors, has the status of a hypothetical creditor who acquired a judicial lien on the date of the bankruptcy petition.[3] When Article Nine controls the question of "perfection," the rule in Section 9-301(1)(b) makes a security interest, which is unperfected as of the date of filing the bankruptcy petition, avoidable. The unperfected security interest, in this circumstance, is subordinate to the interest of the person who "becomes a lien creditor."[4]

Article Nine perfection is also important in bankruptcy because it marks the date on which many pre-bankruptcy transfers of security are "deemed" to occur. Under section 547 of the Bankruptcy Code, transfers of personal property (including intellectual property) to secure an antecedent debt that occur within a specified pre-petition period (90 days, or 1 year for "insiders") are generally "preferences" and subject to possible avoidance by the trustee.[5] If the perfection of these transfers is delayed for more than ten days after the *actual* transfer of the collateral, the *transfer date* will be deemed to be the *date of "perfection*."[6] Section 547(e) of the Bankruptcy

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3 11 U.S.C. § 544(a)(1) (1988). *See also* 11 U.S.C. § 550(a) (Supp. 1999)

4 Article Nine defines a "lien creditor" to include the "trustee in bankruptcy from the date of the filing of the petition..." U.C.C. § 9-301(3). *Accord* U.C.C. [Revised] § 9-102(a)(52)(C). Revised Article Nine gives priority to a secured party who does not even have a security agreement covering the collateral when the lien creditor "becomes" such, as long as the secured party has a proper filing "covering" the collateral. U.C.C. [Revised] § 9-317(a)(2). Although this first-to-file rule will help filed but "unattached" secured parties in competition with real judicial lien creditors when the security agreement arises after the lien creditor attaches, it will not help secured parties in bankruptcy. The date of the petition marks the trustee's lien creditor status under section 544(a)(1) of the Bankruptcy Code [11 U.S.C. § 544(a)(1) (1994)], and post-petition transfers of estate property are avoidable under section 549(a) of the Bankruptcy Code [11 U.S.C. § 549(a) (1994)].

5 11 U.S.C. § 547(b) (1994).

6 11 U.S.C. § 547(e)(2)(A)&(B) (1994). Note that under section 547(e)(3) of the Bankruptcy Code, no transfer occurs until the debtor has rights in the property transferred. 11 U.S.C. § 547(e)(3) (1994). *See* T. Ward & J. Shulman, *In Defense of the Bankruptcy Code's Radical Integration of the Preference Rules Affecting Commercial Financing*, 61 WASH. U.L.Q. 1, 28-36 (1983). Even if state law dates the secured party's priority over the lien creditor from the time a filing is made that covers the yet to be acquired property of the debtor, such early state law protection cannot be used to pre-date a transfer. The debtor must have rights in the collateral before a transfer can occur. Although Revised Article Nine gives the secured party priority over the lien creditor from the time of a filing "covering the collateral," [U.C.C. [Revised] § 9-317(a)(2)] that

Code references other law[7] because it defines perfection as the point when the transfer of personal property collateral is protected against the ubiquitous "lien creditor."[8] If, under this perfection-sensitive timing rule, the transfer of collateral under a security agreement is "deemed" to occur when the security interest in the transferred collateral is perfected, rather than when the agreement is executed and value is given, then in bankruptcy a new value exchange can become a debt followed by a *subsequent* securing transfer of collateral.[9] These delayed transfers of collateral are preferential because they are deemed to have occurred after the creation of the debt.[10] In the language of the Bankruptcy Code, they are transfers "for or on account of an antecedent debt."[11] If, in addition, a transfer so delayed occurs within the appropriate pre-petition preference period, and if allowing the transfer to stand would increase the secured party's take in bankruptcy, the transfer is generally a "preference."[12] Note that the same bankruptcy reference to "perfection" that is necessary to determine time for purposes of "antecedentness" can also mark the date of the transfer as either inside or

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filing date cannot be used to date the debtor's transfer of collateral unless the debtor has actual rights in the collateral on that date.

