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Amending the Article Nine Filing System to Meet Current Deficiencies

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Article Nine¹ is currently undergoing substantial revision.² "[B]ecause

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The National Conference of Commissioners on Uniform State Laws (the "Conference") and the University of Minnesota Law School are engaged in an unprecedented, cooperative effort regarding Article Nine filing. Cosponsored by these two organizations, an Article Nine filing Project (the "Project"), headed by an Executive Committee composed of Carlyle C. Ring, Jr., Darrell Pierce, Harry C. Sigman, Jan Whitehead Swift, and Everett Wohlers (with Professor Edward S. Adams serving as a liaison between the University of Minnesota Law School and the Executive Committee), is seeking the promotion of uniform filing seeking the advice and input of technological specialists, users and service providers, and filing officers. The Project is very much a product of the tireless and extraordinary efforts of Carlyle C. Ring, Jr., as head of the Article 9 Filing System Task Force of the American Bar Association. The Project also owes a sincere debt of gratitude to William M. Burke, Professor Frederick H. Miller, and Dean Robert A. Stein. Hopefully, the work of this Project will make the goals of these visionaries a reality.

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1. All references to Article Nine of the Uniform Commercial Code (the "Code" or "UCC") refer to the 1990 Official Text promulgated by the Conference and the American Law Institute.

2. The genesis of the present Article Nine can be traced to 1942 when The American Law Institute and The National Conference of Commissioners on Uniform State Laws initiated a joint project to develop what would become the Uniform Commercial Code, including Article Nine. In 1951, they promulgated the first draft of the Uniform Commercial Code, which was enacted in Pennsylvania in 1953. In 1956, the Editorial Board of the UCC recommended a revision of the 1952 text which resulted in a revised Official Text, the first of several minor revisions.

By 1968, the Uniform Commercial Code, including Article Nine, was enacted in every state except Louisiana, which waited until 1988 to enact Article Nine. Article

secured credit is a trillion-dollar activity," this revision is extraordinarily significant.³ A focal point of this amendment process is Article Nine's notice-filing system which appraises prospective creditors, and others, of a secured party's interest in a debtor's collateral.⁴ As few would dispute, the notice-filing system, which seeks to cure the "ostensible ownership problem,"⁵ is in serious need of repair.

Most fundamentally, the filing system, in its current form, has failed to achieve the uniformity and simplicity its drafters intended.⁶ Article Nine itself provides for three separate alternative filing office locations⁷ and some

Nine was last substantially revised in 1972, although the basic theory and structure remained the same.

In December 1992, the Permanent Editorial Board of the UCC published the final report of its study committee which was established to review Article Nine. This report has been sent to a drafting committee sponsored by the Conference and the American Law Institute. If everything goes according to schedule, the new amendments to Article Nine should be ready for passage by individual states by 1995 or 1996. See GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE, *reprinted in* SELECTED COMMERCIAL STATUTES (West 1994); RICHARD E. SPEIDEL ET AL., COMMERCIAL LAW 6 (West 4th ed. 1987); Barkley Clark, *Revision of UCC Article 9: The 1992 Final Report*, 26 UCC L.J. 307 (1994).

3. Clark, *supra* note 2, at 307.

4. Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN L. REV. 175 (1983).

5. Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53 (1983). See also *Navarro v. IBM*, 70 B.R. 94, 95 (Bankr. N.D. Tex. 1987) ("Notice to third parties is a fundamental purpose of the Article 9 filing system.").

6. See generally PEB STUDY GROUP U.C.C. ARTICLE 9, app. VI (1992). Section 9-402 official cmt. 3 provides that: "This section departs from the requirements of many pre-Code chattel mortgage statutes [which] penalize[d] good faith mortgagees who had inadvertently failed to comply with the statutory niceties. They are here abandoned in the interest of a simplified and workable filing system."

7. Section 9-401, in relevant part, provides:

Place of Filing; Erroneous Filing; Removal of Collateral.

First Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(b) in all other cases, in the office of the [Secretary of State].

Second Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the _____ in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the _____ in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the _____ in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State].

Third Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the _____ in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the _____ in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the _____ in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State] and in addition, if the debtor has a place of business in only one county of this state, also in the office of _____ of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of _____ of the county in which he resides.

Note: *One of the three alternatives should be selected as subsection (1).*

states have even adopted their own variations of these three suggested alternatives.⁸ Moreover, states and state filing offices have often supplemented the statute with their own administrative rules or procedures requiring the filing party to comply with requirements not sanctioned in the statute.⁹ With over 4300 filing offices in the United States,¹⁰ these peculiarities from jurisdiction to jurisdiction indicate little uniformity exists in the filing system.

In addition to difficulties with uniformity, the current Article Nine filing provisions also suffer from an inability to accommodate present and anticipated technological developments. For example, presently, section 9-402(1) includes the signature of the debtor among the formal requirements of a "sufficient" financing statement. However, suppose that current technology allows filing via electronic transmissions. Should a signature still be required? Why was it initially required? Do the same reasons exist today?

Unfortunately, yet perhaps not unexpectedly, a lack of uniformity and a failure to anticipate technological innovation are not the only problems with the Article Nine filing system. Many other problems exist. This Article details many of the more common problems below. It also suggests amendments to Article Nine, or areas of study for the drafters, to address these difficulties.¹¹ By necessity, this Article's list of problems is incomplete. All those who have used, taught, or studied the Article Nine filing system doubtlessly have their own pet peeves or complaints. Although it is unrealistic to expect Article Nine to be revised to accommodate some of the more idiosyncratic problems, it is highly likely that the drafters will confront and,

U.C.C. § 9-401 (emphasis in original).

8. See, e.g., MINN. STAT. ANN. § 336.9-401 (West Supp. 1994) (U.C.C. § 9-401(1) amended to specifically include filing provisions for motor vehicles); IOWA CODE § 554.9401 (1993) (U.C.C. § 9-401(1)(b) amended to specifically include filing provisions for consumer goods).

9. Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, 55 LAW & CONTEMP. PROBS. 5 (Summer 1992). For an enlightening discussion of the hazards that may be encountered by filing parties as a result of the varying requirements imposed by UCC filing officers nationwide, see Mark A. Gittelman, *Filing UCC-1 Financing Statements: How a Perfect Filing Can Achieve Less Than Perfection*, 24 UCC L.J. 195 (1992).

10. Jan Whitehead Swift, *The UCC Filing System and the Need for Reform*, 26 UCC L.J. 283, 283 (1994).

11. These suggestions and some of the text derive from recommendations promulgated by the UCC Committee of the Conference whose primary mission was a study of the filing system. The Project has assumed this Committee's duties. Copies of the full text of these recommendations may be obtained from the authors or the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair, Suite 1700, Chicago, IL 60611.

one hopes, remedy the more common difficulties explored in this Article—a step clearly in the right direction.

