

# COLLATERAL DAMAGE: INSECURITY ASSETS IN THE RISING VIRTUAL AGE OF E-COMMERCE

## INTRODUCTION

Virtual worlds are computer-based, simulated environments that incorporate real-world representations of objects into an interface where users can interact with one another, typically through the use of an “avatar”<sup>1</sup> that is graphically visible to other users.<sup>2</sup> Virtual worlds are “persistent and dynamic” because they exist independent of users’ home computers and constantly change even when users are offline.<sup>3</sup> At the forefront of innovative virtual realities is the online application Second Life, developed by Linden Labs and launched on June 23, 2003. In Second Life, a resident assumes the role of an avatar in a virtual world where he can personalize his appearance, own property and real estate, shop in a virtual economy, operate a storefront, socialize with other players, and acquire numerous forms of virtual, intangible property that has real value.<sup>4</sup> To buy land and items in Second Life, players can acquire “Lindens,” Second Life’s currency, with U.S. dollars.<sup>5</sup> Second Life, unlike its predecessors, is a “non-scripted” world in which users design content and transform the virtual world

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<sup>1</sup> An “avatar” is defined as: “An on-line, real-time graphical representation of an interactive computer service user visible to other users accessing (or sharing) the same virtual three-dimensional world. Depending on its implementation, an Avatar may communicate by a combination of body movements (such as walking, gesturing and making facial expressions), text and speech, all of which may be seen and heard by other occupants of the virtual world. Avatars may grasp, possess and exchange objects with other Avatars and entities within the virtual world.” Steven Hetcher, *Virtual China*, 7 J. MARSHALL REV. INTELL. PROP. L. 469, 473 n. 21 (2008) (quoting 2 RICHARD RAYSMAN ET AL., *EMERGING TECHNOLOGIES & THE LAW: FORMS & ANALYSIS* APP. E. (2008)).

<sup>2</sup> Ned Kock, *E-Collaboration and E-Commerce in Virtual Worlds: The Potential of Second Life and World of Warcraft*, 4 INT’L J. E-COLLABORATION, Jul.-Sept. 2008, at 1 (discussing the emergence of virtual worlds used for entertainment and business purposes).

<sup>3</sup> Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 FLA. L. REV. 159, 169 (2010) [hereinafter Moringiello, *Virtual Worlds*].

<sup>4</sup> What is Second Life?, SECOND LIFE, <http://secondlife.com/whatis> (last visited Oct. 21, 2010).

<sup>5</sup> *Id.*

through their creations.<sup>6</sup> In 2003, Linden became the first virtual developer to recognize property rights in its' users virtual creations.<sup>7</sup> The revised Terms of Service allows subscribers to "retain full intellectual property protection for the digital content they create, including characters, clothing, scripts, textures, objects and designs."<sup>8</sup>

Although many onlookers see virtual property and applications, such as Second Life, as "just a game," this type of virtual property is poised to become the next generation of e-commerce.<sup>9</sup> Disputes in this virtual world have already led to litigation. In *Bragg v. Linden Research*, a Pennsylvania lawyer and Second Life player sued Linden for an improper "conversion" of his virtual assets, an alleged breach of the game's terms agreement.<sup>10</sup> The case was settled out of court. Similarly, the plaintiffs in *Eros, LLC v. Simon*, brought intellectual property claims relating to their creation of the first in-world sex bed, and the sale of other adult-themed items to other avatars online. The defendant, another Second Life user, copied the plaintiffs' items by manipulating a security flaw in Second Life's code.<sup>11</sup>

While these peculiar lawsuits could be accredited to over-enthusiastic gamers with an excess of time and money, one could also view the creation of virtual markets as a precursor to an evolution on the Internet that assigns value to intangible assets. Although businesses and individuals are not rushing to use pixilated items and virtual real estate as means of securing collateral (yet), the evolution of Internet virtual worlds signifies the effect of the Internet upon traditional notions of property law, securities, and the types of assets used to obtain financing.

In an effort to expand the availability of financing, businesses and creditors have already tapped into nontraditional, yet valuable, elec-

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<sup>6</sup> Moringiello, *Virtual Worlds*, *supra* note 3, at 170 (discussing the authentic and realistic nature of the virtual world in Second Life).

<sup>7</sup> Press Release, Linden Lab, Second Life Residents to Own Digital Creations (Nov. 14, 2003), *available at* [http://lindenlab.com/pressroom/releases/03\\_11\\_14](http://lindenlab.com/pressroom/releases/03_11_14) (announcing Second Life's revised Terms of Service that allows users to retain complete intellectual property rights for the digital content created by that user).

<sup>8</sup> *Id.*

<sup>9</sup> See Kock, *supra* note 2, at 8 (arguing that "[t]rade in virtual worlds is essentially a more sophisticated version of e-commerce," and have "the potential to be the new infrastructure providers for B2C [business-to-consumer] and, particularly, C2C [consumer-to-consumer transactions]"); See also Moringiello, *Virtual Worlds*, *supra* note 3.

<sup>10</sup> Complaint, *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (No. 06-cv-4925).

<sup>11</sup> Complaint, *Eros, LLC v. Simon*, No. 1:07-cv-04447 (E.D.N.Y. Oct. 24, 2007).

tronic and intangible assets as a means of securing collateral.<sup>12</sup> Companies have increasingly used intangible assets such as intellectual property, domain names, and other payment rights and monetary obligations to secure financing.<sup>13</sup> In the case of a typical Internet company, a domain name and other intangible assets may constitute its only valuable assets.<sup>14</sup> Domain names are often the only and most valuable asset of an Internet company and can be a lucrative means for Internet start-up companies to secure financing.<sup>15</sup> For example, over the last 10 years, an e-commerce company bought Business.com for \$7.5 million in stock and cash,<sup>16</sup> an online jewelry retailer bought jewelry.com for \$5 million,<sup>17</sup> and Bank of America acquired loans.com for \$3 million.<sup>18</sup>

Revisions to the Uniform Commercial Code have attempted to follow these developments by expanding the scope of multiple articles to account for electronic assets and means of perfecting, filling and realizing security interests.<sup>19</sup> The most recent revision of the U.C.C. expanded enforcement of secured collateral in intangible property by

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<sup>12</sup> See Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1368 (1998-2000) (describing the evolution of Article 9 from the use of personal property financing to modern methods for securing collateral. "Other types of intangible property have become important sources of wealth in the ensuing decades."); see also Xuan-Thao N. Nguyen, *Commercial Law Collides with Cyberspace: The Trouble with Perfection—Insecurity Interests in the New Corporate Asset*, 59 WASH. & LEE L. REV. 37, 41-42 (2002) ("The recent downturn of the e-commerce sector has revealed that for most Internet companies filing for bankruptcy, the most valuable remaining assets are intangible assets.") [hereinafter Nguyen, *Commercial Law*].

<sup>13</sup> See Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 GA. L. REV. 1, 18 (2007) [hereinafter Nguyen, *Collateralizing Intellectual Property*].

<sup>14</sup> Marjorie Chertok & Warren E. Agin, *Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyber-Assets in Bankruptcy Proceedings*, 8 AM. BANKR. INST. L. REV. 255, 261-62 (2000) ("Unlike typical brick and mortar companies, the assets of the typical Internet company are often "virtual" consisting of intellectual property such as trademarks, trade names, copyrights, and patents, and general intangibles.").

<sup>15</sup> See *Dorer v. Arel*, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999) ("[T]here is a lucrative market for certain generic or clever domain names . . . [that are] extremely valuable to Internet entrepreneurs. . . . A domain name with significant value on the open market certainly would be an attractive . . . target for a judgment creditor.").

<sup>16</sup> Greg Johnson, *The Costly Game for Net Names*, L.A. TIMES, Apr. 10, 2000, at A1.

<sup>17</sup> Silvia Sansoni, *It Was Good While it Lasted: Internet Hotshots Reflect on Where all the Money Went*, FORBES, Dec. 25, 2000, at 36.

<sup>18</sup> Robert Frank, *Who Will Buy Wealth.com*, WALL ST. J. BLOG (June 3, 2009, 8:30 AM), <http://blogs.wsj.com/wealth/2009/06/03/who-will-buy-wealth.com>.

<sup>19</sup> See Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility*, 35 FLA. ST. U.L. REV. 119 (2007) [hereinafter Moringiello, *False Categories*].

extending the scope of Article 9 to govern the sale of “payment intangibles,” otherwise defined as “a general intangible under which the account debtor’s principal obligation is a monetary obligation.”<sup>20</sup> This expansion, however, fails to reach intangible assets other than monetary obligations that can be used as secured collateral, including domain names and various forms of intellectual property.

The problems faced by creditors seeking to enforce judgments against debtors by foreclosing on intangible collateral are best illustrated by a hypothetical presented by Juliet M. Moringiello. In her hypothetical, eSnowshoes, Inc. is a small company selling snowshoes online.<sup>21</sup> To start up its business, the company borrowed \$100,000 from Commercial Bank by granting a security interest in its inventory, accounts receivable and general intangibles, including their domain name and eSnowshoes storefront in the virtual world “Second Life.”<sup>22</sup> Due to an unusually warm winter, eSnowshoes defaults on its loan and Commercial Bank seeks to foreclose on the collateral pursuant to the security agreement on its loan.<sup>23</sup> Although the bank can use the self-help provision of Article 9 to foreclose on the inventory and other collection remedies to obtain payment on the accounts receivable, its ability to reach the Internet domain name and virtual real estate is uncertain because neither asset falls within the purview of a “payment right” or “monetary obligation” as defined by U.C.C..<sup>24</sup> As such, the bank must rely on the default provision of U.C.C. § 9-601(a)(1), which provides that a secured party “(1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by *any available judicial procedure*.”<sup>25</sup> Even if Commercial Bank is able to secure a judgment against eSnowshoes, because of the significant variance on state law remedies, traditional remedies such as replevin, garnishment and execution may be unavailable for a “general intangible” asset such as a domain name or virtual store.<sup>26</sup>

The purpose of this Note is not to revisit the arguments of whether virtual “property” is property at all.<sup>27</sup> Rather, this Note starts from the baseline idea that all virtual and intangible assets are, in fact, property

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<sup>20</sup> U.C.C. § 9-102(a)(61) (2002).