7 For security transfers of intellectual property governed by state law, the "other law" is Article Nine. The perfection question should then center on whether or not the secured party has properly perfected an interest in *general intangibles* by filing in the correct office in the state where the *debtor is located. See* Chesapeake Fiber Pkg. v. Sebro Packing Corp., 143 B.R. 360, 368-69 (D. Md. 1992)*aff'd*, 1993 U.S. App. LEXIS 28605 (4th Cir. 1993); *In re* Transportation Design and Technology, Inc., 48 B.R. 635, 638-39 (Bankr. S.D. Cal. 1985). However, some forms of "embodied" or "installed" intellectual property (*e.g.* software) may be classified as *goods* under the current language of Article Nine and will need to be perfected by filing in the correct office in the state where the *goods are located. See In re* C Tek Software, Inc., 117 B.R. 762, 768-69 (Bankr. D.N.H. 1990). *But see* U.C.C. [Revised] § 9-102(a)(42)&(75)("software" classified as a "general intangible" under Revised Article Nine). When state law is preempted because a particular federal intellectual property statute governs the priority between the secured party and the lien creditor, the priority rules under that federal statute should be referenced in order to decide the issue of bankruptcy "perfection." National Peregrine, Inc. v. Capital Federal Savings & Loan Ass'n, 116 B.R. 194, 204-08 & n.17 (C.D. Cal. 1990).

8 11 U.S.C. § 547(e)(1)(B) (1994).

9 U.S.C. § 547(e)(2)(A)&(B) (1994).

10 *Id; See also* 11 U.S.C. § 547(b)(2) (1994).

11 11 U.S.C. § 547(b)(2) (1994). *See also* 1 D. Epstein, S. Nickles, J. White, BANKRUPTCY § 6-19 at 572-76 (1992).

12 11 U.S.C. § 547(b)(4)&(5) (1994). Section 547(b) also requires that the debtor be insolvent at the time of the transfer. However, the trustee has the benefit of a presumption that the debtor was insolvent for 90 days preceding the bankruptcy petition. *See* 11 U.S.C. § 547(f) (1994).

outside of the pre-petition preference period.[13]

2. Secured Party vs. Assignees and Licensees

a) The Transferee Rule

Under the current section 9-301(1)(d), "a person who is a transferee" of a general intangible has priority over a security interest "to the extent that he gives value without knowledge of the security interest and before it is perfected."[14] An assignee of intellectual property qualifies as both a "purchaser" under the presumption language in section 9-201 and a "transferee" under the priority rule in section 9-301(1)(d).[15] Subsection (d), therefore, provides the person *who is such a transferee* a kind of priority exception from the section 9-201 presumption in favor of the security interest as long as that person *gives value* without knowledge of the security interest and *before it is perfected*.[16]

The priority rule in section 9-301(1)(d) does not play out as neatly, however, when a *prior perfected* secured party comes up against a later licensee who takes no interest in the intellectual property. Such a licensee seems to be less than a section 9-201 "purchaser"[17] and therefore is outside the reach of the predicate presumption in favor of the secured party.[18] However, such a licensee is still a transferee and finds no comfort as against

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13 11 U.S.C. § 547(b)(4) (1994). "For purposes of this section...a transfer is made ...(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days..." 11 U.S.C. § 547(e)(2)(B) (1994). *See* 1 D. Epstein, S. Nickles, J. White, Bankruptcy § 6-12 (1992).

14 U.C.C. § 9-301(1)(d). *See also* U.C.C. [Revised] § 9-317(d).

15 "Transfer" is not defined in Article Nine. However, the definition of "purchase" in section 1-201(32) is broad enough to include "any...voluntary transaction creating an interest in property." U.C.C. § 1-201(32). Any transfer of an interest in intellectual property appears to make the receiving party both a "transferee" and a "purchaser." The presumption of priority provided by section 9-201 is effective against "purchasers of the collateral and creditors." U.C.C. § 9-201. Transferees are not mentioned in section 9-201. However, some transferees (those that take an interest in property) are included under the definition of a "purchaser." U.C.C. § 1-201(32).

16 U.C.C. § 9-301(1)(d).

17 U.C.C. § 1-201(32)&(33). Revised Article Nine includes an amended definition of "purchase" in Article 1 that expressly includes a "security interest." U.C.C. [Revised] § 1-201(32).