DEFICIENCIES AND RECOMMENDATIONS

A. *Eliminate or Modify the Signature Requirement*

Perhaps the most common reason filing officers reject a financing statement is some perceived defect in the signature submitted by the filing party. Currently, section 9-402(1) includes the signature of the debtor among the formal requisites of a "sufficient" financing statement.¹² Although Article Nine provides that particular financing statements are effective when signed by only the secured party¹³ or are only effective when signed by both the secured party and the debtor,¹⁴ courts have consistently held that financing statements lacking the debtor's signature are fatally flawed.¹⁵

However, recent and sweeping changes in information systems technology are fast rendering Article Nine's paper-based filing system obsolete.¹⁶ These

12. U.C.C. § 9-402(1).

13. A financing statement filed to perfect a security interest in certain types of collateral listed in § 9-402(2) may be effective if "signed by the secured party instead of the debtor" U.C.C. § 9-402(2).

14. The signatures of both the debtor and secured party are required to amend a financing statement. U.C.C. § 9-402(4).

15. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1032 (3d ed. 1988) ("We have found no case in which a court found a financing statement without the debtor's signature to be effective."). *See, e.g., In re Lyn-Dee Dairy Farm, Inc.*, 97 B.R. 95, 97 (Bankr. M.D. Fla. 1989) ("[F]ailure to include debtor's signature on the financing statement results in an unperfected security interest . . ."); *Ledford v. Thorp Fin. Servs.*, 52 B.R. 45, 47 (Bankr. S.D. Ohio 1985) ("Although sometimes harsh, the statutory requirement that a financing statement be signed by the debtor is mandatory."); *Guardian State Bank v. Lambert*, 834 P.2d 605, 608 (Utah Ct. App. 1992) ("[in] the vast majority of cases . . . failure to comply with signature requirements is not a minor error and such failure to comply renders the financing statement invalid"). *See also In re Medical Oxygen Serv., Inc.*, 36 B.R. 341, 344 (Bankr. N.D. Ga. 1984) (collecting cases); *Southwest Bank v. Moritz*, 277 N.W.2d 430, 435 (Neb. 1979) (collecting cases). *But cf. In re Hammons*, 438 F. Supp. 1143, 1153-54 (S.D. Miss. 1977) *rev'd on other grounds*, 614 F.2d 399 (5th Cir. 1980) (holding that, where debtor is a partnership, failure of one partner to sign financing statement did not render the financing statement defective).

16. Patricia Brumfield Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607, 611 (1993) ("The inefficiencies caused by legal requirements that transactions be memorialized on paper can only increase as progressively more transactions are accomplished through direct computer-to-computer communications.").

changes raise serious questions about the propriety of a technical signature requirement that fatally flaws so many filings. Already, Iowa¹⁷ and British Columbia¹⁸ provide for the electronic transmission of filing statement information; no paper document is ever submitted. In order to provide the filing system with the greatest flexibility to adapt to these advances and to promote the ease and convenience of filing for those relying on the system, this Article recommends that the debtor and secured party signature requirements be eliminated as requisites of filed financing statements and subsequent related filings.

The UCC filing system was conceived as a "notice system," whereby searchers would be led to further sources of information.¹⁹ Therefore, elimination of the signature requirement would not significantly undermine present filing systems. Admittedly, both the drafters of Article Nine and the courts have recognized that signature requirements serve an important authentication function²⁰ requiring a debtor's signature theoretically reduces

In 1991, the UCC Article 9 Filing System Task Force reported that the majority of jurisdictions have computerized at least part of their filing and search systems. PEB STUDY GROUP, *supra* note 6, app. VIII at 115. Only a handful of jurisdictions do not plan to computerize portions of their filing and search systems in the near future. *Id.*

17. IOWA CODE § 554.9402 (1993) ("[t]he Secretary of State may adopt rules for the electronic filing of a financing statement"); IOWA ADMIN. CODE r. 721-6.1 to 6.9 (1990).

18. Personal Property Security Act, S.B.C. ch. 36, § 1(1) (1989) *amended by* S.B.C. ch. 11, § 1(e)(b) (1990) (Can.) (the term "financing statement" means "data authorized under the regulations to be transmitted electronically to the computer data base of the registry . . .").

19. Baird, *supra* note 4, at 54. *See also*, RAY D. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 4-5 at 64 (2d ed. 1979) ("The purpose of a financing statement is simply to give notice to the world that the designated parties have entered into a secured transaction covering the described collateral. The details must be learned from the parties"); J.K. Merrill & Son v. Carter, 702 P.2d 787, 792 (Idaho 1985) ("Notice is one of the fundamental purposes of the Article 9 filing system."); Whitworth v. Krueger, 558 P.2d 1026 (Idaho 1976); Magna First Nat'l Bank and Trust Co. v. Bank of Ill., 553 N.E.2d 64 (Ill. App. Ct. 1990); Interstate Steel Co. v. Ramm Mfg. Corp., 438 N.E.2d 1381 (Ill. App. Ct. 1982); Merchants Nat'l Bank of Cedar Rapids v. Halberstadt, 425 N.W.2d 429 (Iowa Ct. App. 1988); United Coops. v. Libel Oil Co., 699 P.2d 1040 (Kan. Ct. App. 1985); Pinkerton's, Inc. v. John A. Roebling Steel Corp., 450 A.2d 1336 (N.J. Super. Ct. Law Div. 1982); *In re* Maple Contractors, Inc., 411 A.2d 1186 (N.J. Super. 1979); Hobart Corp. v. North Cent. Credit Servs., Inc., 628 P.2d 842 (Wash. Ct. App. 1981).

20. Sommers v. IBM, 640 F.2d 686, 691 (5th Cir. 1981) ("When a debtor 'signs' . . . a financing statement, he does so with a present intention to authenticate . . ."); Ledford v. Thorp Fin. Servs., 52 B.R. 45, 47 (Bankr. S.D. Ohio 1985) ("The absence of the debtor's signature cannot properly be construed as a minor error inasmuch as

the number of unauthorized filings.²¹ However, an alternate authentication system could be adopted which accounts for the realities of evolving information management technology. Such a system already exists in British Columbia where debtors receive a copy of financing statement information filed under the debtor's name.²² Debtors in British Columbia can terminate unauthorized filings unless the secured party obtains a court order stating that the filing should remain on record.²³ The United States could adopt a slightly abbreviated procedure which would provide debtors with a copy of the financing statement that was filed, perhaps by having the secured party provide such a copy to the filing office. Moreover, the system could be modified so that an aggrieved party could clear the record and receive damages for slander of credit or title. Finally, it may be advisable to provide all parties named in financing statements, both debtors and secured parties, with filing information so as to provide sufficient notice of the contents of the public record to the affected parties.