<sup>21</sup> Moringiello, *False Categories*, *supra* note 19, at 119.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> U.C.C. § 9-102(a)(61).

<sup>25</sup> *Id.* § 9-601(a)(1) (emphasis added).

<sup>26</sup> *See infra* Part III(B).

<sup>27</sup> For a discussion on domain names and virtual assets as property, *see generally* Moringiello, *Virtual Worlds*, *supra* note 3.

and focuses on how to revise Article 9 to create a consistent and uniform foreclosure remedy that can reach unique intangible assets.

In Part II of this Note, I describe the history and purpose of the U.C.C. in modernizing and facilitating commercial transactions. In particular, I focus on the evolution of the U.C.C. and Article 9 to incorporate the use electronic assets as a means of secured collateral by various industries. Through this process, I demonstrate how the securitization and loan participation industries heavily influenced the drafting of Revised Article 9 and how former revisions of the U.C.C. have allowed the financial industry to vastly expand the methods and means in which they finance business transactions.

Part III focuses on the inadequacies of current Article 9 foreclosure remedies and state laws in dealing with the enforcement of general intangibles. It will demonstrate how the drafting committee omitted a foreclosure remedy for *all* intangible assets by tailoring the revisions of Article 9 narrowly to payment intangibles and other monetary obligations. In addition, I will show how the myriad of state laws governing the enforcement of judgments against intangible property are inconsistent, confusing, and often incapable of reaching general intangibles. Even if a state has enacted a statute that allows a creditor to reach intangible assets, those statutes are difficult to locate and often require judicial interpretation to reach general intangibles.<sup>28</sup>

Finally, Part IV proposes a revision to Article 9 that bridges the gap between the U.C.C.'s foreclosure remedies and state law. By analogizing general intangibles to intangible investment securities under Article 8 of the U.C.C., and looking to state law mechanisms that have allowed creditors to reach intangible assets, I will show how a flexible remedy can be created for all general intangibles by invoking the equitable powers of the court.

## I. HISTORY OF THE UNIFORM COMMERCIAL CODE

### A. Generally

The U.C.C. was created in the mid-twentieth century out of a growing need for certainty and uniformity in the law governing commercial transactions.<sup>29</sup> A myriad of state laws and remedies governed the creation and enforcement of security interests prior to the ratifica-

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<sup>28</sup> See generally, Moringiello, *False Categories*, *supra* note 19.

<sup>29</sup> Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 FLA. L. REV. 367, 369 (1957) ([Certainty and uniformity] is of particular value to the business or bank which is negotiating with an outfit of gigantic financial resources, because either inaccessibility or obscurity in the governing law can offer false color to bargaining positions....") (emphasis in original).

tion of Article 9 of the U.C.C. in 1962.<sup>30</sup> Creditors utilized a wide variety of security devices such as “chattel mortgages, conditional sales, trust receipts, factor’s liens, and assignments of accounts receivable.”<sup>31</sup> The type of collateral subject to these devices varied widely and was determined by state statutes and common law.<sup>32</sup> The laws dictating the classification, creation, and enforcement of security interests varied dramatically from state to state causing “confusion and redundancy [in] multi-state transactions.”<sup>33</sup> Grant Gilmore, one of the principal drafters of the U.C.C., once described pre-Code personal property security laws as “closely resembling that obscure wood in which Dante discovered the gates of hell.”<sup>34</sup>

The Pre-U.C.C. legal scheme was seen by legal scholars and commercial actors as “embodying a per se prejudice against secured financing.”<sup>35</sup> This concern was expressed in the 1972 version of the Official Comment to § 9-101:

The growing complexity of financing transactions forced legislatures to keep piling new statutory provisions on top of our inadequate and already sufficiently complicated nineteenth-century structure of security law. The results of this continuing development were increasing costs to both parties and increasing uncertainty as to their rights and the rights of third parties dealing with them.<sup>36</sup>

The expansion of the commercial economy, the increased use of new types of collateral including intangible assets such as accounts receivable, and the growing gaps and variance in state laws provided a fur-

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<sup>30</sup> See Nguyen, *Commercial Law*, *supra* note 12, at 43-44.

<sup>31</sup> *Id.* (citing U.C.C. § 9-101 cmt. (1972)).

<sup>32</sup> Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 202-03 (2000).

<sup>33</sup> *Id.* at 203. See also U.C.C. § 9-101 cmt. (1972) (“Pre-Code law recognized a wide variety of security devices, which came into use at various times to make possible different types of secured financing. Differences between one device and another persisted, in formal requisites, in the secured party’s rights against the debtor and third parties, in the debtor’s rights against the secured party, and in filing requirements, although many of those differences no longer served any useful function.”).

<sup>34</sup> Grant Gilmore, *The Good Faith Purchase Idea and The Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 620 (1981).

<sup>35</sup> Lupica, *supra* note 32, at 203.

<sup>36</sup> U.C.C. § 9-101 cmt (1972).

ther impetus for a unified structure governing the creation and enforcement of security interests.<sup>37</sup>

To remedy this, the drafters “intended that Article 9 would be the single source of law on security interests.”<sup>38</sup> Article 9 provides “a comprehensive scheme for the regulation of security interests in personal property and fixtures,” although it does not replace the use of pre-U.C.C. security devices and remedies.<sup>39</sup> Article 9 divides collateral into three primary categories goods, quasi-tangible property, and intangible property. Further, it promulgates the procedures required for a creditor to perfect an interest in each type of collateral; and designates the rights and duties of debtors and creditors upon default.<sup>40</sup> Thus, the ratification of Article 9 by all 50 states created a unified mechanism in which a debtor can grant a security interest in virtually any type of asset with value.

Article 9’s general provisions, consistent with the U.C.C.’s overall goals, are intended to facilitate the use of secured credit.<sup>41</sup> The Article’s provisions lessen transaction costs by making it easier to create and perfect security interests and to establish priority, in case of default, over other claimants.<sup>42</sup> Secured financing has also become fundamental to the economy because it “reduces the debtor’s misbehavior, increases the availability of credit, promotes investment, and enhances production.”<sup>43</sup>

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<sup>37</sup> See Lupica, *supra* note 32, at 204 (“A further impetus for the development of Article 9 was the idea that the unification of the disparate bodies of law creating and governing security devices would remove some of the impediments to further proliferation of collateralized transactions.”).

<sup>38</sup> RICHARD F. DUNCAN & WILLIAM H. LYONS, *THE LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9* § 1.04[1] (9th ed. 2004).

<sup>39</sup> U.C.C. § 9-101 cmt. 1 (2002).

<sup>40</sup> See generally U.C.C. § 9-101 (2002).

<sup>41</sup> See Harris & Mooney, *supra* note 12, at 1361 (“Revised Article 9 also facilitates secured credit by expanding its reach beyond that of the Former Article.... Article 9’s coherent and rational system offers advantages over operating under common-law or other statutory rules....”).

<sup>42</sup> See *id.* at 1360-61 (providing examples to illustrate how revisions to Article 9 make it “easier and less expensive to create and perfect security interests and to achieve priority over competing claimants”). See also Steven L. Schwarcz, *The Impact on Securitization of Revised U.C.C. Article 9*, 74 CHI.-KENT L. REV. 947, 950-51 (1999) (“Establishing clear and pragmatic rules for perfection and priority of the transfer of covered financial assets will minimize transaction costs . . . filing for both types of transfers will forestall litigation attempting to second-guess that determination if the originator in the securitization transaction eventually goes bankrupt; and sales of covered financial assets no longer will have to be perfected under state common law procedures that are often costly and impractical.”).

<sup>43</sup> Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 19.

Although the overall goal of Article 9 was to provide a comprehensive, uniform structure for commercial transactions, “[t]he drafters of the U.C.C. never intended it to cover all areas of commercial law.”<sup>44</sup> In particular, the common law supplements the U.C.C. by filling in gaps that were intentionally left out by the drafters in order to account for novel developments.<sup>45</sup> For example, the U.C.C. does not define “property” or “possession,” leaving it to the courts to interpret the meaning of these terms.<sup>46</sup> In doing so, courts retain the ability to shape the development of new property rights into the structure of the existing code.

Despite the courts’ retained authority, revisions to the U.C.C. demonstrate a growing trend of incorporating electronic methods and intangible property into commercial transactions. For example, Articles 3, 7, and 8, which govern the transfer of negotiable instruments, documents of title, and investment securities, have evolved from the traditional system of requiring the transfer of intangible rights by the manual transfer of paper, to allowing a party to convey these rights without the use of any physical document.<sup>47</sup> The recent revision of Article 9 continued this trend of evolving with technology.

#### B. The Revision of Article 9

The revision of Article 9 was primarily influenced by the emergence of new commercial practices that, at the time of the U.C.C.’s original drafting, did not exist or were not highly prevalent.<sup>48</sup> These include the increasing propensity of creditors to use intangible assets as a form of secured collateral.<sup>49</sup> In 1990, the Permanent Editorial Board for the U.C.C. and its sponsors, The American Law Institute

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<sup>44</sup> Moringiello, *False Categories*, *supra* note 19, at 122.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* See also U.C.C. § 9-408 cmt. 3 (2002) (“Other law determines whether a debtor has a property interest (‘rights in the collateral’) and the nature of that interest.”); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 771 (5th ed. 2000) (“The drafters of the UCC . . . declined the futile task of defining possession in the Code.”).

