Vanderbilt Journal of Entertainment & Technology Law

Volume 25 | Issue 2 Article 2

2023

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ABSTRACT

Films and television series are increasingly being created under a co-production model, making copyright co-ownership a common occurrence in the world of Hollywood content creation. So long as each co-owner's rights are pre-negotiated and specifically delineated in their contracts, the co-owners can rest assured that their rights to the project and any potential derivative works are safe. Or can they?

In the modern entertainment landscape, where tentpole programming and related spinoffs and derivatives are the gold standard of content creation, the proper protection of co-owned copyrights is more important than ever. But tenuous financial outlooks pose a looming, existential threat to the future of copyright co-owners. Will their co-owners declare bankruptcy, and what does that mean for those highly negotiated rights? Is there anything that entertainment executives can do to protect their companies and their content?

This Article argues that security interests are common sense protections for copyright co-owners.

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I. INTRODUCTION

With the past few years having financially rocked virtually all industries, fear of financial woes has rippled through the entertainment industry in an especially dramatic fashion.[1] While rumors of a coming battle have swirled for years, media companies have finally and fully bought into the streaming wars, spending such that the industry holds nearly double the debt ratio of the average communications services sector.[2] Though many believe these companies to be relatively recession-proof[3]—after all, who can live without their Netflix subscription?—steep interest rate hikes,[4] shocking financial reports,[5]

1. *See* Evie Whiting & Ashleigh Stanley, *Security Interests: A Must-Have For Copyright Co-Owners In Uncertain Times (Guest Column)*, HOLLYWOOD REP. (Oct. 26, 2020, 12:44 PM), https://www.hollywoodreporter.com/business/business-news/security-interests-a-must-have-for-copyright-co-owners-in-uncertain-times-guest-column-4082693/ [https://perma.cc/V3CF-73AP]; *see also* Stephen Galloway, *"It Was Getting Out of Control": Media Giants Stare Down "Terrifying" Debt Problem*, HOLLYWOOD REP. (Oct. 9, 2019, 5:15 AM), https://www.hollywoodreporter.com/news/general-news/it-was-getting-control-media-giants-stare-down-terrifying-debt-problem-1246259/ [https://perma.cc/GP68-XQ6Y].

2. Whiting & Stanley, *supra* note 1; *see also* Galloway, *supra* note 1.

3. Galloway, *supra* note 1.

4. *See* Rob Wile, *Fed Raises Key Interest Rate By 0.75% As It Hardens Fight Against Inflation*, NBC NEWS (June 15, 2022, 1:02 PM), https://www.nbcnews.com/business/economy/federal-reserve-raises-interest-rate-june-fight-inflation-rcna33358 [https://perma.cc/4XT4-PMSQ].

5. *See* Julia Horowitz, *Netflix's Collapse Is a Warning Sign For Stocks,* CNN BUS., https://www.cnn.com/2022/04/20/investing/premarket-stocks-trading/index.html [https://perma.cc/48P5-KT6W] (Apr. 20, 2022, 12:08 PM).

ballooning inflation,[6] and signals of an impending recession[7] pose a looming, existential threat.

In a world where content is increasingly birthed within a co-production model, the risk of a co-producing partner's bankruptcy is especially haunting. Take, for example, the industry's classic cautionary tale: Relativity's back-to-back bankruptcies.[8] The assets jointly held by Relativity and its co-producers stalled in waves of bankruptcy proceedings for years,[9] and post-bankruptcy, the co-producers were forced to work with new industry entrants who were naïve to the bespoke requirements and expectations of the entertainment industry.[10] Tales like these play an increasingly realistic bogeyman for many media executives.[11] But what can these executives do to protect their companies and their content?

Enter: security interests.

This Article sets the stage in Part I by describing a typical co-production arrangement and the accompanying contractual agreements. Part II then details what happens to that arrangement during the course of bankruptcy. Part III examines what a security interest is and how it may change that course of events, and Part IV explores how to turn these theoretical concepts into practical applications.