In the event the drafting committee disagrees with the elimination of the signature requirements, this Article alternatively recommends revising Article Nine to accommodate and encourage the electronic transmission of symbols indicating a debtor's or secured party's consent. Many commercial statutes still operate under the presumption that commercial transactions are accompanied by pieces of paper that may be physically "signed."²⁴ For

the stated purpose of the signature is not notice to third parties, but rather to authenticate the statement." (quoting *In re Industro Transistor Corp.*, 14 U.C.C. Rep. 522 (Bankr. E.D.N.Y. 1973)); *USI Capital and Leasing v. Medical Oxygen Serv., Inc.*, 36 B.R. 341, 344 (Bankr. N.D. Ga. 1984) ("debtor's signature is necessary to authenticate the financing statement"); *In re Carlstrom*, 3 U.C.C. Rep. Serv. 766, 771 (Bankr. N.D. Me. 1966) (discussing the Article Nine filing system as one of "authenticated notice filing"). *But see In re Waldick Aero-Space Devices, Inc.*, 71 B.R. 932 (D.N.J. 1987) (holding that copy of equipment lease attached to otherwise complete financing statement will be sufficient to authenticate debtor's typewritten name on one statement); *In re Air Vermont, Inc.*, 45 B.R. 817 (D. Vt. 1984) (signing of security agreement by "Air Vermont" rather than by correct name, "Air Vermont, Inc." nonetheless embodied present intention to authenticate the writing); *J.K. Merrill & Son v. Carter*, 702 P.2d 787 (Idaho 1985) (photocopy of signed security agreement attached to unsigned financing statement sufficient to perfect security interest.).

21. WHITE & SUMMERS, *supra* note 15, § 22-18.

22. A secured party must, within 20 days, provide the debtor with a copy of the financing statement or the verification statement issued by the registry. S.B.C. ch. 36, § 43(14) (1989) *amended by* S.B.C. ch. 11, § 14(c) (1990) (Can.).

23. S.B.C. ch. 36, § 50(8) (1989) (Can.).

24. Fry, *supra* note 16, at 610-11. Explicit and implicit references to paper records in many commercial statutes abound because:

example, by requiring "signed" financing statement's Article Nine implicitly presumes that a tangible document exists for marking by the debtor.²⁵ The Code provides for no means of authenticating documents that are transmitted electronically; although at least one jurisdiction, Iowa, has sought to address this problem administratively.²⁶ The electronic filing system promulgated by the Iowa Secretary of State allows a secured party to receive written authorization from the debtor to transmit a symbol indicating its "intent to authenticate the electronically filed document."²⁷ A similar system could be considered as an alternative to the preferred elimination of the signature requirement.

B. Consider the Use of Federal Taxpayer Identification Numbers

Article Nine's requirement that financing statements include the name of the debtor²⁸ has proved the root of some of its most persistent difficulties. Because financing statements are indexed alphabetically according to the name of the debtor,²⁹ the debtor's name as written becomes the only means by which a particular financing statement may be located.³⁰ Filings are often difficult or impossible to locate because of variations in the spelling or

[T]he drafters, like the rest of the legal profession, could not know how electronic technologies might impact commercial law until there was experience with some commercial applications. It is unremarkable, then, that existing provisions of the UCC are replete with assumptions of the existence of pieces of paper, whether explicit or not.

Id.

25. Under the Code, a document is "signed" if it contains "any symbol executed or adopted by a party with present intention to authenticate a *writing*." U.C.C. § 1-201(39) (emphasis added). Some early cases construed § 1-201(39) quite strictly. *See, e.g., In re Kane*, 1 U.C.C. Rep. Serv. 582, 587 (Bankr. E.D. Pa. 1962) ("signed" means "an actual signature manually produced by a writing instrument in the hand of the signer in direct contact with the document being executed"). Most recent decisions have relaxed the requirements substantially. *See, e.g., In re Save-on-Carpets, Inc.*, 545 F.2d 1239 (9th Cir. 1976) (typewritten signature sufficient); *J.K. Merrill and Son v. Carter*, 702 P.2d 787 (Idaho 1985) (photocopied signature sufficient); *Strevell-Paterson Fin. Co. v. May*, 422 P.2d 366 (N. Mex. 1967) (that financing statement was not signed by seller did not render it defective).

26. IOWA ADMIN. CODE r. 721-6.1 to -6.9 (1990).

27. *Id.* at r. 721-6.5 (1990).

28. U.C.C. § 9-402(1).

29. *Id.* § 9-403(5). *See also* 9 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 9-402:08 (1991).

30. WHITE & SUMMERS, *supra* note 15, § 22-18.

punctuation of a debtor's name,³¹ use of a debtor's trade name,³² changes in the debtor's individual or business name,³³ or the number of debtors filing under particularly common names.³⁴ Whether such financing statements remain effective generally turns on whether the debtor's name, as it appears on the financing statement, is "seriously misleading" under section 9-402(8).³⁵ Courts have exhibited notable disagreement regarding the appropriate application of the "seriously misleading" standard.³⁶

31. See *In re Tyler*, 23 B.R. 806 (Bankr. S.D. Fla. 1982) ("Tri-State Molded Plastics, Inc." misspelled as "Tri-State Moulded Plastics"); *In re Gustafson*, 14 U.C.C. Rep. Serv. 231 (Bankr. W.D. Okla. 1973) ("Gustafson" misspelled as "Gustavsen"); *In re Vaughan*, 4 U.C.C. Rep. Serv. 61 (Bankr. W.D. Mich. 1967) ("Vaughan" misspelled as "Vaught").

32. See *Pearson v. Salina Coffee House, Inc.*, 61 B.R. 538 (D. Kan. 1986) (filing under trade name ineffective), *aff'd*, 831 F.2d 1531 (10th Cir. 1987); *In re Covey*, 66 B.R. 459 (D.N.H. 1986) (same). But see *In re McBee*, 714 F.2d 1316 (5th Cir. 1983) (filing under trade name effective); *In re Glasco, Inc.*, 642 F.2d 793 (5th Cir. 1981) (same). See generally Michael G. Schinner, *Examining the Integrity of a Notice-Filing System: Are Financial Statements Filed Solely Under a Debtor's Trade Name Sufficient to Perfect a Security Interest Under U.C.C. Section 9-402?*, 94 COM. L.J. 175 (1989); Julianna J. Zekan, *The Name Game—Playing to Win Under § 9-402 of the Uniform Commercial Code*, 19 HOFSTRA L. REV. 365 (1990).

33. U.C.C. § 9-402(7) provides that a change in a debtor's name rendering the financing statement "seriously misleading" remains effective for four months after the change. A lender, unaware of a debtor's recent name change, could find itself without priority over a secured party that recently filed under the debtor's old name even though the lender conducted a thorough and reasonable search. For a complete discussion of this unusual provision see Jay Lawrence Westbrook, *Glitch: Section 9-402(7) and the U.C.C. Revision Process*, 52 GEO. WASH. L. REV. 408 (1984).

34. In just such a case involving a title search, the Ninth Circuit United States Court of Appeals held that a county records office "had so many entries under the name of Polk that someone searching diligently under 'Bruce Polk' would be unlikely to notice entries under 'Ray Bruce Polk'." *United States v. Polk*, 822 F.2d 871, 872-73 (9th Cir. 1987).

35. U.C.C. § 9-402(8) (providing that a financing statement is "effective even though it contains minor errors which are not seriously misleading").