<sup>47</sup> See U.C.C. §§ 3-102, 7-101, 8-101 (2002); see also Moringiello, *False Categories*, *supra* note 19, at 123.

<sup>48</sup> Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 180 (1999) (“As commercial practices evolved, the fit between Article 9 and commercial practices no longer was so nearly perfect.”). See also David Frisch, *Revised Article 9: A Primer for the General Practitioner*, 35 U. RICH. L. REV. 813, 821 (2001) (“In order to accommodate the growing number and the economic importance of securitization transactions, the reach of Revised Article 9 has been expanded considerably to pull in a much broader spectrum of sales of receivables.”).

<sup>49</sup> See discussion *supra* Part I.



and the National Conference of Commissioners on Uniform State Laws, established a committee to issue a report regarding suggested revisions to Article 9.<sup>50</sup> The Article 9 committee provided the following:

During the two decades since [Article 9 was last revised], the secured credit markets have seen continued growth and unprecedented innovation. In addition, many hundreds of judicial decisions applying Article 9 have been reported and a large volume of commentary on Article 9, both scholarly and practice-oriented, has emerged. Moreover, the enactment by Congress of the Bankruptcy Reform Act of 1978 ... has had a profound effect on secured transactions. These developments have led to a strong consensus ... that although Article 9 is fundamentally sound, serious consideration should be given to the revision of some of the Article's provisions.<sup>51</sup>

Because Article 9 was based on the commercial practices at the time of its original drafting, the old language was not a perfect fit for the needs of emerging securitization practices.<sup>52</sup>

For example, asset securitization is a way for current financial institutions to “transform[] financial assets into marketable securities.”<sup>53</sup> The assets are transferred to an entity created specifically for this purpose, called a “special purpose vehicle,” which then issues securities based on the revenue stream that is produced by the assets.<sup>54</sup> At the time of the redrafting of Article 9, and still currently today, securitization is “the most rapidly growing segment of the U.S. credit markets’ and increasingly a major part of foreign credit markets.”<sup>55</sup> Under former Article 9, however, transfers of many of these securities were not covered by the U.C.C., because they constituted sales of general intangibles which were not within the scope of the Article at the time.<sup>56</sup>

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<sup>50</sup> U.C.C. § 9-101 cmt. 2 (2002).

<sup>51</sup> PERMANENT ED. BD. FOR THE U.C.C., PEB STUDY GROUP U.C.C. ART. 9 REP. 2 (Dec. 1, 1992).

<sup>52</sup> See Shupack, *supra* note 48, at 180.

<sup>53</sup> WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 162 (7th ed. 2007).

<sup>54</sup> *Id.*

<sup>55</sup> Schwarcz, *supra* note 42, at 947 (citing Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 24 (1996)).

<sup>56</sup> Former Article 9, in addition to governing secured transactions, also governed the sale of accounts and chattel paper, which were commonly used in securitization. U.C.C. § 9-102(b) (2002) (stating that Article 9 applies to “any sale of accounts or chattel paper.”). Former Article 9, however, did not cover payment intangibles and other promissory notes, which were also used by the securitization indus-

Hence, there was immense pressure by the asset securitization industry to ensure that all receivables, including payment intangibles and promissory notes, were governed by the U.C.C.<sup>57</sup>

Conversely, the loan participation industry, which sold “participations in a debtor’s obligation to repay a loan,” and also deemed a general intangible, had diverging interests from the securitization industry.<sup>58</sup> Bringing the sale of all general intangibles under the U.C.C. would subject loan participation transactions to the filing requirements under Article 9, which would increase the underlying costs of the entire industry.<sup>59</sup> Thus, the drafters were forced to come to a compromise, which provided for the perfection of payment intangibles, a distinct category of “general intangibles,” automatically.<sup>60</sup>

The revision expands the scope of Article 9 and simplifies the recognition and enforcement of secured collateral in several ways. First, Revised Article 9 expands coverage of security interests to deposit accounts as original collateral, commercial tort claims, and sales of rights to payment.<sup>61</sup> Thus, “payment intangibles” and “promissory notes” were now under the scope of Article 9.<sup>62</sup> This was important because enforcement of security interests in payment intangibles had been, up to this point, exclusively dealt with by state courts and the common law.

The revision also improves two other areas of great importance, namely, filing and enforcement.<sup>63</sup> Because perfection of a security interest for payment intangibles now occurs automatically, there is no need to incur additional expenses to comply with the common law procedures of the state where the seller was located.<sup>64</sup> This revision satisfied the objectives of the loan participation industry, which did not want to incur the additional expense associated with the filing requirements of the U.C.C. To the extent that perfection of a security

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try. See Schwarcz, *supra* note 42, at 949-50; see also WARREN & WALT, *supra* note 53, at 163 (“A case in which a retail chain sells its accounts to a securitization entity would be covered as sales of accounts, but if the receivables sold were obligations on loans former Article 9 did not apply because this was a sale of general intangibles.”).

<sup>57</sup> WARREN & WALT, *supra* note 53, at 163.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See U.C.C. §§ 9-102(a)(42), 9-312 (2002).

<sup>61</sup> Harris & Mooney, *supra* note 12, at 1361.

<sup>62</sup> Schwarcz, *supra* note 42, at 949.

<sup>63</sup> Harris & Mooney, *supra* note 12, at 1362 (“The new filing rules . . . clarify various questions left unanswered by Former Article 9, resolve issues left in doubt or in conflict under the Former Article by the courts, and impose specific requirements on filing offices to increase efficiency, accuracy, and speed.”).

<sup>64</sup> See Schwarcz, *supra* note 42, at 949 n.9 (describing how automatic perfection reduces transaction costs associated with common law filing procedures).

interest in collateral is accomplished by filing, “Revised Article 9 contains several provisions that promote efficiency and uniformity in the operations of filing offices,” which help to reduce expense.<sup>65</sup> Revised Article 9 also provides an extensive revision of the enforcement mechanisms of collection and strict foreclosure to provide foreclosure remedies that cover the new category of payment intangibles.<sup>66</sup>

The evolution of more complicated and sophisticated forms of collateral is arguably the result of the success of Article 9 in bringing uniformity to other forms of secured transactions.<sup>67</sup> Indeed, Article 9 has often been referred to as the “crown jewel” of the Uniform Commercial Code.<sup>68</sup> When new practices for property financing emerged, therefore, it was not surprising that there was pressure to bring the sale of general intangibles for money due and other intangible collateral under the ambit of the U.C.C.<sup>69</sup>

## II. FORECLOSING ON NON-“PAYMENT INTANGIBLE” ASSETS – THE MISSING LINK

Although Revised Article 9 provides a uniform system for the creation and perfection of all general intangibles, the foreclosure mechanisms of Article 9 were specifically tailored to the new categories of “payment intangibles,” which were carved out of the broader category of general intangibles.<sup>70</sup> The expansion of the definition of “collateral” to include “general intangibles” in Revised Article 9 effectively brought the transfer of *all* general intangibles as collateral for a loan under the U.C.C., but went no further to ensure that the foreclosure remedies could properly apply to general intangibles that are not payment obligations.

For instance, a debtor that owns the rights to a domain name can grant a security interest because the debtor has “rights in the collateral-

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<sup>65</sup> Harris & Mooney, *supra* note 12, at 1382.

<sup>66</sup> *See infra* Part III(A).

<sup>67</sup> Harris & Mooney, *supra* note 12, at 1397 (“[T]he very success of Article 9 has resulted in a substantial increase in the sophistication of secured transactions since the early years of the UCC.”).

<sup>68</sup> *Id.* at 1401.

<sup>69</sup> *Id.* at 1368. Although Article 9 traditionally covered only secured transactions, the sale of accounts and chattel paper were included because “[c]ommercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered . . . whether intended for security or not.” Former U.C.C. § 9-102(1)(b) cmt. 2 (1972). This same rationale was used to bring the sale of payment intangibles and promissory notes under Revised Article 9. *See also* Schwarcz, *supra* note 42, at 948-49.

<sup>70</sup> *See infra* Part III(A).

al,”<sup>71</sup> and a general intangible is a category of collateral under Revised Article 9.<sup>72</sup> A secured party can perfect its interest in the secured collateral by filing a financing statement.<sup>73</sup> Thus, although the U.C.C. enables creditors to establish a security interest in any general intangible, intangibles that do not relate to a payment right or monetary obligation fall outside the repossession and collection remedies of Article 9. This leaves the enforcement of non-payment intangibles such as domain names, intellectual property, and virtual property to common law mechanisms including execution and garnishment, which vary significantly from state to state.

#### A. U.C.C. Foreclosure: Self-Help, Collection & Strict Foreclosure

Upon default, a secured party has a variety of Article 9 mechanisms to recover the value of the debt owed. The secured party “may reduce a claim to judgment, foreclose, or otherwise enforce the claim, [or] security interest[s] . . . by any available judicial procedure.”<sup>74</sup> The secured party may exercise the right to take possession of the collateral pursuant to judicial process (typically, through a replevin action), or by taking possession of the collateral through “self-help” methods without judicial process if it “proceeds without breach of the peace.”<sup>75</sup> After taking possession, the secured party can sell the collateral in a public or private disposition and apply the proceeds to the satisfaction of the debt as long as the disposition is commercially reasonable.<sup>76</sup> In the case of a right to payment, Revised Article 9 modified the collection remedy to allow creditors to collect from persons otherwise obligated to pay the debtor, and apply these proceeds to the underlying debt.<sup>77</sup> Alternatively, the secured party may exercise the right to “strict foreclosure” and keep the collateral in full or partial satisfaction of the debt.<sup>78</sup> All of these methods “are cumulative and may be exercised simultaneously.”<sup>79</sup> None of these mechanisms, however, as explained below, provide a method of obtaining intangible assets other than payment intangibles without looking to state law remedies.