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6. *See* Winston Cho, *Hollywood Aims to Trim Production Costs Amid Inflation Surge, Supply Chain Pain*, HOLLYWOOD REP. (June 27, 2022, 5:00 AM), https://www.hollywoodreporter.com/business/business-news/inflation-costs-production-budgets-hollywood-1235170037/ [https://perma.cc/8BUJ-EHT9].

7. *See* Ben Casselman, *Banking Crises Hangs Over Economy, Rekindling Recession Fear*, NEW YORK TIMES., https://www.nytimes.com/2023/03/17/business/economy/economy-banks-recession.html (March 20, 2023, 8:46 AM) (describing the challenges the U.S. economy has faced in recent months, including supply-chain backlogs, labor shortages, global conflicts, the fastest increase in interest rates in decades, and at the time of this article's writing, a banking crisis.)

8. Tom Corrigan, *Relativity's Second Bankruptcy Gets Off to a Rocky Start*, WALL ST. J. (May 9, 2018, 7:08 PM), https://www.wsj.com/articles/relativitys-second-bankruptcy-gets-off-to-a-rocky-start-1525907333 [https://perma.cc/YMN5-H2PX].

9. *See* Eriq Gardner, *Relativity Bankruptcy: Viacom Objects to Sale of 'Catfish,' 'Fighter* '*2*' *Deals,* HOLLYWOOD REP. (Sept. 22, 2015, 3:19 PM), https://www.hollywoodreporter.com/business/business-news/relativity-bankruptcy-viacom-objects-sale-826389/ [https://perma.cc/63F3-E5XA].

10. *See* David Lieberman & Anita Busch, *The ABCs of Relativity: What Happened in Its Bankruptcy Case, and What's Next?*, DEADLINE (Oct. 9, 2015 2:16 PM), https://deadline.com/2015/10/relativity-media-bankruptcy-case-explain-1201570811/ [https://perma.cc/KM57-22BN].

11. Just ask Viacom (now Paramount Global), HBO, A&E, and Rat Entertainment how they felt about a group of (non-entertainment industry) investment companies stepping into Relativity's shoes on their joint projects. Or, read their many court filings to get a sample. *See, e.g.*, David Lieberman, *Relativity Bankruptcy: Viacom, HBO, A&E, Brett Ratner Want Protection In Sale,* DEADLINE (Sept. 22, 2015, 4:21 PM), https://deadline.com/2015/09/relativity-bankruptcy-viacom-hbo-ae-brett-ratner-protection-sale-1201544432/#! [https://perma.cc/H9VX-LEXH].

II. THE TYPICAL CO-PRODUCTION STRUCTURE

Consider a common co-production structure: two entertainment companies enter into a co-production arrangement to create a television show.[12] One of the companies takes the financier role, supplying the majority of the funds for the production, whereas the other company takes the lead producer role, managing the budget, crew, and boots-on-the-ground creation. The financing partner (Financier) promises to give the lead-producing partner (Producer) the funds needed to do the Producer's job, and the Producer promises to deliver the agreed-upon product. In exchange, both the Financier and the Producer will own 50 percent of the copyright in the resulting show.

Under copyright law, unless they contract otherwise, co-owners can exercise certain rights freely and concurrently.[13] For example, in the structure described above, both the Financier and the Producer may enter into nonexclusive license deals, create derivative works, and even sell their 50 percent interest without permission from the other.[14] The potential for competing exploitation is a significant reason why, at the onset of a co-production arrangement, the two parties will likely spend significant amounts of time and money to negotiate specific contractual rights and obligations with respect to their productions.[15] The resulting co-production agreement delineates integral partnership terms, often including rules about who has the right to initiate sequels or spinoffs, rights to creative control and approval of final cuts, attachments to credits, financial back-ends and accompanying audit rights, and restrictions on assignment.[16]

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12. An easy way to get a sense for how common it is to have these types of jointly produced projects is to pay particular attention to company names listed in the main credits of a television show or motion picture. For ease of discussion, this Article refers only to television productions in Part I, but the concept is equally applicable to film productions.

13. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 6.10–6.11 (2022) [hereinafter NIMMER ON COPYRIGHT].

14. *Id.*

15. *See Garcia v. Google, Inc.*, 786 F.3d 733, 743 (9th Cir. 2015) ("The reality is that contracts . . . govern much of the big-budget Hollywood performance and production world."). *See also* MARK LITWAK, DEALMAKING IN THE FILM & TELEVISION INDUSTRY: FROM NEGOTIATIONS TO FINAL CONTRACTS, Chapter 2: Dealmaking (4th ed. 2016) ("Indeed, most people who work in the industry devote far more time to dealmaking than filmmaking.")

16. *See generally*, MARK LITWAK, CONTRACTS FOR THE FILM & TELEVISION INDUSTRY, Chapter 1: Common Provisions of Entertainment Contracts, Chapter 5: Collaboration (3d ed. 2012)

However, when a bankruptcy threat arises, the co-owners' terms of ownership are supplanted by a unique—and often unexpected and counterintuitive—set of rules.[17]

III. BANKRUPTCY CHANGES EVERYTHING

Many legal understandings and business paradigms are subject to shift during bankruptcy,[18] and copyright co-ownership is no exception. All co-owned property is subject to (think of it as "frozen under") the bankruptcy's "automatic stay,"[19] and during the pendency of the bankruptcy proceedings, agreements surrounding such property may be subject to assumption or rejection[20] and even sale.[21]

A. The Automatic Stay

When a debtor files for bankruptcy, all property of such debtor becomes property of the "bankruptcy estate."[22] Title 11 of the US Code (the "Bankruptcy Code") dictates that an automatic stay goes into effect, halting all actions seeking to collect on the debtor's prepetition debts or to exercise control over property of the bankruptcy estate.[23] The automatic stay is essentially a cease-fire on any rights that a third party—including the Financier—may have on the estate's assets, and it is meant to protect the bankrupt debtor's assets from outside interference in order to maximize the value of the bankruptcy estate.[24] The flip side of that "maximizing value" maxim is that the bankrupt estate *can* continue to enforce contract rights owed to it.[25]

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17. *See infra* Part II; 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.03.

18. *See, e.g.*, *infra* Sections II.A (explaining the ability of the bankruptcy estate to pause its own contract performance while requiring the other party to continue its performance), II.B.3 (explaining the ability of the court to sell a co-owned asset without both owners' permission).

19. *See* 11 U.S.C. § 362.

20. *Id.* § 365(a).

21. *Id.* § 363(h).

22. *Bankruptcy Basics Glossary*, US COURTS, https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary [https://perma.cc/S7TB-HHUC] (last visited Feb. 5, 2023).

23. 11 U.S.C. § 362(a).

24. *See* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.01. *See generally* H.R. REP. NO. 95-595, at 220 (1977). While there are certain police and regulatory powers which are exempt from the automatic stay, they are not likely to be implicated in the hypothetical case under discussion.

25. *See* Mason v. Off. Comm. of Unsecured Creditors, 330 F.3d 36, 43 (1st Cir. 2003) ("Although . . . a prepetition executory contract remains in effect and enforceable against the nondebtor party to the contract, the contract is *unenforceable* against the debtor in possession

