CURRENT ISSUES IN SECURED TRANSACTIONS LAW
IN THE UNITED STATES

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I. LICENCES

May a debtor grant a security interest in a statutory or contractual licence?

Example 1. Restaurant holds liquor licence issued by State Liquor Board. State law prohibits assignment of licence without Board’s consent. Restaurant grants Bank a security interest in all its business assets, including licence, to secure repayment of bank loan. Bank duly perfects its interest. Restaurant defaults and commences insolvency proceeding. With consent of Liquor Board, the business assets—including the licence—are sold as a “going concern”. Does Bank have an enforceable security interest in the proceeds of this sale?

Example 2. Developer agrees to grant SME a non-exclusive licence of its computer software. One term of the agreement provides that an attempt by SME to assign rights in the software entitles Developer to terminate the licence. A second term prohibits SME from disclosing to anyone certain information regarding the software. If SME seeks financing secured by a security interest in the licence, what legal or practical obstacles will it face?

Selected reading

Edwin E Smith, “Article 9 in revision: a proposal for permitting security interests in nonassignable contracts and permits” (1994) 28 Loy LA Rev 335

Steve O Weise, “The financing of intellectual property under revised UCC Article 9” (1999) 74 Chicago-Kent L Rev 1077

Peter Picht, “Collateralizing IP licenses: present deficiencies and proposed reforms” (2013) 41 AIPLA L.Q. 423

UCC Article 9 provisions

§ 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

(3) “Account debtor” means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(42) “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.

(a) **Term restricting assignment generally ineffective.** Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

1. would impair the creation, attachment, or perfection of a security interest; or
2. provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) **Applicability of subsection (a) to sales of certain rights to payment.** Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620.

(c) **Legal restrictions on assignment generally ineffective.** A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

1. would impair the creation, attachment, or perfection of a security interest; or
2. provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) **Limitation on ineffectiveness under subsections (a) and (c).** To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) would be effective under law other than this article but is ineffective under subsection (a) or (c), the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

1. is not enforceable against the person obligated on the promissory note or the account debtor;
2. does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;
3. does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;
4. does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;
5. does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and
6. does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) **Section prevails over specified inconsistent law.** This section prevails over any inconsistent provisions of the following statutes, rules, and regulations:[List here any statutes, rules, and regulations containing provisions inconsistent with this section.]

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II. DEPOSIT ACCOUNTS

How may syndicated financiers perfect a security interest in a deposit account?

**Example 3.** D maintains a deposit account with Bank A. To secure a loan from Banks X, Y and Z, D creates a security interest in the deposit account in favour of Bank A, as agent for the three banks. Do Banks X, Y and Z have a perfected security interest in the bank account?

**Example 3 (var. a).** D maintains a deposit account with Bank A. D creates a security interest in the deposit account to secure a loan from Banks X, Y, Z, and A. The banks appoint Bank A as collateral agent. Do Banks X, Y, Z and A have a perfected security interest in the bank account?

**Example 3 (var. b).** D maintains a deposit account with Bank A. D creates a security interest in the deposit account to secure a loan from Banks X, Y, and Z. The banks appoint Bank A as collateral agent. Do Banks X, Y, Z have a perfected security interest in the bank account?

**Selected reading**


**UCC Article 9 provisions**

§ 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

(29) “Deposit account” means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(73) “Secured party” means:

(A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

§9-104. Control of Deposit Account

(a) [Requirements for control.] A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained;

(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) the secured party becomes the bank's customer with respect to the deposit account.

(b) [Debtor's right to direct disposition.] A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

§ 9-203. Attachment and Enforceability of Security Interest; Proceeds; Supporting Obligations; Formal Requisites.
(a) [Attachment.] A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) [Enforceability.] Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

1. value has been given;
2. the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
3. one of the following conditions is met:
   A. the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
   D. the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under Section 7-106, 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.


(b) [Control or possession of certain collateral.] Except as otherwise provided in Section 9-315(c) and (d) for proceeds:

1. a security interest in a deposit account may be perfected only by control under Section 9-314;

§ 9-314. Perfection by Control.

(a) [Perfection by Control.] A security interest in … deposit accounts … may be perfected by control of the collateral under Section 9-104….

(b) [Specified collateral: time of perfection by control; continuation of perfection.] A security interest in deposit accounts … is perfected by control under Section 9-104 … when the secured party obtains control and remains perfected by control only while the secured party retains control.

§ 9-327. Priority of Security Interests in Deposit Account.

The following rules govern priority among conflicting security interests in the same deposit account:

1. A security interest held by a secured party having control of the deposit account under Section 9-104 has priority over a conflicting security interest held by a secured party that does not have control.
2. Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control under Section 9-314 rank according to priority in time of obtaining control.
3. Except as otherwise provided in paragraph (4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.
4. A security interest perfected by control under Section 9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

§ 9-340. Effectiveness of Right of Recoupment or Set-Off Against Deposit Account.

(a) [Exercise of recoupment or set-off.] Except as otherwise provided in subsection (c), a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) [Recoupment or set-off not affected by security interest.] Except as otherwise provided in subsection (c), the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured
party.

(c) [When set-off ineffective.] The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under Section 9-104(a)(3), if the set-off is based on a claim against the debtor.

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III. PURCHASE-MONEY SECURITY INTERESTS

Over what collateral should a secured party be given purchase money priority?

Example 4. X Inc. grants SP-1 a security interest in all the corporation’s existing and after-acquired assets to secure repayment of a loan. SP-2 subsequently lends money to X Inc. to enable it to acquire Inventor's patent. X Inc. grants SP-2 a security interest in the patent to secure repayment. As between SP-1 and SP-2, which creditor has priority if X Inc. defaults on both loans?

Selected reading

Grant Gilmore, “The purchase money priority” (1963) Harv L Rev 1333
Hideki Kanda & Saul Levmore, “Explaining Creditor priorities” (1994) 80 Virginia L Rev 2103

UCC Article 9 provisions

§ 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

(44) “Goods” means all things that are movable when a security interest attaches. *** The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded.

(76) “Software” means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

§ 9-103. Purchase-Money Security Interest; Application of Payments; Burden of Establishing.

(a) [Definitions.] In this section:

(1) “purchase-money collateral” means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) “purchase-money obligation” means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) [Purchase-money security interest in goods.] A security interest in goods is a purchase-money security interest:

(1) to the extent that the goods are purchase-money collateral with respect to that security interest;

(2) if the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and
(3) also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) [Purchase-money security interest in software.] A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

1. the debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and
2. the debtor acquired its interest in the software for the principal purpose of using the software in the goods.


(a) [General rule: purchase-money priority.] Except as otherwise provided in subsection (g), a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in Section 9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

(b) [Inventory purchase-money priority.] Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 9-330, and, except as otherwise provided in Section 9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

1. the purchase-money security interest is perfected when the debtor receives possession of the inventory;
2. the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
3. the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and
4. the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(f) [Software purchase-money priority.] Except as otherwise provided in subsection (g), a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in Section 9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) [Conflicting purchase-money security interests.] If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f):

1. a security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and
2. in all other cases, Section 9-322(a) applies to the qualifying security interests.