18 U.C.C. § 9-201.

a perfected secured party under the language in section 9-301(1)(d).[19] The law outside of Article Nine does not help the nonpurchaser/licensee. A first-in-time secured party will argue that common law gives the licensee only what the debtor had to license—rights subject to a perfected security interest.[20] If the perfected secured party takes ahead of a subsequent purchaser/licensee with ownership rights, it should have no less right against a subsequent nonexclusive licensee who takes no proprietary right in the intellectual property. The Preliminary Report of the ABA Task Force on Security Interests in Intellectual Property concludes that a *prior perfected* secured party would prevail against a subsequent licensee.[21] This position applies the section 9-201 presumption and the section 9-301(1)(d) exception when the licensee is a purchaser with "an interest in property"[22] under the license. The ABA position logically extends these provisions when the licensee takes only a "personal" right.[23]

The counterparts in Revised Article Nine to the current rules in sections 9-201 and 9-301(1)(d) are found in Revised sections 9-201 and 9-317(d).[24] Unfortunately, section 9-201 of the Revisions retains the current language that brings only "purchasers" within the general presumption in favor of the effectiveness of the security interest.[25] Section 9-317(d) of the Revisions, on the other hand, creates an exception from the 9-201 presumption that protects both innocent "licensees" and innocent "buyers" of

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19 U.C.C. § 9-301(1)(d).

20 Bank of the West v. Commercial Credit Financial Services, Inc., 852 F.2d 1162, 1174 (9th Cir. 1988)(Because the Article Nine priority rules fail to address the issue of secured parties with the same collateral but different debtors, the Court falls back on the derivative title principal that a transferee's creditor can have no greater rights in the collateral than does its transferee.)

21 Task Force On Security Interests in Intellectual Property, Business Law Section, American Bar Assoc. (June 1, 1992). Note, however, that nonexclusive licensees in the ordinary course are separately protected in Revised Article Nine under the language in Revised section 9-321(b). *See* U.C.C. [Revised] § 9-321(b).

22 U.C.C. § 1-201(32)&(33).

23 *See generally*, Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priority Among Creditors*, 88 YALE L.J. 1143, 1161-64 & 1178-82 (discussing the relationship of the first-in-time principle and the notice filing premise of Article Nine). If the first-in-time principle controls in the case of a subsequent licensee, the prior secured party should prevail even if the security interest is unperfected. This specific priority rule is taken up in the context of other provisions that might give more express protection to subsequent licensees.

24 *See* U.C.C. [Revised] § 9-201(a) & § 9-317(d).

25 U.C.C. [Revised] § 9-201 & [Revised] § 1-201(32)(definition of "purchase" amended to expressly include "security interest").

general intangibles against unperfected security interests.[26] Although the word "licensee" in section 9-317(d) is not defined, the rule seems designed to protect all licensees, including nonexclusive licensees who would never get title. The Revisions retain the same BFP-type qualifying conditions as the current rule.[27]

Both the current rule in section 9-301(1)(d) and the new rule in section 9-317(d) of the Revisions should allow a *prior perfected* secured party to prevail against a subsequent assignee and a subsequent "nonpurchaser"/licensee of the debtor's intellectual property. Both versions of the statute would be improved, however, if the definition of "purchaser," as that term is used in section 9-201 presumption, would include a common licensee.

b) Ordinary Course Licensees Rule

Revised Article Nine goes further than section 9-317(d), by protecting nonexclusive *ordinary course* licensees against prior perfected secured parties. Section 9-321(b) of Revised Article Nine gives priority to the subsequent nonexclusive licensee of a debtor's general intangible who takes from its licensor in the ordinary course against a prior perfected security interest created by the licensor. This priority holds even when the license is not authorized by the secured party and the licensee is aware of the security interest.[28] Note, however, that Revised section 9-321(b) retains the

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[26] U.C.C. [Revised] § 9-317(d). Although the Revisions do not define either "licensee" or "buyer," the most recent draft of Revised Article 2 defines "buyer" as "a person that buys or contracts to buy." "Sale" is defined in the Article Nine Revisions by reference to Article 2, which requires a "passing of title." U.C.C. § 2-106(1). *See also* Draft U.C.C. § 2-102(3)("buyer") & § 2-102(27)("sale") (Discussion Draft, May 1, 1998). Revised Article Nine also adopts the Article 2 definition of "sale" by reference. U.C.C. [Revised] § 9-102(b).

[27] U.C.C. [Revised] § 9-317(d).