Assume that, under this Article's classic co-production example, the Producer files for bankruptcy midway through the production of the show.[26] The automatic stay goes into effect for all assets owned by the Producer, including the show and the Producer's copyright therein.[27] The Financier will be required to continue performing (i.e., paying) as usual, per the terms of the co-production agreement.[28] However, the automatic stay means that the Financier *cannot* force the Producer to continue performing (i.e., producing) so long as the stay is in force and the debtor has not yet rejected the co-production agreement.[29] The Financier and its interest in the show are subject to the bankruptcy judge's discretion as to when—if at all—during the bankruptcy proceedings the automatic stay will be lifted.[30] In addition to the broad frustration that comes from a project in limbo, the automatic stay almost certainly impacts production schedules.[31] Ultimately, timing may force key talent to move on to other projects, and the Producer will likely find it impossible to reunite the cast and crew at a later date without paying substantial "hold" fees (which balloon the budget).[32]

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unless and until the contract is assumed."); *see also, e.g.,* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 532 (1984) ("[F]rom the filing of a petition in bankruptcy until formal acceptance, the [executory contract] is not an enforceable contract [against the debtor in possession] . . . and may never be enforceable again."); United States *ex rel.* U.S. Postal Serv. v. Dewey Freight Sys., Inc., 31 F.3d 620, 624 (8th Cir. 1994) (citing *Bildisco*, 465 U.S. at 532); *In re* Univ. Med. Ctr., 973 F.2d 1065, 1075 (3d Cir. 1992)); *In re* Pub. Serv. Co. of New Hampshire, 884 F.2d 11, 14–15 (1st Cir. 1989); *In re* Alongi*,* 272 B.R. 14´8, 152 (Bankr. D.Md. 2001); *In re* El Paso Refinery, L.P., 220 B.R. 37, 48 (Bankr. W.D. Tex. 1998).

26. This was exactly the relationship between Viacom International Inc. (and its affiliates, including Paramount) and Relativity during Relativity's second bankruptcy filing. According to one of Viacom's court filings, "Viacom [had] a multitude of contracted relationships with [Relativity] covering a wide variety of activities including the production and distribution of television programs and motion pictures." Response of Viacom to Debtor's Motion, ¶ 1, *In re* Relativity Fashion, LLC., No. 15-11989 (Bankr. S.D.N.Y. Aug. 12, 2015).

27. *See* 5 NIMMER ON COPYRIGHT, *supra* note 13 § 19A.02.

28. *See, e.g.*, *Mason*, 330 F.3d at 43.

29. *Id.*

30. *See* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.01. 11 U.S.C. § 362(b), (d), and (f) describe in what situations a third-party creditor may petition the court to lift the automatic stay. However, given that decisions in the bankruptcy court are guided by the principle of maximizing the bankrupt estate's value, it's a rare occurrence when an unsecured third party can convince the court that this principle will be met by taking assets away from the estate. *See id.*

31. *See, e.g.*, Lieberman*, supra* note 11.

32. *See e.g.*, Mark Litwak, *supra* note 15 (defining hold fees in film production).

B. Executory Contracts

The automatic stay is a "mere inconvenience" when compared to the potential demise of a co-production agreement in bankruptcy.[33] Once the bankruptcy proceedings commence, the Bankruptcy Code provides the trustee with the option to "assume" or "reject" executory contracts.[34] Although the Bankruptcy Code does not specifically define the term "executory contract," the US Supreme Court has defined it as a contract "on which performance remains due to some extent on both sides."[35] Specific performance obligations—such as a continuing obligation to account for and pay royalties,[36] a duty to provide notice,[37] a duty to refrain from certain actions,[38] and promises to perform in the future[39]—may be sufficient to render a contract executory, so long as some such obligations remain on each side of the agreement.

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33. *See* Whiting & Stanley, *supra* note 1.

34. 11 U.S.C. § 365(a). While the term "trustee" is used throughout the Bankruptcy Code, including in section 365, the default position in a chapter 11 case is for the debtor to remain in possession such that the debtor (or more specifically, its management) has the duties and powers delineated for a trustee. *Id.* at §1107. Thus, it is typically the debtor's management that is determining what to do with the estate's assets, including the co-production agreement.