36. Courts have generally asked "whether a diligent person, searching under the true name, would have been likely to have discovered the filing." WHITE & SUMMERS, *supra* note 15, § 22-18. What is reasonable turns on a variety of factors. Compare *In re Tyler*, 23 B.R. 806 (Bankr. S.D. Fla. 1982) (filing held ineffective because computer search failed to locate statements containing slight misspelling of debtor's name); *District of Columbia v. Thomas Funding Corp.*, 593 A.2d 1030, 1036 (D.C. App. 1991) (a financing statement filed under the name "Silvermine" fails to give notice of the security interest in the accounts receivable of "Silverline"), with *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990) (use of trade name not seriously

In recognition of the problems associated with the Code's current organizational system, more than a dozen jurisdictions now request debtors' taxpayer identification numbers ("TINs")³⁷ as part of their filing information.³⁸ These states use debtors' TINs as supplemental identifiers to facilitate the search process and report few, if any, problems with the use of such systems. In addition, computer searches for TINs, which consist merely of strings of numbers, are easy to work with and simple to program.

Although the use of TINs as an indexing mechanism has proved successful in a number of jurisdictions, amending Article Nine to require inclusion of TINs as part of the required filing information is a controversial step.³⁹ Individuals who provide TIN information, as well as those who subsequently copy the information to other documents or media, could inadvertently transpose the string of numbers making up the TIN. Guarding against this possibility would require the institution of a potentially costly internal checking procedure to insure accuracy before filing. In addition, confirmation of the TINs provided by debtors may prove difficult as many debtors have multiple TINs⁴⁰ and the merger or acquisition of a corporation may lead to confusion as to the proper TIN to include on a financing statement. Finally, federal privacy laws could prove troublesome if individuals are required to provide their Social Security numbers.⁴¹

In light of these problems associated with converting to an indexing system based on TINs, this Article recommends that the TIN be used as a

misleading); *In re Thriftway Auto Supply, Inc.*, 156 B.R. 300 (Bankr. W.D. Okla.) (identification of debtor corporation in financing statement by its trade name, "Thriftway Auto Stores"—instead of its corporate name, "Thriftway Auto Supply, Inc."—was only a minor error which was not seriously misleading), *aff'd*, 159 B.R. 948 (Bankr. W.D. Okla. 1993); *In re Esparza*, 821 P.2d 1216 (Wash. 1992) (filing held effective despite misspelling because pronunciation of debtor's true name and that of the misspelling were the same).

37. The Internal Revenue Service uses two types of TINs: Social Security numbers to identify individual persons and estates, and employer identification numbers to identify corporations, partnerships, trusts and other non-individual persons. Treas. Reg. § 301.6109-1 (1994).

38. See PEB STUDY GROUP, *supra* note 6, app. VI at 93 (listing states).

39. See GEORGE A. HISERT, REPORT TO THE CALIFORNIA STATE BAR UCC COMMITTEE 13 (1991).

40. A sole proprietor will have two TINs: a social security number and an employer identification number. MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE § 4.02[2] (2d ed. 1991).

41. See 5 U.S.C.A. § 552a note (West 1977) (prohibiting governmental denial of "any right, benefit or privilege . . . because of [an] individual's refusal to disclose his social security account number" unless disclosure is required by federal law). See also *Yeager v. Hackensack Water Co.*, 615 F. Supp. 1087 (D.N.J. 1985) (applying statute).

supplemental identifier to facilitate the search process. In order to protect filing parties, the amended Article Nine could provide that the absence of a TIN, or an error in the TIN, would not be construed to be seriously misleading when determining the sufficiency of a financing statement.

*C. Devise a Uniform System for Time-Noting
Financing Statement Information*

The UCC currently requires filing officers to "mark each statement with a file number and with the date and hour of filing;" a system intended to establish priority between conflicting security interests.⁴² This language, however, and the time-noting systems that derive from it, wholly fail to account for the increase in the volume of filings directed to state filing offices,⁴³ new modes of transmittal of financing statement information,⁴⁴ and variations in filing office procedure in assigning a time to financing statements as they arrive.⁴⁵

Many of the problems with the existing time-noting system arise from the assumption that mailed documents arrive in a sequence which is related to the relative diligence of filers; that is, that documents are marked with the time at the moment of receipt.⁴⁶ Even the most cursory review of the day-to-day operations of state filing offices, however, reveals that this assumption is flawed as mail typically arrives at filing offices daily in one large batch.⁴⁷ In the case of competing documents arriving on the same day or processed in the same batch, many time-noting systems allow the first document randomly selected from the day's mail batch to enjoy an arbitrary priority advantage.⁴⁸

42. U.C.C. § 9-403(4).

43. A recent UCC committee report noted that many filing offices are "besieged by the overwhelming number of filings of financial statements." The Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645, 1715 (1990).

44. *See supra* notes 17-18.

45. *See* PEB STUDY GROUP, *supra* note 6, app. VI at 93 (listing filing office procedures of differing states).

46. A financing statement is "filed" when the statement is either presented for filing accompanied by the appropriate fee or accepted by the filing officer. U.C.C. § 9-403(1). Despite this language, the "time" of the filing is determined by the filing officer's time mark. U.C.C. § 9-403(4).

47. Often, mail within each batch is opened and processed during that day and, in some cases, the next. The time marked on the documents, therefore, is not usually the time of receipt but rather the time at which the document, randomly selected from the mail batch it arrived with, is opened and processed.

48. *See* U.C.C. § 9-403(4).

At least one jurisdiction, Alabama, is seeking to eliminate this arbitrary advantage by assigning a fixed time to all mail received during one day.⁴⁹ This system would fail, however, to provide a means for determining priorities among documents arriving during the same day where one is assigned an earlier file number giving it priority.

Another problem with the current time-noting system is its failure to account for the fact that several jurisdictions now allow filing by FAX, modem, or other forms of electronic transmittal.⁵⁰ Again, the lack of uniform procedures for time marking documents affords different filers arbitrary advantages depending on the filer's mode of transmittal. In filing offices where, for example, times are marked as the mail is opened, a document arriving with the morning mail but opened late in the day may receive a later time mark than that of a document arriving by courier hours after the morning mail.⁵¹ The increased use of new filing technologies will invariably complicate this problem.⁵²

In light of the foregoing, this Article contends that a uniform system for time-noting financing statement information must be developed to ensure consistency in the manner filing officers process documents. The particular system adopted to promote uniformity is not as critical in this regard as the adoption of a uniform system which clearly establishes priority rights.

D. Clarify When Mis-Identification of a Debtor Should Render Filing Ineffective

The lack of uniformity among courts interpreting the debtor name requirements of section 9-402 has caused substantial confusion within the

49. See PEB STUDY GROUP, *supra* note 6, app. VI at 95.

50. See, e.g., IOWA ADMIN. CODE r. 721-6.1 to -6.9 (1990).

51. See PEB STUDY GROUP, *supra* note 6, at 95 (table detailing treatment of hand-delivered filings by jurisdiction).

52. Filing officers are the first to concede that the current time-noting system is inadequate. As Everett Wohlers, the Idaho Deputy Secretary of State, explains: [Section] 9-403 calls for marking a paper document with the date and time of filing. New filing technologies will not conform to the underlying assumption of paper documents. The revised law must . . . specify what constitutes the time of filing of an electronically transmitted image or data stream, e.g. the moment it appears in the computer or FAX machine queue or the time it is reviewed and accepted by the filing office staff. If it is the moment the document appears in the computer or FAX queue, the date and time to be assigned to documents transmitted during non-business hours such as 11 p.m. or weekends must be defined.