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<sup>71</sup> U.C.C. § 9-203(b)(2) (2002). Collateral is defined as “the property subject to a security interest. . . .” *Id.* § 9-102(a)(12).

<sup>72</sup> *Id.* § 9-102(3).

<sup>73</sup> *Id.* § 9-310(a).

<sup>74</sup> *Id.* § 9-601(a)(1).

<sup>75</sup> *Id.* § 9-601(a)-(b).

<sup>76</sup> *Id.* § 9-610(a)-(c).

<sup>77</sup> *Id.* § 9-607.

<sup>78</sup> *See id.* § 9-620(a).

<sup>79</sup> *Id.* § 9-601(c).

## 1. Default and Repossession

The repossession remedy under U.C.C. § 9-609 is unworkable for intangible assets because it requires the secured party to take physical possession of the collateral. Pursuant to U.C.C. § 9-609, a secured creditor may take possession of the collateral after default either pursuant to judicial process or by self-help if “it proceeds without breach of the peace.”<sup>80</sup> Although Article 9 does not limit the repossession remedy to tangible assets,<sup>81</sup> and “possession” is not defined in the U.C.C., commentators and leading authorities generally agree that the repossession remedy is limited to tangible assets.<sup>82</sup> One way to expand this remedy to cover intangible assets would be to expand the scope of this provision to allow the creditor to take possession or *exert control* over the collateral. In this way, if the creditor has protected his right to exert control over the intangible collateral through either a prior agreement with a third party responsible for the transfer of the intangible, or by having a means by which the debtor can be denied access to the intangible, the creditor can proceed by self-help and dispose of the collateral pursuant to U.C.C. § 9-610.<sup>83</sup>

## 2. Collection and Enforcement Rights

The collection remedy was significantly expanded in Revised Article 9 to provide a foreclosure mechanism for payment intangibles by allowing secured parties to exercise collection and enforcement rights against third persons – not just the account debtor – after default.<sup>84</sup> Creditors seeking to enforce their security interests do not need to rely on the repossession provision of Article 9. Instead, they can rely on the collection provision of U.C.C. § 9-607(a), which states: “[i]f so agreed, and in any event after default, a secured party: (1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party.”<sup>85</sup> Because the definition of “account debtor” was ex-

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<sup>80</sup> *Id.* § 9-609(a)-(b).

<sup>81</sup> Moringiello, *False Categories*, *supra* note 19, at 126.

<sup>82</sup> *Id.* at 126-27.

<sup>83</sup> An example of “self-help” using the eSnowshoes hypothetical would be if the bank required access to the account information to the virtual store as part of the underlying agreement. If eSnowshoes defaulted on the loan, the bank could manually change the online account information, thereby denying the debtor access to the virtual store, and then proceed with the disposition of the collateral pursuant to U.C.C. § 9-610. Self-help remedies, however, would still be limited to actions that do not “breach the peace.”

<sup>84</sup> U.C.C. § 9-607 (2002).

<sup>85</sup> *Id.* § 9-607(a)(1).

panded under the revision to include the person obligated on an account, chattel paper, or a general intangible,<sup>86</sup> payment intangibles and other contract rights are subject to the collection remedy under revised Article 9.<sup>87</sup>

The effect of U.C.C. § 9-607 is that a secured creditor can enforce an intangible payment right by forcing debtors to pay the creditor rather than the original debtor. In doing so, the account debtors can only discharge their obligation by paying the secured creditor. If payment is made to the original debtor that is not for the benefit of the secured party, account debtors “risk having to pay twice.”<sup>88</sup>

These remedies, however, do not allow secured creditors to enforce security interests posited in intangible assets that are not payment rights or monetary obligations. Because an intangible asset, such as a domain name or some types of intellectual property, is neither tangible nor a “monetary obligation” as defined by Article 9,<sup>89</sup> the secured creditor cannot rely on the collection remedy to foreclose on the asset after default.

### 3. Strict Foreclosure

The changes to strict foreclosure promulgated under Revised Article 9 do provide a limited remedy to all general intangibles, but this remedy is inadequate to protect creditors facing uncooperative debtors. Strict foreclosure in Revised Article 9 provides that “a secured party may accept collateral in full or partial satisfaction of the obligation . . . if: (1) the debtor consents to the acceptance under subsection (c); [and] (2) the secured party does not receive, within [20 days], a notification of objection. . . .”<sup>90</sup> In order to expand the remedy of strict foreclosure to payment intangibles, Revised Article 9 removed the requirement of possession in non-consumer transactions.<sup>91</sup> Thus, this option is now available for intangible collateral and tangible collateral that is not yet repossessed. There is nothing in the code that limits this remedy to general intangibles that are monetary obligations. Additionally, the remedy of strict foreclosure was also expanded to allow

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<sup>86</sup> *Id.* § 9-102(a)(3); *see also* G. Ray Warner, *Lien on Me: Default and Foreclosure Under Revised Article 9*, 19-4 AM. BANKR. INST. J. 20, 20 (2000).

<sup>87</sup> Warner, *supra* note 86, at 20.

<sup>88</sup> Moringiello, *False Categories*, *supra* note 19, at 127 (using the eSnowshoes hypothetical to describe the right of a secured party under U.C.C. § 9-607 to request payment from an account debtor to satisfy the amount owed by the original debtor).

<sup>89</sup> *See* U.C.C. § 9-102(a)(61) (2002).

<sup>90</sup> *Id.* § 9-620(a)(1)-(2).

<sup>91</sup> *See id.* § 9-620 cmt. 7.

for the foreclosure of the collateral in partial satisfaction of the debt owed, and not just the full amount.<sup>92</sup>

Strict foreclosure, however, only provides for satisfaction of a debt upon default if the debtor is cooperative or is unresponsive, which is demonstrated by the requirement that the debtor must either consent or fail to object within 20 days.<sup>93</sup> Hence, a creditor seeking to foreclose on intangible property where the debtor is *uncooperative* would still have no remedy under Article 9.

#### 4. Default Provision: “Any Other Judicial Procedure”

A creditor seeking to foreclose on a true general intangible is forced to rely on the default provision found in U.C.C. § 9-601(a)(1) that allows a secured creditor to use state law remedies traditionally used by unsecured creditors at common law. Section 9-601(a) states: “A secured party: (1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, [or] security interest . . . by any available judicial procedure.”<sup>94</sup> This allows a secured creditor to use remedies such as execution and garnishment to enforce a security interest. However, these remedies, as demonstrated later in this Note, vary dramatically from state to state and may not adequately address this “gap.”<sup>95</sup>

#### 5. Drafting Committee Oversight

The exclusion of a foreclosure remedy for all general intangibles is the consequence of the Drafting Committee revising Article 9 for a narrow purpose – to provide a more workable framework for asset securitization involving payment streams and the right to receive payments that were increasingly utilized by financial institutions.<sup>96</sup> In 1992, the Permanent Editorial Board Study Group Report recommended that Article 9 be amended to “include within its scope sales of general intangibles for the payment of money. However, the Drafting Committee should ensure that the expanded scope does not embrace sales of receivables as to which regulation by Article 9 would be impractical or unnecessary.”<sup>97</sup> Asset securitization was previously governed by non-uniform state law because the definition of “account”

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<sup>92</sup> *Id.* § 9-620(a).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* § 9-601(a)(1).

<sup>95</sup> *See infra* Part III(B).

<sup>96</sup> *See* Shupack, *supra* note 48, at 168.

<sup>97</sup> PERMANENT ED. BD. FOR THE U.C.C., PEB STUDY GROUP U.C.C. ART. 9 REP. 43 (Dec. 1, 1992).

in the old Article 9 was limited to receivables arising out of the sale or lease of goods or out of services rendered.<sup>98</sup>

Grant Gilmore, one of the principal drafters of the U.C.C., envisioned a uniform commercial code that did not distinguish between contract rights, accounts, and general intangibles.<sup>99</sup> His criticisms, however, did not persuade the Study Group and Drafting Committee, which did not “consider[] including the sales of all general intangibles within the scope of Revised Article 9.”<sup>100</sup> The primary reason for excluding the sale of all general intangibles under Revised Article 9 was that such an expansion, which would necessarily include the sale of patents, permits, copyrights, trade secrets, partnership interests, or the rights to performance in any contract, was too far-reaching and “appealed to no one.”<sup>101</sup> Hence, there was little thought or discussion to ensure that the modified foreclosure remedies that provided creditors with clear methods of enforcement of security interests against payment intangibles would be able to reach all general intangibles.

#### B. Inadequacy of State Law Remedies

Although a creditor may be unable to use the default provisions of Revised Article 9 to enforce a security interest in a general intangible, other state law remedies—those typically used by unsecured creditors to enforce judgments at common law—may provide relief. Notably, a creditor may enforce its interest by resorting to “any available judicial procedure” pursuant to U.C.C. § 9-601(a)(1). This does not, however, always provide the creditor with a clear remedy because state laws vary significantly.<sup>102</sup> Resorting to the common law also undermines the primary goal of the U.C.C. and Article 9: to create a uniform system for commercial transactions, which reduces the transaction costs associated with having inconsistent provisions in various jurisdictions.<sup>103</sup> Often, even if common law courts theoretically have an in-

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<sup>98</sup> Shupack, *supra* note 48, at 168-69 (discussing the definition of “account” in the version of Article 9 prior to the 2002 revision).

<sup>99</sup> 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 383 (Little, Brown & Co. 1965) (“The three-headed classification, being not only unnecessary but harmful, should be done away with at the earliest possible moment.”).