[28] U.C.C. [Revised] § 9-321(b) Revised section 9-321(a) defines a "licensee in the ordinary course of business."Revised section 9-321(b), as it was approved by the American Law Institute in May 1998 and the National Conference of Commissioners on Uniform State Laws in July of 1998, protected all licensees in the ordinary course, not just "nonexclusive" licensees. Apparently, the last minute change was prompted by pressure from segments of the Copyright Bar that did not want the protection of section 9-321(b) extended to exclusive copyright licensees. Recall that all exclusive licensees of a copyright take a "transfer of copyright ownership." The logic behind the change is not entirely clear. The broader protection of the prior language covered exclusive patent and trademark license who do not necessarily take an ownership interest with such a license. Furthermore, the prior language would not have protected an exclusive copyright licensees who took an "ownership" interest under what was essentially a horizontal transfer of a capital asset because such a license would not be "in the ordinary course."

restriction, borrowed from the analogous "goods" rule in Revised section 9-320(a),[29] that an ordinary course licensee only takes free of a security interest created by its immediate licensor. If for example, the licensor grants an unauthorized exclusive license to use the intellectual property while such property is already subject to a perfected security interest created by the licensor, the exclusive licensee takes subject to the perfected security interest. If thereafter, the exclusive licensee grants a nonexclusive sublicense, the nonexclusive licensee could not rely on section 9-321(b) for protection against the secured party, even if the sublicense was taken in the ordinary course. The nonexclusive sublicensee would not hold the sublicense free of the original perfected security interest because that interest was not created by its immediate ordinary course licensor.

c) Authorized Transfers

The protection for transferees provided by the priority rules in current section 9-301(1)(d) and Revised section 9-317(d) is augmented by the Article Nine rule on authorized transfers of collateral. Assignees and licensees of the debtor/licensor's intellectual property are protected against a *prior perfected* security interest whenever the assignment or license is a "disposition" that is "authorized" by the secured party.[30] Most assignees and some licensees in the ordinary course will find protection under this rule because these kinds of transfers are nearly always expressly or impliedly authorized "free and clear of the security interest."[31]

Current Article Nine section 9-306(2), protects subsequent assignees more clearly than subsequent licensees because section 9-306(2) refers to an authorized *disposition*. Recall from prior discussion that a section 9-306(2) "disposition" has been interpreted to mean a transfer or exchange of some underlying intellectual property. If an authorized licensee—even an exclusive licensee—is merely buying a nontransferable personal right, rather than making a disposition of property, the licensee would still seem to be subject to the prior perfected security interest, even though the transfer was authorized. This seems particularly unfair to these subsequent licensees. An authorized license represents the licensor's effort to exhaust the value of

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[29] U.C.C. [Revised] § 9-320(a).

[30] U.C.C. § 9-306(2). It must be an express or implied authority to license "free and clear of the secured parties security interest." U.C.C. § 9-306, Comment 3. *See also*, U.C.C. [Revised] § 9-315(a)(1)(the revised language expressly requires that the secured party authorize disposal "free of the security interest.")

[31] Tanbro Fabrics Corp. v. Deering Milliken, Inc., 39 N.Y.2d 632, 385 N.Y.S.2d 260, 350 N.E.2d 590, 19 UCC 385 (1976); *In re* Tacoma Boatbuilding Co., 158 B.R. 19, 22 (S.D.N.Y. 1993).

some particular aspect of the exclusive right that is the intellectual property. If the prior secured party authorizes that attempted exploitation (expressly or impliedly), it should have a right in the resulting income stream (proceeds), but it should not have a right to upset the license if the licensor defaults. Courts should opt for the broader notion of substitute value when defining a "disposition" under current section 9-306 in order to protect these authorized, but non-proprietary, licenses.[32]

Revised Article Nine rejects the overly narrow definition of "disposition" that has marked section 9-306 case law.[33] The broader "substitute value" notion of disposition in the Revisions will protect many ordinary course licensees against even perfected secured parties because many licenses will now be covered transfers expressly or impliedly authorized "free of the security interest."[34]

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[32] Revised Article Nine contains a broader definition of "proceeds" that embraces the concept of substitute value. U.C.C. [Revised] § 9-102(a)(64). The new definition not only makes the proceeds rule more accommodating to intellectual property, but it also protects the limited rights of subsequent nonexclusive licensees against secured parties who expressly or impliedly gave authority to license to the debtor. U.C.C. [Revised] § 9-315(a). Section 9-315(a) adds the word "license" to the set of events that do not destroy the security interest *unless authorized*. Under the Revisions, even when authorized licensees take a mere personal right in the underlying intellectual property, they will take free of any claim by the prior authorizing secured party. *See also* Superseded Draft U.C.C. Revised Article Nine, Reporters' Prefatory Comments No.5(f) (Proposed Final Draft, April 15, 1998).

[33] *See* U.C.C. [Revised] §9-102(a)(69). See U.C.C. [Revised] §9-315(a); Superseded Draft U.C.C. Revised Article Nine, Reporters' Prefertory Comments No. 5(f) (Proposed Final Draft, April 15, 1998).