Memorandum of Everett Wohlers (November 8, 1992) (in possession of the author).

Article Nine filing system.⁵³ Because Article Nine provides little guidance as to the appropriate form a debtor's name should take,⁵⁴ it forces courts to rely on the "seriously misleading" language of section 9-402(8)⁵⁵ to determine whether a particular expression of a debtor's name supports the financing statement.⁵⁶ In accordance with this provision, courts have, in some circumstances, held financing statements filed under a debtor's misspelled name,⁵⁷ trade name,⁵⁸ or previously used name⁵⁹ sufficient.

53. See generally 9 HAWKLAND, *supra* note 29, § 9-402:14; Zekan, *supra* note 32, at 365-66; Todd D. Penny, Note, *Article 9 Financing Searches: Is a Rose by Any Other Name Still a Rose?*, 51 OHIO ST. L.J. 1415 (1990).

54. According to U.C.C. §9-402(1), a financing statement must include the "name of the debtor." See *supra* notes 28-41 and accompanying text for a discussion. The Code's explanation of the meaning of this phrase is somewhat circular and not particularly informative: "A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners." U.C.C. § 9-402(7). The official comments to U.C.C. § 9-402 show that the drafters included this language to resolve any confusion as to whether additional filings were required under a debtor's trade names. U.C.C. § 9-402 official cmt. 7.

55. "[A] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." U.C.C. § 9-402(8).

56. This widespread reliance on U.C.C. § 9-402(8), which attorneys often raise in last ditch attempts to salvage flawed filing statements, has invariably given rise to conflicting opinions: "A review of [cases applying U.C.C. § 9-402(8)] fails to reveal clear criteria to be used generally in determining whether an error vitiates the filing. In this regard, it is inevitable that different jurisdictions will treat the consequences of errors differently." 9 HAWKLAND, *supra* note 29, § 9-402:14 at 561.

57. See, e.g., *In re Gustafson*, 14 U.C.C. Rep. Serv. 231, 236 (Bankr. W.D. Okla. 1973) (filing effective because misspelled name "publicly accepted" as debtor's name); *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile*, 293 N.Y.S.2d 647, 652 (N.Y. Sup. Ct. 1968) (misspelling of debtor's first name as "Shelia" instead of "Sheila" not seriously misleading), *rev'd on other grounds*, 300 N.Y.S.2d 884 (N.Y. App. Div. 1969); *American City Bank v. Western Auto Supply Co.*, 631 S.W.2d 410, 416-18 (Tenn. Ct. App. 1981) (slight misspelling of a debtor's name did not render financing statement seriously misleading); *In re Esparza*, 821 P.2d 1216, 1220 (Wash. 1992) (filing effective because misspelling pronounced the same as legal name).

58. See, e.g., *In re McBee*, 714 F.2d 1316, 1321 (5th Cir. 1983) (filing under trade name effective); *In re Glasco, Inc.*, 642 F.2d 793, 796 (5th Cir. 1981) (same).

59. It is important to remember that a financing statement filed under a name no longer the legal name of the debtor may, pursuant to U.C.C. § 9-402(7), remain effective even when the change renders the financing statement seriously misleading. Such a financing statement is effective with respect to collateral covered at the time of filing and during the four months after the name change. U.C.C. § 9-407(7).

Considering these decisions, a prudent searcher, in order to increase the likelihood that effective filings will not be missed, must request information on all the names under which the debtor in question may be known to have transacted business.⁶⁰ These additional searches strain the capacity of the filing system, complicate business transactions, and often prove expensive to searchers. The situation is further complicated by the role computers have come to play in the search process; filings which may have been picked up in a manual "hands on" search by a filing officer are often missed in a computerized "exact match" search system.

This Article recommends, therefore, that sections 9-402(1) and (7) be amended to require that financing statements include the correct legal name of the debtor or debtors.⁶¹ Amendments to the Official Comment of section 9-402, as well as administrative regulations promulgated at the state level, could provide effective guidance to secured parties as to the proper course of action in determining the true legal name of the debtor.⁶²

Alternatively, this Article recommends amending the statute, the official comment, or both, to clarify when a "minor error" with respect to the debtor's name provided on the financing statement renders the filing "seriously misleading".⁶³ An amendment could provide, for example, that an erroneous

Courts have upheld the effectiveness of financing statements under such circumstances. *See, e.g., In re Pubs, Inc.*, 618 F.2d 432, 440 (7th Cir. 1980); *In re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665, 668 (S.D. Ill. 1977). *See generally Westbrook, supra* note 33.

60. *See Zekan, supra* note 32, at 446 ("a search should also be conducted in the trade name or names known to the searcher and in the legal name(s) the debtor has used within the previous five years"); PEB STUDY GROUP, *supra* note 6, at 24 ("[T]he attorney ordering the search must . . . for good measure order searches under any likely variations on that name.").

61. Trade names by which a debtor may commonly be known should not operate to put third-parties on notice of a security interest and, therefore, need not be included on the financing statement. The use of a trade name as the debtor's name on a financing statement should render the financing statement ineffective unless use of the trade name is *not* "seriously misleading."

62. For example, the legal names of corporations and partnerships could be obtained by consulting the Secretary of State's office where the debtor is incorporated or does business. A significant problem remains, however, with respect to determining the legal names of a number of entities, including trusts, estates, unincorporated associations, joint ventures and oral or unnamed partnerships, which are not published in a public record. Presently, there is no uniform practice for identifying these entities and the same entity may be identified on competing financing statements in a variety of ways; none plainly "wrong" under existing standards. It is further recommended, therefore, that a consistent methodology by which such entities may be identified be established.

63. *See supra* notes 53-62 and accompanying text.

debtor's name will be considered "seriously misleading" where the financing statement containing the error could not be located through a search conducted in accordance with the practices and technologies employed by the jurisdiction.⁶⁴ Such a rule would remain true to the underlying notice rationale of Article Nine's filing system as financing statements containing minor errors in the debtor's name would still be picked up by a jurisdiction's search system.⁶⁵

E. Extend the Concept of Minor Error

A strict and literal reading of section 9-402(8)'s "minor error" provision suggests the concept of "minor error" applies only to financing statements.⁶⁶ Indeed, courts have held that section 9-402(8) applies only to original financing statements and does not apply to other related filings.⁶⁷ Given that the "minor error" concept was intended to "discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged,"⁶⁸ it is somewhat ironic that the concept itself should be given such a narrow reading.