<sup>100</sup> Shupack, *supra* note 48, at 170.

<sup>101</sup> *Id.*

<sup>102</sup> Moringiello, *False Categories*, *supra* note 19, at 131 (“The absence of clear remedies for creditors with security interests in electronic assets renders the U.C.C. nonuniform, as the secured creditor must look to other state laws, which are far from uniform, for its remedies.”).

<sup>103</sup> *Id.* (discussing how the nonuniformity of state law remedies “deviate[s] from the U.C.C.’s purposes of simplifying, modernizing and clarifying the law go-



creased flexibility to deal with emerging technology and innovations, the courts have either declined to do so, or have failed to adequately address these issues because of their adherence to outdated notions of tangibility.<sup>104</sup>

### 1. Inapplicability of Replevin and Conversion

Replevin, the traditional method of obtaining direct control over property, has been inadequate to enforce security interests in intangible property rights. This is because replevin is only viable when the property is “tangible and specifically identifiable.”<sup>105</sup> Hence, state courts applying their respective replevin statutes have consistently denied relief when the property sought is an intangible asset.<sup>106</sup>

Conversion, a similar remedy, has been inconsistently enforced by state courts. For example, in *Kremen v. Cohen*, the plaintiff brought a claim of conversion against NSI after a third-party facilitated the fraudulent transfer of the domain name “sex.com” by forging the owner’s signature.<sup>107</sup> The court granted summary judgment in favor of NSI and held that a domain name, as an intangible, could not be the subject of a conversion action.<sup>108</sup> The Ninth Circuit eventually reversed, and held that a domain name was protected by California conversion law because California did not follow the strict requirement that an intangible be merged into a document.<sup>109</sup>

Common-law courts are also inconsistent when intangible assets are coupled with a security interest in tangible property. States that

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verning commercial transactions and making uniform the law among the various jurisdictions”).

<sup>104</sup> *Id.* at 132 (“[T]he courts left with the task of fashioning rules governing both rightful and wrongful transfers of electronic property are doing a poor job of providing guidance to courts deciding commercial disputes.”). *See also* discussion *infra* Part IV(D)(3).

<sup>105</sup> 1 WILLIAM HOUSTON BROWN, *THE LAW OF DEBTORS AND CREDITORS* § 6:32 (rev. ed. 2010); *see also* Moringiello, *False Categories*, *supra* note 19, at 128 (“These judicial procedures also developed along lines based on the tangibility or intangibility of the assets involved . . . . Replevin, as noted above, allows a secured creditor to gain possession only of tangible personal property.”).

<sup>106</sup> *See* *Walther v. Cent. Trust Co.*, 590 N.E.2d 375, 379 (Ohio Ct. App. 1990) (affirming the dismissal of a replevin claim, because the depositor’s interest in a bank account did not constitute specific personal property); *see also* *Mai Basic Four, Inc. v. Generic Bus. Solutions, Inc.*, No. 9908, 1990 Del. Ch. LEXIS 2, at \*4 (Del. Ch. Jan. 16, 1990) (“The law of replevin has long held that only tangible and corporeal objects may be replevied . . . . [S]hares in a corporation, because they are understood to be intangible rights, cannot be the subjects of a replevin action.”).

<sup>107</sup> *Kremen v. Cohen*, 99 F. Supp. 2d 1168 (N.D. Cal. 2000).

<sup>108</sup> *Id.*

<sup>109</sup> *See* *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

traditionally reject replevin or similar remedies as a means of reaching general intangibles may allow such remedies when intangibles are grouped with tangible collateral. For instance, in *Star Bank v. Matthews*, an Ohio Appellate Court affirmed the lower court's decision to grant permanent possession of "all inventory, accounts receivable, equipment, furniture, and general intangibles" in a replevin action.<sup>110</sup> As such, some courts allow a creditor to reach general intangibles if they are incorporated into a broader security agreement that includes tangible property.

## 2. Garnishment and Execution

Alternative state law remedies, such as garnishment and execution, do not provide meaningful alternatives to enforce a security interest in general intangibles. The Connecticut Supreme Court criticized its own state's collection statutes in *Burchett v. Roncari*, stating: "ancient writs of execution have become so encrusted with procedural barnacles that frequently they are not suited to the needs of modern society."<sup>111</sup> A writ of execution, also known as a writ of *fiery facias*, is a common law remedy used by creditors to seize a debtor's property to satisfy a judgment. After winning a judgment against the debtor, the creditor has the right to a writ of execution, which is delivered to a sheriff, who levies the property by taking actual or constructive possession.<sup>112</sup> If the property is in the hands of a third party or is intangible, such as wages or bank accounts, a creditor can proceed by garnishment, in which the sheriff serves a notice of garnishment on the person holding the debtor's property, and that party must turn over the debtor's property, or risk being liable for the entire judgment.<sup>113</sup> Historically, garnishment was used in "medieval times to compel the appearance of a foreign merchant" in cases where a writ of execution could not reach the debtor's property.<sup>114</sup>

Although creditors can seize tangible property through execution, "there is no universally available mechanism by which to gain control over intangible property."<sup>115</sup> In *Network Solutions, Inc. v. Umbro In-*

<sup>110</sup> See *Star Bank v. Matthews*, 759 N.E.2d 1274, 1275, 1281 (Ohio Ct. App. 2001).

<sup>111</sup> *Burchett v. Roncari*, 434 A.2d 941, 942 (Conn. 1980). See also Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. CIN. L. REV. 95, 130 (2003) ("The law of enforcement of judgments comes from a confusing conglomeration of state legislation, much of it antiquated.") [hereinafter Moringiello, *Seizing Domain Names*].

<sup>112</sup> See Moringiello, *Seizing Domain Names*, *supra* note 111, at 131.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 132.

<sup>115</sup> Moringiello, *False Categories*, *supra* note 19, at 129.

*ternational Inc.*, the Virginia Supreme Court noted that: “Historically, certain types of intangible, intellectual property have not been subject to levy and sale under execution.”<sup>116</sup> The Court declined to expressly classify the domain name at issue as “form of intellectual property,” and instead, the plaintiff was prevented from executing the writ of *feri facias* under the Virginia statute because the domain name was intangible property that was inseparable from the service provided.<sup>117</sup> This is consistent with the traditional common law principle that a sheriff must take physical possession of the debtor’s property in order to institute a successful levy.<sup>118</sup>

Whether garnishment statutes can reach intangible assets such as a domain name or virtual property is also unclear. The language of garnishment statutes varies dramatically across jurisdictions. Some statutes appear to allow a creditor to reach any property, while others narrowly construe categories of garnishable property that seem to exclude general intangibles.<sup>119</sup> In Pennsylvania, for instance, a garnishment action is proper against anyone who has “custody, possession or control” of the debtor’s property, which seemingly allows an action to seize a general intangible.<sup>120</sup> Similarly, in Illinois a creditor can bring a garnishment action against anyone who “is indebted to the judgment debtor” or “has in his or her possession, custody or control any other property belonging to the judgment debtor, or in which the judgment debtor has an interest...”<sup>121</sup> Other states, such as Massachusetts, only allow creditors to bring a garnishment action against a person who holds “goods, effects, or credits of the [debtor],”<sup>122</sup> which

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<sup>116</sup> *Network Solutions, Inc. v. Umbro Int’l Inc.*, 529 S.E.2d 80, 86 n.13 (Va. 2000).

<sup>117</sup> *Id.* at 86 (“[W]hatever contractual rights the judgment debtor has in the domain names at issue in this appeal, those rights do not exist separate and apart from NSI’s services that make the domain names operational Internet addresses....A contract for services is not ‘a liability’ as that term is used [under Virginia law] and hence is not subject to garnishment.”). See also *Dorer v. Arel*, 60 F. Supp. 2d 558, 560 (E.D. Va. 1999) (deferring judgment on whether the writ of *feri facias* could be applied to domain names, but noting “[t]here are several reasons to doubt that domain names should be treated as personal property subject to judgment liens”).

<sup>118</sup> See Moringiello, *Seizing Domain Names*, *supra* note 111, at 131.

<sup>119</sup> See Moringiello, *False Categories*, *supra* note 19, at 129 nn.67-68 (comparing a Pennsylvania statute that “allow[s] a garnishment action against anyone who has ‘custody, possession or control’ of the debtor’s property” to a Virginia statute that “allow[s] only a ‘liability’ to be garnished”).

<sup>120</sup> PA. R. CIV. P. § 3101(b)(2) (2010).

<sup>121</sup> 735 ILL. COMP. STAT. ANN. 5/12-701 (West 2003).

<sup>122</sup> MASS. GEN. LAWS ANN. ch. 246, § 20 (West 2004).

some early courts interpreted as requiring “actual possession” and thus, precluding the ability to garnish intangible assets.<sup>123</sup>

The jurisdictional variance of state law execution and garnishment remedies for intangible assets is even clearer in the context of domain names. As discussed above, in *Network Solutions, Inc. v. Umbro International, Inc.*, the Virginia Supreme Court held that a domain name could not be garnished under Virginia law because the domain name was inextricably linked with the service provided via the Internet site.<sup>124</sup> Conversely, in *Online Partners.com, Inc. v. Atlanticnet Media Corporation*, the United States District Court for the Northern District of California recognized a domain name as “intellectual property [that] may be attached under the law”<sup>125</sup> in a trademark infringement action. In order to satisfy the judgment, the court exercised an equitable lien over the domain name and transferred it to the plaintiff.<sup>126</sup> These decisions help to illustrate the problem of wide-spread inconsistency in common law remedies for intangible assets, leaving creditors unable to predict the enforceability of actions against debtors in possession of valuable domain names.