35. *Bildisco*, 465 U.S. at 522 (quoting H.R. REP. NO. 95-595, at 347 (1977)); *see In re* Access Beyond Techs. Inc., 237 B.R. 32, 43 (Bankr. D. Del. 1999) (citing *In re* Columbia Gas Sys., Inc., 50 F.3d 233, 244 n.20 (3d Cir. 1995)); *see, e.g.*, *In re* Select-A-Seat Corp., 625 F.2d 290, 292 (9th Cir. 1980); *see also* Vern Countryman, *Executory Contracts in Bankruptcy Law: Part I*, 57 MINN. L. REV. 439, 460 (1973) (explaining the more rigorous "Countryman" analysis, which asserts that an executory contract is one under which "the obligations of both the bankrupt and the other parties are so far unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other," an analysis which would necessitate an assessment of state contract law).

36. *In re* Wegner, 839 F.2d 533, 537 (9th Cir. 1988) (noting that the duty to pay money on one side is a material obligation sufficient to render a contract executory provided that corresponding material obligations exist on the other side).

37. Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1045 (4th Cir. 1985) (noting that the duty to notify the counterparty of certain events, such as commencement of infringement suits or further licensing of intellectual property, was found to be sufficient to render a contract executory provided that corresponding material obligations exist on the other side).

38. *See In re Select-A-Seat Corp.*, 625 F.2d at 292 (finding that a duty to refrain licensing to others (in the context of an exclusive licensing agreement) is sufficient to render a contract executory provided that corresponding material obligations exist on the other side); *see also In re* Am. Magnesium Co., 488 F.2d 147, 152 (5th Cir. 1974) (finding agreement to refrain from action to be executory).

39. AGV Prods. v. MGM, Inc., 115 F. Supp. 2d 378, 388 & n.23 (S.D.N.Y. 2000) (stating that the agreements included (i) the obligation to indemnify and defend future damages or losses, (ii) an underlying promise to pay a certain percentage of distribution revenues, and (iii) a promise of non-assignment to the extent such assignment would conflict with rights granted); *see also In re* Qintex Ent., Inc., 950 F.2d 1492, 1496 (9th Cir. 1991) (finding an executory contract existed

Co-production agreements contain a wide range of promises and obligations, almost always including some mélange of the aforementioned negative covenants and royalty, notice, and audit obligations.[40] Even in the case of television or film projects that have wrapped production, the co-production agreements for such projects include mutual obligations that far outlast principal photography and post-production.[41] Given these broad ongoing obligations, co-production agreements are most often considered executory contracts in bankruptcy, meaning that the bankruptcy trustee is tasked with determining whether to assume or reject such contracts.[42] The bankruptcy trustee may not assume only part of an executory contract and reject the rest; assumption is an all-or-nothing proposition.[43] In other words, the bankruptcy trustee may not pick and choose the co-production provisions that serve the bankruptcy estate best and rid itself of the others.[44] The trustee must instead choose, wholesale, whether to reject the contract (constituting a material breach of the agreement)—which can result in dismantling all of the hotly negotiated contractual rules of engagement—or to assume the contract—thereby choosing to operate within the agreed-upon parameters.[45]

1. Rejection

Many factors could influence the bankruptcy trustee's decision to reject an executory contract.[46] Perhaps the rights have become more valuable than they were when the original co-production deal was struck. Or perhaps the bankruptcy has led the parties into a deteriorating relationship, meaning the Producer is happy to use an escape hatch to exit the relationship. Whatever the motivation, there is a high risk that the bankruptcy trustee will decide to reject the

between distributor and producer where producer contracted to refrain from selling sub-distribution rights to third parties and to indemnify and defend the distributor).

40. *See generally* MARK LITWAK, *supra* note 16.

41. *See e.g.*, *In re Qintex Ent.*, 950 F.2d at 1496 (noting the duty to give accounting and pay royalties for future sales of the film or show, or to indemnify for future potential litigations).

42. Whiting & Stanley, *supra* note 1; *see also supra* note 25.

43. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984).