64. At least one court has relied on this line of reasoning to hold a financing statement ineffective. In *In re Tyler*, 23 B.R. at 810, the court's determination that a debtor name error was "seriously misleading" turned on the fact that a search, conducted by the jurisdiction's filing officer on its computer system, failed to locate the erroneous financing statement.

65. An issue remains as to the point in time at which the standard should be applied: at the time of the initial filing or at the time a third party actually ran a search? This Article urges reforms that require filing officers to disclose their search logic and make it available to the public. This information alone would shed significant light in determining whether a particular manifestation of a debtor's name is seriously misleading to searchers.

66. U.C.C. § 9-402(8) provides that a "financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." *Id.*

67. U.C.C. § 9-402(8) has been held not to apply to termination statements. *See, e.g., In re Kitchin Equip., Inc.*, 960 F.2d 1242, 1246 (4th Cir. 1992). Courts have generally held, however, that continuation statements are so similar to financing statements that U.C.C. § 9-402(8) should apply. *See, e.g., In re Hilyard Drilling Co.*, 840 F.2d 596, 600 (8th Cir. 1988); *In re Kruckenberg*, 160 B.R. 663, 670 (Bankr. D. Kan. 1993); *FDIC v. Victory Lanes*, 158 B.R. 617, 621 (Bankr. E.D. Va. 1993); *In re Adam*, 96 B.R. 249, 251 (Bankr. D.N.D. 1989); *In re Vincent Gaines Implement Co.*, 71 B.R. 14, 16 (Bankr. E.D. Ark. 1986); *In re Edwards Equip. Co.*, 46 B.R. 689, 691-92 (Bankr. W.D. Okla. 1985).

68. U.C.C. § 9-402 official cmt. 9.

Accordingly, this Article recommends that section 9-402(8) be clarified to resolve any unintentional ambiguity with respect to application of the "minor error" concept to filings other than original financing statements. In particular, this Article suggests extending the "minor error" concept to embrace all Article Nine filings. In addition, this Article argues for extension of the minor error concept to embrace all methods of perfecting an Article Nine security interest, including means outside the parameters of the Article Nine filing requirements.⁶⁹

F. Establish Filing Officer Performance Standards

The quality of the service rendered by its filing office substantially affects the efficiency and reliability of a particular jurisdiction's filing system. For example, the time it takes to "process" a financing statement,⁷⁰ so that the statement is reflected in a search prepared by a filing officer, varies dramatically across jurisdictions.⁷¹ This inconsistency, coupled with other performance problems,⁷² has prompted an increasing number of lenders and their attorneys to contract with private search companies to insure a quick turn-around time in the filing and search process.⁷³

69. Courts have split as to whether § 9-402(8) applies to state motor vehicle acts. Compare *In re Otasco, Inc.*, 111 B.R. 976, 990 (Bankr. N.D. Okla. 1990) ("[Section] 9-402(8) applies of its own force only to financing statements . . .") with *In re Microbrand Co.*, 135 B.R. 2, 4 (Bankr. S.D.N.Y. 1991) ("state motor vehicle statutes may be read in light of U.C.C. § 9-402(8)"). There is general agreement that § 9-402(8) applies to errors involving certificates of title. See, e.g., *In re Load-It*, 774 F.2d 1077, 1078 (11th Cir. 1985); *In re Circus Time*, 641 F.2d 39, 44 (1st Cir. 1981); *In re Webb*, 106 B.R. 517, 520 (Bankr. E.D. Tenn. 1989). Another extra-Article Nine means of perfection includes, for example, the Federal Copyright Act, 17 U.S.C. § 205 (West Supp. 1992) (providing for the recordation of copyrights).

70. "Process" time is the time required to record and index the financing statement in the public records and return an acknowledgement to the secured party.

71. PEB STUDY GROUP, *supra* note 6, app. II at 59.

72. See Dwight M. Fawcett & Robert F. Hugi, *Hidden Liens: A Trap for the Unwary*, 106 BANK. L.J. 212, 215 (1989) ("[A]s many as 20 percent of the search reports contain an error of some kind . . ."); *Mobile Enters. v. Conrad*, 24 U.C.C. Rep. Serv. 1031 (Ind. Ct. App. 1978) (search failed to disclose a prior financing statement which caused subsequent secured creditor to accept worthless security interest).

73. Some states have counties which do not perform UCC searches at all. In those states, prospective creditors have to hire a local service company to perform the searches. See THE UNIFORM COMMERCIAL CODE FILING GUIDE (The U.C.C. Guide, Inc.) (1992) (Arkansas—only a few counties perform UCC searches; Georgia—only a few counties perform UCC searches; Kentucky—many counties do not perform UCC

Those who rely on Article Nine's filing system are acutely concerned about the reliability and certainty of the system.⁷⁴ Accordingly, this Article recommends that individual jurisdictions establish and maintain statutory performance standards for filing officers. Already, most states with central indexing systems⁷⁵ have enacted statutory deadlines for the indexing of financing statements.⁷⁶ These deadlines apply not only to original financing statements, but to all related filings including continuations, terminations, and amendments.⁷⁷ The filing officers in those jurisdictions involved in the reform process have reported few, if any, problems with meeting their respective deadlines.

Of course, the relative size of a jurisdiction and its attendant workload will influence the establishment of appropriate standards. Accordingly, the statute should, while establishing minimal expectations of timeliness, allow states to enact performance standards which accommodate the unique demands of each state's filing system. These performance standards should encompass all aspects of the filing process including indexing statements, returning acknowledgments of filed statements, and preparing and returning searches and copy requests.

In the past, state filing officers have expressed concern with respect to these recommendations on several grounds. Adoption of statutory performance standards for filing officers, they have noted, may give rise to a

searches; Maine—only one county performs UCC searches, contact legal service company to search UCC records in all other counties; New Jersey—several counties do not perform UCC searches).

74. Courts have held that the risk of filing office error rests with the party making the search. *See, e.g., In re Skinner*, 22 U.C.C. Rep. Serv. 1286, 1292 (W.D. Mich. 1977) ("secured party does not bear the risk of improper indexing by filing officer"); *In re Flagstaff Foodservice Corp.*, 16 B.R. 132, 135 (Bankr. S.D.N.Y. 1981) (evidence that filing officer received financing statement rendered filing effective despite failure of filing officer to index the statement). *See also* Barkley Clark, *Secured Transactions*, 43 BUS. LAW. 1425, 1476-77 (1988) (discussing filing officer liability for filing errors).

75. *See, e.g.,* GA. CODE ANN. § 11-9-407(3) (Harrison 1994) (effective July 1, 1994) (central indexing system); LA. REV. STAT. ANN. § 10:9-403(4) (West 1993) (master index with Secretary of State); MINN. STAT. ANN. § 336.9-411 (West 1966 & Supp. 1994) (statewide computerized filing system); NEB. REV. STAT. § 9-411(4) (1992) (central index with Secretary of State); N.D. CENT. CODE § 41-09-46 (1983 & Supp. 1993) (central notice system).