### 3. The Creditor’s Bill

If a creditor is unable to reach a security interest through the traditional methods of replevin, execution or garnishment, a creditor’s bill is a common method to foreclose on intangible collateral. A creditor’s bill is defined in Black’s Law Dictionary as “[a]n equitable suit in which a judgment creditor seeks to reach property that cannot be reached by the process available to enforce a judgment.”<sup>127</sup> Through a creditor’s bill, a creditor may “request that the court order the defendant to sell the intangible property or assign it to satisfy the judgment.”<sup>128</sup> Even though a creditor’s bill is an equitable remedy, state statutes typically proscribe the scope and ability of courts to utilize the creditor’s bill to seize assets otherwise not available by garnishment

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<sup>123</sup> See Moringiello, *False Categories*, *supra* note 19, at 129-30 (discussing *Jordan v. Lavin*, 66 N.E.2d 41, 44 (Mass. 1946) an older case where the Massachusetts Supreme Court required “actual possession” by a third party for the garnishment statute).

<sup>124</sup> *Umbro*, 529 S.E.2d at 86.

<sup>125</sup> *Online Partners.com, Inc., v. Atlanticnet Media Corp.*, No. Civ.A.C98-4146SIENE, 2000 WL 101242, at \*9 (N.D. Cal. Jan. 20, 2000).

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

<sup>127</sup> BLACK’S LAW DICTIONARY 426 (9th ed. 2009).

<sup>128</sup> Moringiello, *Seizing Domain Names*, *supra* note 111, at 133 (citing DAN B. DOBBS, DOBBS LAW OF REMEDIES § 1.4 (2d ed. 1993)).

or execution.<sup>129</sup> For instance, in Ohio, in order to obtain a creditor's bill a claimant must typically show that the debtor does not have sufficient assets "subject to levy on execution" to satisfy a judgment.<sup>130</sup> In other words, a creditor's bill is a remedy of last resort that may be exercised only when all other attempts to enforce the judgment have failed or are otherwise unavailable.

Although a creditor's bill is capable of reaching intangible assets, including intellectual property, rights to payment, and other forms of intangibles,<sup>131</sup> the remedy is still fraught with difficulties such as valuation of intangible assets,<sup>132</sup> method of disposition and sale (if ordered by the court to satisfy a judgment), and inconsistency in state statutes.<sup>133</sup> Even if creditors are capable of enforcing judgments against intangible assets using a creditor's bill, the uniformity of Article 9 that proscribes the rights and obligations of parties and the means of disposition in order to maximize the value of the collateral is preferable and beneficial for both debtors and creditors.

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<sup>129</sup> See, e.g., OHIO REV. CODE ANN. §2333.01 (West 2007) ("When a judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment, any equitable interest which he has in real estate as mortgagor, mortgagee, or otherwise, or any interest he has in a banking, turnpike, bridge, or other joint-stock company, or in a money contract, claim, or chose in action, due or to become due to him, or in a judgment or order, or money, goods, or effects which he has in the possession of any person or body politic or corporate, shall be subject to the payment of the judgment by action.")

<sup>130</sup> Teri Rasmussen, *Reaching a Judgment Debtor's Patents and Other Intangible Property Through a Creditor's Bill*, OHIO PRACTICAL BUSINESS LAW (Oct. 10, 2009), <http://www.ohiopracticalbusinesslaw.com/2009/10/articles/creditors-rights/reaching-a-judgment-debtors-patents-and-other-intangible-property-through-a-creditors-bill/>.

<sup>131</sup> See, e.g., *In re Estate of Mason*, 849 N.E.2d 998, 1003-04 (Ohio 2006) (allowing a creditor's bill to seize interests of heirs and legatees in an estate action); *Olive Branch Holdings, L.L.C. v. Smith Tech. Dev., L.L.C.*, 909 N.E.2d 671 681-83 (Ohio Ct. App. 2009) (using a creditor's bill to obtain rights to a patent in which the creditor did not have a security interest); *Lakeshore Motor Freight Co. v. Glenway Indus.*, 440 N.E.2d 567, 569-70 (Ohio Ct. App. 1981) (using a creditor's bill to enforce the judgment in a breach of contract claim).

<sup>132</sup> Moringiello argues that a judgment lien approach to enforce judgments against intangibles is "not ideal because it does not provide a mechanism for selling the intangible property to realize its value." Moringiello, *Seizing Domain Names*, *supra* note 111, at 144. The same problem applies here. Assigning the asset or enforcing a judicial determination of the value of the asset does not have safeguards to ensure the realization of an asset's maximum value like a disposition sale under U.C.C. § 9-610.

<sup>133</sup> See *id.* at 133 (noting that a "mechanism for the seizure of intangible property is not universally available").

### III. REVISING ARTICLE 9: PROVIDING A UNIFORM FORECLOSURE PROVISION

Legal commentators and academic scholars have advanced a number of proposals to deal with the existing disparities in the common law treatment of intangible assets. These include creating a “Judgment Lien Act” to extend judgment liens to cover all property including intangibles;<sup>134</sup> adapting the common law remedies of garnishment for domain names and other intangible assets;<sup>135</sup> expanding the definition of intellectual property in the Bankruptcy Code to include trademarks and general intangibles;<sup>136</sup> and expanding the traditional notions of “property” to eliminate distinctions between tangible and intangible assets.<sup>137</sup> None of these proposals, however, provide a uniform framework or foreclosure remedy that is sufficiently broad to cover all intangible assets. Specifically, the passage of a “Judgment Lien Act” still leaves creditors without a mechanism to realize the true value of intangible property,<sup>138</sup> revising the Bankruptcy Code only narrowly expands the assets creditors can reach, and hoping that judges in common law courts will uniformly change their interpretations of garnishment statutes or notions of tangibility is unrealistic.

As such, the drafters of the U.C.C. should look to pre-existing models that have consistently allowed the enforcement of a security interests against general intangibles, and incorporate those provisions into a broader foreclosure remedy that creditors can use universally across jurisdictions.

#### A. Investment Securities Model: Intangibles Reached by “Legal Process”

The enforcement of corporate securities, and the evolution of the U.C.C. in handling the enforcement of those securities, illustrates how a foreclosure mechanism for general intangibles can be achieved under the preexisting U.C.C. framework. Historically, shares of corporate stock and other securities were not subject to execution and other

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<sup>134</sup> See Charles Shafer, *The Virtual Clerk's Office: A Proposed Model Judgment Lien Act for the Computer Age*, 15 J.L. & COM. 295 (1995-1996).

<sup>135</sup> See Vita Zeltser, *The Specter of the Debt Collector and the Uncharted Domain: The Case for Treating Domain Names as Garnishable Property*, 12 DIGEST 59, 78-80 (2004).

<sup>136</sup> See Alexis Freeman, *Internet Domain Name Security Interests: Why Debtors Can Grant Them and Lenders Can Take Them in This New Type of Hybrid Property*, 10 AM. BANKR. INST. L. REV. 853, 888-89 (2002).

<sup>137</sup> See generally Moringiello, *False Categories*, *supra* note 19, for a discussion of the interplay between intangible assets and traditional property concepts.

<sup>138</sup> See Moringiello, *Seizing Domain Names*, *supra* note 111, at 144.

traditional remedies that required physical possession.<sup>139</sup> By the mid-1800s, states began enacting laws that allowed creditors to reach securities, and by the early 1900s, many states had adopted the Uniformed Stock Transfer Act (“USTA”), which stated that paper shares were the physical manifestation of the stock holdings and hence capable of seizure.<sup>140</sup> The USTA was superseded by Article 8 of the U.C.C. in the early 1960s which provided that “levy was effected by manual seizure of the shares.”<sup>141</sup> This remedy, however, was ineffective if the paper shares could not be physically located or destroyed. As a result, the most recent version of Article 8 provides an alternative method, allowing a creditor to “‘seize’ a security by taking action against the person in a position to control the transfer of that security.”<sup>142</sup>

The language of Article 8-112 provides (in relevant part):

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer....

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor’s security account is maintained....

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party...may be reached by a creditor by legal process upon the secured party.<sup>143</sup>

Moreover, subsequent court decisions interpreting Article 8 have allowed a creditor to gain access over a debtor’s security that could not be readily attached because it was intangible, by invoking the equitable aid of the court.<sup>144</sup>

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<sup>139</sup> *Id.* at 137.

<sup>140</sup> *Id.* at 138-39.

<sup>141</sup> *Id.* at 140.

<sup>142</sup> *Id.*

<sup>143</sup> U.C.C. § 8-112(b)-(d) (2002).

<sup>144</sup> *See, e.g.,* Yield Dynamics, Inc. v. Zavec, No. H028585, 2005 WL 3485660 (Cal. Dist. Ct. App. Dec. 21, 2005).

### B. The Texas Model: Turnover for Assets Otherwise Unavailable by Ordinary Legal Process

Certain state laws regarding turnover remedies for intangible assets also provide a model framework which can be incorporated into Article 9. The Texas Model is an example of a turnover statute that was incorporated as a “safety net” for general intangibles that are otherwise not covered by other state law remedies such as replevin, garnishment and execution. The Texas Statute allows the court to do the following:

- (1) order the judgment debtor to turn over nonexempt property that is in the debtor’s possession or is subject to the debtor’s control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
- (2) otherwise apply the property to the satisfaction of the judgment; or
- (3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.<sup>145</sup>

In a turnover proceeding, however, the court’s jurisdiction is limited to property that “(1) cannot readily be attached or levied on by ordinary legal process; and (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.”<sup>146</sup>

Under the Texas model, the remedies provided by the turnover statute are cumulative and do not require that a judgment creditor first exhaust all remedies such as attachment, execution and garnishment before obtaining relief.<sup>147</sup> Because intangible property may not be subject to execution and the discovery of parties to garnish is not always feasible, practitioners in Texas have used § 31.002 to reach intangible property assets.<sup>148</sup> Further, “[a] judgment debtor may even be

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<sup>145</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)(1) (West 2004).