44. *See*, *e.g.*, *In re* Best Film Video Corp., 46 B.R. 861, 870–71 (Bankr. E.D.N.Y. 1985) ("[Debtor] has further wronged [the other contracting party] by treating the benefits of the contract as available to it but rejecting its burdens.").

45. *See* 11 U.S.C. § 365(a).

46. *See* Countryman, *supra* note 35, at 461.

co-production agreement if there is a perception that a new, more favorable agreement to exploit the underlying rights could be struck.[47]

If the trustee rejects an executory contract during bankruptcy, then the contract is considered breached, meaning the Financier would be entitled to damages for breach of contract.[48] However, the Financier's right to collect such damages will be an unsecured claim,[49] meaning that it will not be paid until after all secured creditors are paid and all administrative expenses of the bankruptcy case are covered. Considering the fact that the average bankruptcy creditor payout is cents on the dollar,[50] the chance of full or even significant partial recoupment for an unsecured claim is low.

Further, if the co-production agreement is rejected, then all of the hotly negotiated contractual guardrails fracture by virtue of the material breach of the agreement.[51] The parties are catapulted back to the bare copyright co-ownership scheme described in Part II: they can each exercise their ownership rights freely and concurrently.[52] Importantly, any restrictions on sale or assignment that were delineated in that contract may not remain intact after the rejection, meaning that the Financier could be locked in a copyright co-ownership with any random third party that purchases the Producer's rights in bankruptcy.[53] This regime effectively pits former co-producing partners (or bankruptcy purchasers) against each other, locking them in "a race to release"[54] and potentially sacrificing product quality in an effort to be the first to market. The potential for market inefficiency and damage to valuable intellectual property generally means that checks will be cut and confidential deals struck to avoid this outcome.[55]

2. Assumption

If, on the other hand, the bankruptcy trustee assumes the co-production contract, then the Producer must cure any interim

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47. *See id.* at 472 n.124 (citing *In re* Philadelphia Penn Worsted Co., 278 F.2d 661 (3d Cir. 1960)).

48. *See* 11 U.S.C. § 365(g); *see also* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.05.

49. *See* Whiting & Stanley, *supra* note 1. However, that changes if the creditor has a perfected security interest. *See infra* Part III.

50. *See, e.g.*, 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.05[C][1] & n.47 (citing 11 U.S.C. §§ 503, 507(a)(1), stating that pre-petition claims are usually paid at far less than 100 cents on the dollar).

51. *See* Whiting & Stanley, *supra* note 1.

52. *Id.*; *see* NIMMER ON COPYRIGHT, *supra* note 13.

53. *See* NIMMER ON COPYRIGHT, *supra* note 13; Whiting & Stanley, *supra* note 1.

54. *See* Whiting & Stanley, *supra* note 1.

55. *See id.*

breaches that have occurred or provide adequate assurance that it will do so,[56] and it must provide adequate assurance of future performance.[57] After assumption of the co-production agreement, the contract is reinstated and becomes fully binding, *except* that Producer may still assign the contract to a third party of its choosing, even if the co-production agreement specifically bans such assignment.[58] So, the assumption of the co-production agreement does not guarantee that the Financier will avoid being bound in co-ownership with a third party it didn't choose or finds creatively unpalatable.[59]

3. Sale of Entire Copyright

In addition to the assumption or rejection of an executory contract, under certain circumstances,[60] a bankruptcy court can also authorize the sale of both the bankruptcy estate's interest *and* the interest of any co-owner in property.[61] In other words, if the bankruptcy judge determines that the best way to maximize value of the bankruptcy estate would be to sell the television show's copyright as a whole, then the bankruptcy court could allow the trustee to sell the Financier's 50 percent ownership out from under them without the Financier's consent.[62] The Financier would have a statutory right to purchase the property "at the price at which the sale is to be consummated."[63] However, if the Financier did not want—or was not able—to purchase such rights, then it would be deprived of the benefit of copyright ownership moving forward, receiving merely the proceeds

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56. 11 U.S.C. § 365(b)(1)(B); *see also* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.05 ("The debtor must also make whole any third parties who suffered losses as a result of the defaults."); Douglas W. Bordewieck, *The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract*, 59 AM. BANKR. L.J. 197, 219 ("For all practical purposes, [the trustee] cannot assume a contract unless the non-debtor party is made whole.").