[34] U.C.C. [Revised] § 9-315(a). Many prior secured parties expect that their debtor will license technology covered under the security interest, and look to the debtor's licensing income as the source of repayment. These prior perfected secured parties should lose to subsequent licensees with respect to the licensed right because they have authorized the exploitation of the collateral. However, if the debtor's intellectual property is used in conjunction with its own in-house manufacturing or production activity, the secured party should not be deemed to have authorized subsequent licensing activity. If the debtor begins to farm out its intellectual property without seeking the secured party's consent, authorization should not be presumed and the license should not be treated as one in the "ordinary course."

3. Secured Party vs. Secured Party

a) The First to File Rule

Priority conflicts between two non-purchase-money security interests in the same collateral are *not* resolved by the order of perfection. These common conflicts between secured parties are resolved by giving priority to the first party to *file* a proper financing statement covering the collateral.[35] The *order of filing* is different from the *order of perfection* because under Article Nine filing can occur before attachment and before *any* of the elements necessary for attachment.[36]

The recording and BFP rules in the federal intellectual property statutes add another interesting and limiting dimension to the operation of the Article Nine race priority rule. A debtor/owner of this property must also record or run the risk that its underlying rights in the collateral will be displaced in favor of a subsequent bona fide purchaser.[37] The first-to-file rule is premised on the assumption that both competing secured parties take their security interest from the same debtor who has good title.[38] When the collateral rights of different debtors underlie the two competing security interests, secured party priority will turn on the resolution of priority between the underlying debtor/owners, not the order of filing between the secured parties.[39]

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35 U.C.C. § 9-312(5)(a). The first-to-file rule is a residual rule that does not protect a party who has *filed* yet remains unperfected when priority must be determined, because the security interest has never *attached.* "So long as conflicting security interests are unperfected, the first to attach has priority." U.C.C. § 9-312(5)(b). *See also* U.C.C. [Revised] § 9-322(a)(1),(2)&(3).

36 U.C.C. § 9-402(1).

37 35 U.S.C. § 261 (1994); 17 U.S.C. § 205 (1994); 15 U.S.C. § 1060 (1994).

38 Bank of the West v. Commercial Credit Financial Services, Inc., 852 F.2d 1162, 6 UCC2d 602 (9th Cir. 1988)("We think the correct result is reached in this case by applying the common sense notion that a creditor cannot convey to another more than it owns. Put another way, the transferee, Allied, cannot acquire any greater rights in the beverage business's assets than its transferor, BCI, had in them.") *Id.* at 1174, *citing*, U.C.C. § 2-403(1). *See* J. White & R. Summers, UNIFORM COMMERCIAL CODE § 24-19(d) at 897-98 (4th ed. 1995). *See also* U.C.C. [Revised] § 9-325, cmt. 6. These derivative title questions are examined in THOMAS M. WARD, INTELLECTUAL PROPERTY IN COMMERCE §§ 2:20 and 2:46 (2000).

39 *Id.*

b) The Purchase Money Priority Rule

As the prior section illustrates, the secured creditor who wins the race to the file holds an unusually strong position vis-a-vis other parties interested in extending credit to the debtor. Article Nine qualifies the strength of this first-to-file position by providing a kind of super-priority for "purchase-money" security interests. These purchase-money secured parties must provide the debtor with new value. Two kinds of credit extenders can have purchase-money status. First, the status is afforded to the secured credit seller on the property *sold* and retained as security. Second, any secured party whose credit *directly enabled* the debtor to purchase the collateral has "purchase-money" status to that extent.[40] Once a secured party satisfies the threshold test for purchase-money treatment, sections 9-312(3) and (4) provide separate scenarios under which the purchase-money interest qualifies for super-priority in the purchased property. This priority runs against both prior and subsequent secured parties.[41]

Current Article Nine permits the creation of a purchase-money security interest in any "collateral."[42] Following up on this general reference to "collateral," the priority rule in current section 9-312(4) creates an exception from the first-to-file priority rule for the purchase-money secured party with an "interest in *collateral* other than inventory."[43] Subsection (4) provides:

A purchase-money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase-money security interest is perfected at the time the debtor *receives possession* of the collateral or within ten days thereafter.[44]

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40 An interest in "collateral" sold is purchase-money if it is "taken or retained by the seller." U.C.C. § 9-107(a). The enabling credit given by a nonseller also creates purchase-money status in the collateral, but only if the value given "is in fact so used" to purchase the collateral. U.C.C. § 9-107(b). *See* 2 G. Gilmore, §9.2 @ 781-782 (1965); J. White & R. Summers, UNIFORM COMMERCIAL CODE § 24-5 at 859-60 (4th ed. 1995). *See also* U.C.C. [Revised] § 9-103(a)(2).