<sup>146</sup> *Id.* § 31.002(a)(1)–(2).

<sup>147</sup> *See, e.g.,* Matrix, Inc. v. Provident Am. Ins. Co., 658 S.W.2d 665, 668 (Tex. App. 1983). *See also* Donna Brown, *Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships Under the DTPA and “Other Stuff”* 36 (May 2010), available at, <http://www.dbrownlaw.com/postjudgement.doc>.

<sup>148</sup> *See* Brown, *supra* note 147.



ordered to assign a cause of action to a judgment creditor, as a cause of action is a property interest which is subject to turnover.”<sup>149</sup>

Similar to the turnover statute, an Article 9 remedy should specify that the court has the power to assign or transfer control of the interest of an intangible asset to either a receiver with the authority to take possession—similar to a sheriff that executes a writ of *feri facias*—or to the creditor himself. However, unlike the Texas turnover statute, an Article 9 remedy would use the existing mechanisms in Article 9 to dispose of the collateral in order to maximize its potential value.<sup>150</sup> In addition, it is not necessary for the Article 9 remedy to appoint a receiver with the power to “seize” the collateral and sell the asset because Article 9 already contains a number of provisions that specify the creditor’s obligations when in control or possession of the collateral, which properly protects the debtor from any wrongdoing or mishandling of the asset by the creditor. As such, the court should directly transfer control of the asset over to the creditor who can proceed with liquidation of the asset pursuant to the standard provisions of Article 9.

### C. Turnover Provision for Article 9’s Collection and Enforcement Remedies

Below is a model revision that merges the provisions of U.C.C. § 8-112, which allows creditors to reach intangible investment securities, with the turnover provisions that have been enacted by various state legislations:

#### § 9-607. Collection and Enforcement by Secured Party.

(b) [Judicial enforcement of general intangibles] If a secured party holds an interest in a general intangible other than a payment intangible, in any event after default, the secured party:

- (1) may reach the security interest by legal process against the debtor<sup>151</sup> or against a third party interme-

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<sup>149</sup> *Id.* at 37.

<sup>150</sup> *See* U.C.C. § 9-610 (2002).

<sup>151</sup> This provision is analogous to U.C.C. § 8-112(b)-(d) that specifies the parties whom the proper action can be brought against. It also clarifies the substantive right of the creditor to seek judicial enforcement of a security interest against a debtor for a general intangible.

diary in possession, control, or with whom the general intangible is maintained;<sup>152</sup>

(2) is entitled to aid from a court of competent jurisdiction to assign the interest or transfer control of collateral to the creditor;<sup>153</sup> and

(3) may dispose of collateral under Section 9-610.

(c) [Enforcement of a security interest not readily reached by other legal process] A creditor whose debtor is the owner of a general intangible is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the general intangible or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.<sup>154</sup>

[Current §§ 9-607(b)-(e) shall be modified to (d)-(g), respectively]

This revised provision explicitly creates a substantive right for a secured creditor to enforce his interest in a general intangible; specifies the proper parties with which to file suit; allows an action against a third party intermediary in the case in which the virtual property is maintained by a third party; and allows intangible assets to be reached through the equitable powers of the court. In applying this provision to the domain name or virtual store in the E-snowshoes hypothetical, Commercial Bank would know who to initiate legal proceedings against and how to reach these assets. For the domain name, the Bank could get a court order pursuant to (b)(1) against NSI, forcing them to

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<sup>152</sup> This provision is analogous to U.C.C. § 8-112(c) that provides a remedy for securities that are maintained by a third party securities intermediary. General intangibles, such as the virtual store in the Second Life scenario, are often held or maintained by a third party. This provision allows the creditor to reach the asset controlled by a third party similar to how a creditor may reach an intangible securities investment maintained by a broker.

<sup>153</sup> This provision is a merger of the general language of U.C.C. § 8-112(e) and the Texas turnover provision statute that extends to the court the power to order the assignment or transfer control of the collateral.

<sup>154</sup> This provision is a replica of U.C.C. § 8-112(e) that allows creditors to reach investment securities through the equitable powers of the court when it cannot readily be obtained through legal process. This also allows creditors the right to enjoin a debtor or third party from transferring an interest before a court ordered assignment or disposition. This language is similar to the Texas turnover statute which only applies when the property "cannot readily be attached or levied on by ordinary legal process." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)(1).

transfer control of the domain name to the Bank for disposition pursuant to Sections (b)(3) and 9-610. For the virtual store, Commercial Bank could obtain a court order compelling Second Life to transfer control of the asset to the Bank for disposition also pursuant to (b)(3). In other cases of intellectual property, generally, Commercial Bank could bring an action against E-snowshoes and get a court order compelling them to sign over the interest similar to a creditor's bill. What the state courts chose to call this action thereby becomes irrelevant, similar to enforcement actions that are made under Article 8 that allows "seizure" of investment securities. In any case, revised section (c) specifically grants the court the means in equity to enforce the security interest against the debtor. This also allows the creditor to obtain an injunction to prevent any actions by the debtor of avoiding enforcement, such as assigning the interest or control of the collateral to someone else before it is seized.

Adopting a foreclosure remedy as described above would bring about several unique advantages when compared to today's patchwork of state law remedies. First, it would allow creditors to use the disposition procedures codified in Section 9-610 to maximize the value of the intangible asset. The comments to Section 9-610 note: "[t]his section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned."<sup>155</sup> Further, Section 9-610 "does not restrict disposition to sales; [the] collateral may be sold, leased, licensed, or otherwise disposed," which also seeks to maximize the potential value of the asset.<sup>156</sup>

Second, Article 9 contains substantial protections for debtors to prevent unreasonable seizure or disposition of collateral. For example, when disposing of collateral, creditors must ensure that "[e]very aspect. . . including the method, manner, time, place, and other terms, [is] commercially reasonable."<sup>157</sup> Additionally, aggrieved debtors can enforce the remedial provisions of Article 9 against creditors for all violations of the Article, allowing a debtor to obtain an injunction, equitable relief, or damages for a creditor's non-compliance.<sup>158</sup> Article 9 also proscribes the rights of the debtor after seizure of the collateral. If the collateral is seized, the debtor may redeem it by paying the full amount outstanding on the loan before disposition.<sup>159</sup> The debtor sub-

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<sup>155</sup> U.C.C. § 9-610, cmt. 2.

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

<sup>157</sup> *Id.* § 9-610(b).

<sup>158</sup> *See id.* § 9-625(a)-(g).

<sup>159</sup> *See id.* § 9-623(a)-(c).

sequently retains any remaining proceeds after the outstanding loan and costs of preparation are deducted from the sale.<sup>160</sup>

Finally, adopting a uniform foreclosure mechanism in Article 9 will facilitate the financing of unique assets which, like domain names and virtual real estate, may not fall into traditional categories of collateral that are enforceable by state law. The history of the U.C.C. shows that the uniformity brought by adoption of a Uniform Code increased the overall availability of commercial credit and fostered new innovative methods of financing.<sup>161</sup> Although it is hard to imagine that virtual property will serve as secured collateral for the financing of businesses in today's world, a turnover-like provision will still allow creditors the freedom to securitize any collateral that has value.

#### D. Responding to Objections

Although the official comments to Article 9 do not explicitly state any justifications for limiting the expansion of general intangibles to only payment rights and monetary obligations, comments by members of the drafting committee and observations by commentators in the field suggest several reasons that may have factored into that decision and represent potential objections to any expansion of Article 9.

##### 1. Lack of a Commercial Need to Expand Article 9

First, the main purpose and history of the U.C.C. show that the original enactment and later revision of Article 9 was done, by and large, to accommodate emerging business practices.<sup>162</sup> As of today, however, few intangible assets fall outside the parameters of a payment right or monetary obligation,<sup>163</sup> and even fewer are valuable enough to be used as secured collateral in financing arrangements. Hence, it can be argued that the need for an expansion of Article 9 beyond "payment intangibles," is premature because the finance industry does not widely use non-payment intangibles, such as "virtual stores" in Second Life, as collateral for loans.

However, the emergence of Internet businesses has dramatically increased the use of general intangibles as collateral. Because online

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<sup>160</sup> See Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 23 (citing U.C.C. § 9-615).

<sup>161</sup> See *supra* Part II.

<sup>162</sup> Moringiello, *False Categories*, *supra* note 19, at 123 ("The articles of the U.C.C. that govern specific types of intangible property developed to accommodate business practices in various industries.").

<sup>163</sup> *Id.* at 136 ("Most of the known intangible assets before the advent of the Internet fell into two categories, intellectual property rights and payment rights.").

businesses generally do not have the same level of tangible collateral as their material counterparts, they rely more heavily on intangible assets such as domain names, intellectual property, and other general intangibles to secure financing.<sup>164</sup> There is little argument that domain names can acquire substantial value.<sup>165</sup> In one high-profile case, a plaintiff was awarded \$65 million in damages for the misappropriation of the “sex.com” domain name.<sup>166</sup> The same domain name was also said to have been sold for \$12 million in early 2006.<sup>167</sup> Using intellectual property as a means of secured financing has also become a routine practice for many businesses.<sup>168</sup> In the past few decades, “the proliferation of intellectual property as collateral in secured financing has spread across many industries,”<sup>169</sup> as lenders realize the value that intangible assets hold.