76. *See, e.g.,* GA. CODE ANN. § 11-9-407(3) (Harrison 1994) (24 hours); LA. REV. STAT. ANN. § 10:9-403(4) (West 1993) (second business day); NEB. REV. STAT. § 9-411(1)-(2) (1992) (day of receipt); N.D. CENT. CODE § 41-09-46 (1983 & Supp. 1993) (one working day).

77. *E.g.,* NEB. REV. STAT. § 9-414(2) (1992).

new action in tort against a filing officer for failure to comply with the statutory performance standards if, for example, a financing statement is not indexed by the statutory deadline.⁷⁸ This concern may easily be eliminated by including language in the amendments to provide that revised performance standards do not give rise to any liability other than that already existing under state law.⁷⁹ Filing officers have also expressed concern that a lack of financial support from state legislatures may prevent filing offices from attaining these enhanced levels of performance.⁸⁰ These concerns can be mitigated by coupling performance mandates with filing and search fee structures which will adequately fund staffing and equipment needs.⁸¹ Finally, circumstances beyond the control of a filing officer, such as equipment or computer failure, may prevent compliance with these standards. Recognizing the importance of encouraging adoption of emerging information systems technology, this Article recommends that safeguards be established to protect filing officers who are truly unable to perform their duties due to conditions beyond their control.⁸²

78. See *Scot Lad Foods, Inc. v. Secretary of State*, 418 N.E.2d 1368, 1372 (Ohio 1981) ("[T]he negligent performance by one of the state's officers of his ministerial duty may have . . . technically subjected the state to liability even though not actionable by the virtue of sovereign immunity."). An argument can also be made that the failure of the filing officer to live up to her part of the bargain gives the harmed party a contract claim. This argument, however, was denied by the Michigan Supreme Court in *Borg-Warner Acceptance Corp. v. Department of State*, 444 N.W.2d 786, 788 (Mich. 1989).

Liability for errors is already a concern for filing officers. In *Borg Warner Acceptance Corp. v. Secretary of State*, 731 P.2d 301 (Kan. 1987), for example, the Kansas Supreme Court upheld a \$70,622 judgment in favor of a secured party against the Kansas Secretary of State based on "the negligence of [the Secretary of State's] employees in failing to report the existence of a prior security interest in response to a request for a record search . . ." *Id.* at 302.

79. A number of states already limit the liability of filing officers by statute. See, e.g., HAW. REV. STAT. § 490:9-409 (1985) (liable only for "willful negligence"); KAN. U.C.C. ANN. § 84-9-407(3) (Vernon 1983 & Supp. 1992) (liable only for "willful misconduct"); MINN. STAT. ANN. § 336.9-412 (West 1966 & Supp. 1994) (immunity for "errors in or omissions from information provided from the computerized filing system"); NEB. REV. STAT. § 9-411(1) (1992) (liable only for "willful misconduct or gross negligence"). Other non-statutory concepts of governmental immunity may also protect filing officers from liability. See Clark, *supra* note 74, at 1477.

80. In recent years, across-the-board budget cuts have resulted in an inability of some filing officers to satisfactorily perform existing statutory mandates.

81. North Dakota successfully set up a dedicated fund consisting of all filing fees collected, for the express purpose of implementing and maintaining their UCC filing system. N.D. CENT. CODE ANN. § 41-09-42.1 (Smith 1983 & Supp. 1993).

82. A system for excusing a filing officer's inability to meet statutory deadlines

*G. Define the Filing Officer's Authority to
Reject Financing Statements*

Although Article Nine provides that financing statements are effective only when filed in compliance with its requirements,⁸³ it is silent as to whether filing officers have a right or, in fact, a duty to insure such compliance.⁸⁴ Most creditors and attorneys view the role of filing officers as ministerial; the legal effect of documents in their care is a matter for the courts, not filing officers, to discern.⁸⁵ Filing officers, however, while acknowledging their custodial role, also view themselves as responsible for insuring that the documents in their care comply with applicable statutes.⁸⁶ Because of Article Nine's silence on the issue, many filing officers scrutinize financing statements and reject those that fail to meet particular substantive⁸⁷

could be modeled after the system established in Article Four relating to bank deposits. Under U.C.C. § 4-109(a), a collecting bank acting in good faith may "waive, modify, or extend time limits imposed or permitted by this [Act] for a period not exceeding two additional banking days" without penalty. U.C.C. § 4-109(b)(i). Longer delays are excused in the event of "interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment or other circumstances beyond the control of the bank [so long as] the bank exercises appropriate diligence." U.C.C. § 4-109(b)(ii).

83. Financing statements are "sufficient" only if filed in accordance with the formal requirements of U.C.C. § 9-402(1).

84. U.C.C. § 9-403(1) provides that filing is accomplished by "[p]resentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer" U.C.C. § 9-403(1). The official comments indicate that § 9-403(1) was intended to resolve confusion about the time at which a filing gives constructive notice. U.C.C. § 9-403 official cmt. 1. The Code provides no guidance as to when "acceptance . . . by the filing officer" should occur. See U.C.C. § 9-403.

85. Indeed, filing officers in several states, including Colorado, Connecticut, New Hampshire, and New Mexico, make no substantive inquiry into the adequacy of filing. Financing statements are accepted in these states if the debtor's name can be indexed, the filing can be copied or microfilmed, and the filing fee is correctly computed. See THE UNIFORM COMMERCIAL CODE FILING GUIDE, *supra* note 73.

86. Filing officers in many jurisdictions reject filings for a failure to pay required filing fees, omission of appropriate signature or required substantive information, and failure to comply with local filing guidelines. Swift, *supra* note 10, at 286 n.15.

87. Filing officers in New Jersey, for example, will reject financing statements that lack the local address of the debtor or collateral, fail to include the name and title of each signator printed under their respective signatures, or, where a power of attorney signs for a debtor, that fail to attach documentation supporting the signator's power of attorney. THE UNIFORM COMMERCIAL CODE FILING GUIDE, *supra* note 73.

and procedural⁸⁸ requirements. As jurisdictions adopt new information systems technology to process financing statements, the procedural and technical demands placed on filers is likely to cause the rejection rates to rise.⁸⁹ This development is particularly troublesome to those who extend credit nationwide; determining the procedural and substantive filing requirements of one of the over 4300 filing offices nationwide proves a daunting task in the absence of uniform standards.

In order to restore uniformity and remain true to Article Nine's concept of notice filing, this Article recommends that Article Nine be amended to precisely define a filing officer's scope of review. Although there is general agreement that a financing statement should not be accepted if it cannot be properly indexed, the requirements for acceptance of a financing statement should be clearly stated and kept to a minimum.⁹⁰ Filings submitted on forms other than those preferred at a particular filing office should be accepted; although noncompliance with local technical and procedural requirements could be subject to a different fee structure. In the event that the signature requirements are maintained,⁹¹ new guidelines must be adopted to eliminate confusion and nonuniformity regarding the acceptability of facsimile signatures and electronic manifestations of consent.⁹²

88. Oregon filing officers, for example, require that "documents must be printed or written on at least 20 pound opaque bond paper not larger than 8 1/2" by 14", in at least 8 point type." *Id.* Such technical requirements are typical and vary substantially across jurisdictions. *See generally id.*

89. Optical scanners, for example, function properly only when the forms scanned are prepared in accordance with the technical demands of the equipment. Already, jurisdictions using automated filing systems require that filings conform to a complicated list of requirements. *See, e.g.,* IOWA ADMIN. CODE r. 721-6.4 (1990) (detailing requirements of electronically filed financing statements).