41 U.C.C. § 9-312(3)&(4).

42 U.C.C. § 9-107(a)&(b).

43 U.C.C. § 9-312(4) (Emphasis added.) *Compare* U.C.C. [Revised] § 9-324(e).

44 U.C.C. § 9-312(4) (Emphasis added.) The counterpart rule in Revised Article Nine, section 9-324(e), applies to "goods other than inventory" rather than "collateral other than inventory." The proposed rule limits subsection (e) purchase-money priority in proceeds whenever these proceeds find their way into a deposit account controlled by another secured party. *See* U.C.C. [Revised] § 9-324(e) & § 9-327. Finally, the ten (10) day grace period under current law is extended to twenty (20) days under Revised Article Nine. *Id.*

Herein lies the problem with applying purchase-money priority to intellectual property collateral. Subsection (4) makes "the time the *debtor receives possession* of the *collateral*" the point from which the mandatory purchase-money filing must be made in order to obtain priority over other security interests. Most commentators interpret this reference to possession in the section 9-312(4) priority rule to mean that those financing an acquisition of intellectual property will not have purchase-money priority, because they cannot "possess" the property.[45] Unfortunately, the language of Revised Article Nine incorporates an even narrower notion of purchase-money collateral. The definition of "purchase money collateral" in Revised section 9-103(c) is limited to "goods" and supporting "software."[46] To qualify for a purchase-money supporting role, "software" must be part of an integrated transaction and it must be incidental to the purchase-money interest in the goods in which it is embedded.[47]

In a commercial environment, where more of the debtor's new value opportunities will appear in the form of intellectual property, Revised Article Nine should be revised to broadern the reach of purchase-money priority. Instead of limiting the range of purchase-money status, the Permanent Editorial Board should define "purchase money collateral" in section 9-103(a) to include goods and general intangibles that are not "payment intangibles."[48] Furthermore, the purchase-money priority rule in Revised

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[45] J. Honold, S. Harris & C. Mooney, CASES, PROBLEMS AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 323 (1992); Grant Gilmore concluded that:

"Collateral other than inventory thus comes down to equipment...consumer goods...farm products which are purchased by a farmer..., and (but this is almost on a hypothetical level) *general intangibles*." (Emphasis added.) 2 G. Gilmore, *supra* note40 at § 29.5 at 798 (1965).

See also James Talcott, Inc. v. Associates Capital Co., 491 F.2d 879 (6th Cir. 1974); *In re* Automated Bookbinding Servs. Inc., 471 F.2d 546 (4th Cir. 1972); North Platte State Bank v. Production Credit Ass'n, 189 Neb. 44, 200 N.W.2d 1 (1972); *In re* Michaels, 156 B.R. 584 (Bankr. E.D. Wis. 1993); *In re* Ivie & Associates, Inc., 84 B.R. 882 (N.D. Ga. 1988). These courts interpets, the phrase "receives possession" in 9-312 (4) separately from possession as a mode of perfection as interpreted in 9-305.

[46] U.C.C. [Revised] § 9-103(a)(1).

[47] U.C.C. [Revised] § 9-103(c) & § 9-324(f).

[48] "Payment intangibles" are general intangibles "under which the account debtor's principal obligation is a monetary obligation." U.C.C. [Revised] § 9-102(a)(61). If "payment intangibles" are excluded, then bringing general intangibles under the definition of purchase money collateral in Revised section 9-103(a) will not bring receivables along as well, because the definition of "accounts" has been expanded to include all other commercially significant receivables [U.C.C. [Revised] § 9-102(a)(2)], and the definition of a "general intangible" does not include an "account." U.C.C. [Revised] § 9-102(a)(42).

section 9-324(e) should be amended to embrace "purchase-money collateral other than inventory or livestock," and the grace period language in Revised section 9-324(e) should be amended to read: *". . . if the purchase-money security interest in goods is perfected at or within ten days from the time the debtor receives possession of the collateral, or, in the case of general intangibles other than payment intangibles, at or within ten days from the time the debtor acquires rights in the collateral."*