Moreover, the overall purpose of the U.C.C. is to facilitate secured credit. Virtual property, even if it exists only on a small scale today, can sustain real economic value in applications such as Second Life. Any property that contains value is proper for a security interest, and expanding the types of collateral that is available to creditors will facilitate the use of those types of assets in secured financing. Even if the infrastructure of a “virtual market” for property does not yet exist, the advent of the Internet has shown how rapidly the value of intangible assets can change.<sup>170</sup> By adopting a general foreclosure mechanism for intangibles, lenders will be assured that new forms of valuable assets can be reached upon default, which will incentivize their willingness to allow new types of assets to be used as collateral in financing.

## 2. Allowing a General Remedy for Intangibles is Too Expansive

The drafters of the U.C.C. exercised extreme caution in expanding the scope of Article 9 to general intangibles to avoid any unintended effects that an expansion might have on other industries. As explained in Part II, the drafters were concerned about the effect that Revised Article 9 would have on the loan participation industry, and also ex-

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<sup>164</sup> See discussion *supra* Part I.

<sup>165</sup> See discussion *supra* Part I; see also Zeltser, *supra* note 135, at 79 (“[D]omain names can be used as an investment. A \$35 dollar registration fee can blossom into millions, as it did with sex.com. Indeed, [the] clever registrant obtained a profit of 20,000,000%.”).

<sup>166</sup> See *Kermen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

<sup>167</sup> *Sex.com is Said to be Sold for About \$12 Million to Escom*, L.A. TIMES, Jan. 24, 2006, at C9; see also Moringiello, *False Categories*, *supra* note 19, at 151.

<sup>168</sup> See Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 18.

<sup>169</sup> *Id.* at 19.

<sup>170</sup> See *supra* Part I.

pressed doubt that an expansion of the code would actually influence lenders to extend additional credit.<sup>171</sup> Although certain departments of financial institutions were eager to bring payment intangibles into Article 9, particularly those that handle securitization, “the practical impediments that might arise from conditioning perfection on the filing of a financing statement” weighed heavily on the loan participation markets.<sup>172</sup> By allowing for automatic perfection of the security interest upon attachment, the drafting committee was able to alleviate the industry’s pragmatic concerns while enabling the sale of payment intangibles to be incorporated into Article 9.

The consequences of an overbroad revision are also demonstrated by commentators’ criticisms of Article 9’s extremely broad definition of a “general intangible,” which by its terms, necessarily includes all forms of intellectual property.<sup>173</sup> Professor Xuan-Thao Nguyen criticizes the approach that Article 9 has taken with respect to the collateralization of intellectual property because it lacks transparency.<sup>174</sup> In other words, by providing an extremely broad definition of a general intangible, the U.C.C. increases the risk that debtors who are unfamiliar with the intricacies of Article 9 may inadvertently subject their intellectual property to attachment.<sup>175</sup> Since a general intangible is defined as “any personal property, including things in action,”<sup>176</sup> copyrights, patents, and trademarks are easily included within this catch-all residual category.<sup>177</sup> Hence, a debtor reading a security agreement prepared by the creditor would see that the security agreement includes “general intangibles” without realizing that this category is broad enough to include all forms of intellectual property.<sup>178</sup>

These concerns, however, are not realized by merely adding a foreclosure remedy for all general intangibles. The concern of the Drafting Committee was primarily to avoid bringing the *sale* of all general

<sup>171</sup> See Harris & Mooney, *supra* note 12, at 1364-65.

<sup>172</sup> *Id.* at 1371.

<sup>173</sup> U.C.C. § 9-102(a)(42) (2002) (“‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.”).

<sup>174</sup> Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 5.

<sup>175</sup> *Id.* at 29-37; see also Shupack, *supra* note 48, at 170 (“Given the definition of general intangibles, virtually any sort of intangible property could be a general intangible. A patent, a governmental permit, a copyright, a trade secret, some partnership interests or the right to a performance under any sort of contract could be accommodated within its capacious scope.”).

<sup>176</sup> U.C.C. § 9-102(a)(42) (2002).

<sup>177</sup> Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 33.

<sup>178</sup> *Id.*

intangibles under the scope of Article 9.<sup>179</sup> Providing a foreclosure remedy for all general intangibles does not expand the scope of Article 9 in that respect. Article 9 already governs the transfer of general intangibles as collateral generally because the definition of collateral has been expanded to include “general intangibles” and can be perfected by filing a financing statement. For example, although the sale of intellectual property falls within the residual category of “general intangibles” and is not governed by the U.C.C., Article 9 has been recognized as the uniform mechanism in which to grant a security interest in intellectual property.<sup>180</sup> The existence of the strict foreclosure option under Article 9 also shows that a foreclosure remedy for general intangibles is possible without bringing the sale of general intangibles under the U.C.C. Thus, Article 9 is capable of governing the formalities in establishing securities as collateral without bringing the actual sale of all types of those securities within its reach.

Providing for a clear method of foreclosure of an intangible asset other than a payment obligation will do nothing more in the existing regime of secured transactions than allow creditors to use Article 9 as a default remedy. Beyond the benefits flowing to creditors, this is also beneficial to debtors who will be certain of their rights upon disposition of the collateral, and can use the remedial provisions of U.C.C. to force the creditor’s compliance with the Article’s safeguards.

### 3. State Common Law is Preferable to Adapting Remedies to Modern Technology

Finally, the general approach of the U.C.C.’s drafters has been to allow courts to interpret the code to adapt to novel innovations and new technology.<sup>181</sup> Some commentators argue that the common law is better than legislation for adapting to changes in the industry.<sup>182</sup> This perspective is also included in U.C.C. § 1-103(b), which states: “[u]nless displaced by the particular provisions of [the Uniform

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<sup>179</sup> See *supra* Part II(B).

<sup>180</sup> See, e.g., *In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1045 (9th Cir. 2001) (holding that Article 9 governs the recording of security interests for patents); *Trimarchi v. Together Dev. Corp.*, 255 B.R. 606, 610 (D. Mass. 2000) (holding that “the Lanham Act does not preempt the U.C.C.’s filing requirements and ... the perfection of a security interest in a trademark is governed by Article 9”); *In re Roman Cleanser Co.*, 43 B.R. 940, 944 n.2 (Bankr. E.D. Mich. 1984) (“The perfection of a security interest under a state act is governed by Article 9 unless the state act provides its own method of perfection.”) *aff’d* 802 F.2d 207 (6th Cir. 1986). See also Nguyen, *Collateralizing Intellectual Property*, *supra* note 13, at 27.

<sup>181</sup> Moringiello, *False Categories*, *supra* note 19, at 131.

<sup>182</sup> See generally Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 308, 317 (2002).

Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.”<sup>183</sup> This section also states: “[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies....”<sup>184</sup> Thus, while the drafters of the U.C.C. saw the need for uniformity in state law, they also recognized a need for some deference to common law courts who can (arguably) adapt existing laws to new technology and modern business practices.<sup>185</sup>

Providing a “turnover” foreclosure remedy in Article 9 does not compromise this flexibility. My proposal for a Revised Section 9-607 merely states that a creditor “may reach the security interest by legal process,” similar to the general provisions of Article 8 regarding the enforcement of interests in intangible investment securities.<sup>186</sup> Moreover, although “control” is defined under the U.C.C. in Article 8<sup>187</sup> and various provisions for perfecting the security interests in certain types of intangibles in Article 9,<sup>188</sup> possession is still left for the state courts to define. The foreclosure remedies of Article 9 are also cumulative, which allows the secured creditor the flexibility to use common law remedies available to unsecured creditors through the default provision of Section 9-601.<sup>189</sup>

Further, state courts have already failed to properly adapt common law remedies to new technologies and modern practices.<sup>190</sup> As one commentator explains, “people have difficulty extricating the intangible asset from the contract that conveyed the property right in that asset.”<sup>191</sup> Courts that have interpreted the common law writs cling to notions of tangibility, which “hinder[s] the development of the property law components of commercial law.”<sup>192</sup> Because it would be burdensome to revise the Uniform Commercial Code every time a new, valuable type of asset form develops,<sup>193</sup> providing a general pro-

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<sup>183</sup> U.C.C. § 1-103(b) (2002).

<sup>184</sup> *Id.* § 1-103(a).

<sup>185</sup> See Moringiello, *False Categories*, *supra* note 19, at 131 (“The approach of the U.C.C.’s drafters—to allow courts to interpret the code language in light of changes in business practice—remains relevant today, even as new electronic assets are created”).

<sup>186</sup> See U.C.C. § 8-112(a)-(e) (2002).

<sup>187</sup> See *id.* § 8-106.

<sup>188</sup> See *id.* §§ 9-104-107.

<sup>189</sup> *Id.* § 9-601(c).

<sup>190</sup> See *supra* Part III(B).

<sup>191</sup> Moringiello, *False Categories*, *supra* note 19, at 135.

<sup>192</sup> *Id.* at 138.

<sup>193</sup> *Id.* at 165.



vision to reach all general intangibles offers certainty to secured creditors while giving an interim remedy if a new form or mechanism of enforcement is needed or preferable.

#### IV. CONCLUSION

The lack of standard remedies for intangible assets such as domain names, electronic assets and forms of intellectual property rights undermine the overall purpose of the Uniform Commercial Code. The rapid evolution of technology has challenged legislators and legal scholars alike. What was once referred to as the “crown jewel” of the UCC,<sup>194</sup> renowned for its expert simplicity and accredited for the growth of financial markets in the later century has fractured into a conglomeration of asset-by-asset enforcement provisions which rely on rigid state law remedies that adhere to ancient, antiquated writs.

Virtual, intangible property is the E-Commerce of the future. Intellectual property and intangible property are becoming the most valuable assets of modern corporations, and Internet companies and technology are rapidly replacing the brick-and-mortar companies of old. The Uniform Commercial Code must adapt broader provisions to foster this unprecedented growth, or else risk becoming another antiquity in the rising virtual age of E-commerce.

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<sup>194</sup> Harris & Mooney, *supra* note 12, at 1401.

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