90. As detailed above, Article Nine requires that, at a minimum, financing statements must contain the names of both the debtor and secured party, the address of the secured party and be accompanied by the appropriate fee. U.C.C. § 9-402. Follow-up filings, including amendments, continuation statements, and termination statements, must be submitted by the secured party or a successor in interest and should contain the file number of the original financing statement. *See* U.C.C. §§ 9-402(3), 9-403(3), 9-404(1).

91. *See supra* notes 24-27 and accompanying text.

92. Many rejections occur because a filing officer will accept only original documents and original signatures, and will further require that financing statements include corporate titles, powers of attorney, and the debtor's name typed below the signature line. *See* THE UNIFORM COMMERCIAL CODE FILING GUIDE, *supra* note 73 (detailing requirements for California, Illinois, and Maine).

*H. Allow Filing Parties to Designate the Period of Time
the Financing Statement Will Remain Effective*

Financing statements are currently effective for five years from the date the statement is filed⁹³ unless a continuation statement is filed during the six month period prior to expiration.⁹⁴ This system has proved costly to secured parties who must monitor the timing of outstanding financing statements within the six month window. In addition, Article Nine provides that, upon lapse, financing statements may be removed from the index and, if photographic records of statements are kept, destroyed immediately or, if only original documents are kept, maintained for one year following lapse.⁹⁵ The destruction of lapsed filings in this manner has been a matter of concern in bankruptcy proceedings and other related litigation.⁹⁶

To remedy these difficulties, this Article recommends amending Article Nine to allow secured parties to "buy" the term of effectiveness of a financing statement under a system similar to that already in place in British Columbia. Under the British Columbia system, filings are effective for whatever period of time is indicated on the financing statement.⁹⁷ Moreover, Article Nine should permit filing of a financing change statement, similar in function to a U.C.C. continuation statement, at any time during the effectiveness of the financing statement, thereby extending the effectiveness of the financing statement for whatever period is indicated on the change statement.⁹⁸

93. U.C.C. § 9-403(2). A handful of states provide for longer periods of effectiveness. *See, e.g.*, ARIZ. REV. STAT. ANN. § 47-9403(B) (1988 & Supp. 1993) (six years); MD. CODE ANN., COM. LAW I § 9-403 (2) (1992 & Supp. 1993) (twelve years); S.D. CODIFIED LAWS ANN. § 57A-9-403(2) (1988 & Supp. 1993) (five years and sixty days).

94. U.C.C. § 9-403(2)-(3).

95. U.C.C. § 9-403(3). In fact, many filing officers routinely destroy filings and computer records in less than Article Nine's one year requirement.

96. *See, e.g.*, *In re Callahan Motors, Inc.*, 538 F.2d 76 (3d Cir.) *cert. denied sub nom.* *Sterns v. Princeton Bank & Trust Co.*, 429 U.S. 987 (1976); *In re Lyn-Dee Dairy Farm, Inc.*, 97 B.R. at 97 (security interest avoided by trustee where creditor failed to file continuation statement); *In re Vincent Gaines Implement Co.*, 71 B.R. 14 (Bankr. E.D. Ark. 1986); *In re Brickyard, Inc.*, 36 B.R. 569, 575 (Bankr. S.D. Fla. 1983) (creditor's security interest was originally perfected, but became unperfected when he failed to file continuation statement before expiration of five-year period from date of original filing).

97. Personal Property Security Act, S.B.C. ch. 36, § 44(1) (1989) (Can.) ("[A] registration under this Act is effective for the period of time indicated on the financing statement . . .").

98. S.B.C. ch. 36, § 44(2) (1989) (Can.) ("A registration may be renewed by registering a financing change statement at any time before the registration expires.").

As jurisdictions make the transition to computerized filing and indexing systems, the integration of flexible time limits for financing statements into new filing systems should not prove difficult. To the extent that such a change results in increased expenses to filing offices, fees commensurate to the financing statement duration requested by the secured party could be charged.

I. Define the Effect of Filing a Termination Statement

Currently, Article Nine does not specifically state the effect of filing a termination statement.⁹⁹ Clearly, the filing of an effective termination statement renders the financing statement to which it refers ineffective.¹⁰⁰ A significant question remains, however, as to whether a termination statement must be filed at the conclusion of a bankruptcy proceeding in order to reflect a termination of the underlying security interest by the bankruptcy court.¹⁰¹ Accordingly, this Article recommends amending section 9-404 to clarify that the filing of a termination statement operates only to terminate the effectiveness of the filed financing statement.

J. Consider Inclusion of State Statutory Liens and Federal Liens in the Article Nine Filing System

Although Article Nine's uniform system for providing public notice of security interests represents a significant benefit to creditors, a wide variety of property claims, most notably other non-possessory state statutory and federal liens, are not currently part of the UCC's filing system. The development of a uniform system for providing public notice of such liens would prove invaluable to creditors seeking to ascertain the credit worthiness of borrowers or to identify claims having priority over the creditors' own. Of course,

99. See U.C.C. § 9-404. Section 9-404 does require that a termination statement contain a statement "to the effect that [the secured party] no longer claims a security interest under the financing statement." U.C.C. § 9-404(1). Upon presentation of the termination statement to the filing officer, the termination statement is noted in the index, and the original financing statement and related documents are disposed of as if the filing statement had lapsed. U.C.C. § 9-404(2).

100. See, e.g., *J.I. Case Credit Corp. v. Foos*, 717 P.2d 1064, 1066 (Kan. Ct. App. 1986) ("[T]he effect of Case's improvident filing of a termination statement . . . was to [render] Case's security interest . . . at that moment no longer perfected."); *Palatine Nat'l Bank v. Olson*, 366 N.W.2d 726, 731 (Minn. Ct. App. 1985) ("It is clear as a matter of law that the termination statement released only the security interest.").

101. See, e.g., *In re Apollo Travel, Inc.*, 567 F.2d 841 (8th Cir. 1977); *In re IDK Logging, Inc.*, 116 B.R. 788 (Bankr. E.D. Wash. 1990).

despite the desirability of an integrated filing and indexing system, it is not clear whether such a system is feasible. This Article recommends, therefore, that an inventory be taken of the various statutory liens that currently exist at the state and federal level to determine whether their inclusion under the Article Nine filing system is warranted.

CONCLUSION

Central to a successful revision of Article Nine are amendments to the filing system which both promote uniformity and recognize existing and likely technological advances. The possibility of a paperless, efficient, low cost, accurate filing system is within reach. To achieve that goal, and hence a reduction in the enormous transaction costs attendant to the current filing system, all relevant parties must work toward the realization of a new visionary system which is in their best interest.