57. 11 U.S.C. § 365(b)(1)(C).

58. *Id.* § 365(f)(1); *see also* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.05 ("Bankruptcy law generally authorizes the assignment of executory contracts so as to afford the bankrupt estate the greatest flexibility in reorganizing its business and obtaining value for its creditors, even where the agreement expressly prohibits assignment."); Futuresource L.L.C. v. Reuters Ltd., 312 F.3d 281, 286 ("[E]ven if [the agreement] had forbidden [assignment], the bankruptcy court would not have been bound."). Although an assignee would have to provide adequate assurance comfort (i.e. that it can perform in the future), given the nuances inherent in a creative industry, what looks like fully effective adequate assurances to a bankruptcy court may also be a creatively unfulfilling partnership.

59. *See* Whiting & Stanley, *supra* note 1.

60. *See, e.g.*, 11 U.S.C. § 363(h)(1)–(4) (listing the factors used to determine whether the trustee may sell both the estate's interest and the interest of any co-owner in property).

61. *Id.* § 363(h).

62. *Id.*

63. *Id.* § 363(i).

arising from the sale of its own property.[64] While there are well-worn norms in the entertainment industry demonstrating the feasibility of splitting copyright ownership,[65] a bankruptcy court may be convinced to authorize a sale of the whole in order to maximize estate value.

IV. SECURITY INTERESTS CAN HELP

While there is no magic bullet to neutralize all bankruptcy concerns, obtaining a security interest may help a Financier secure its rights and limit the bankruptcy-related fallout discussed in Part II above.[66] The few and simple words that the Uniform Commercial Code uses to define "security interest"—"an interest in personal property" which "secures payment or performance of an obligation"[67]—belie the concept's broad protective abilities, especially in a bankruptcy context. In general, the purpose of a security interest is to give a secured creditor the means to satisfy a debt owed to it in the case that a borrower defaults.[68] Rather than first having to sue to obtain a judgment, the secured creditor can repossess the agreed-upon collateral, sell it, and retain the proceeds up to the amount due on the debt.[69]

In the co-production example, the Financier could obtain a security interest to protect its rights and secure the Producer's obligations under the co-production agreement.[70] In that case, the Financier would have "an interest" in the Producer's 50 percent of the copyright, which would "secure . . . the performance" of the Producer's lead production obligations.[71] If the Producer failed to satisfy those obligations, the Financier would be entitled to take possession of the Producer's 50 percent ownership in the television show's copyright.[72] This provides a strong incentive for the Producer to live up to the bargain it struck, rather than risk the loss of its copyright ownership.

Further, secured interests are afforded increased protection during bankruptcy proceedings.[73] Bankruptcy proceedings must "insure [sic] that the secured creditor receives in value essentially what

64. 1 NIMMER ON COPYRIGHT, *supra* note 13, § 6.12.

65. *See* Whiting & Stanley, *supra* note 1. Copyrights in the film and television industry are frequently co-owned, as ownership of the underlying intellectual property increasingly becomes the baseline cost of obtaining capital. *See id.*

66. *See supra* Part II.

67. U.C.C. § 1-201 (AM. L. INST. & UNIF. L. COMM'N 2021).

68. *See id.*

69. *See* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.04.

70. *See* Whiting & Stanley, *supra* note 1.

71. *See id.*

72. 5 NIMMER ON COPYRIGHT, *supra* note 14, § 19A.04.

73. *Id.*

he bargained for."[74] Specifically, a secured creditor (here, the Financier) is entitled to the "adequate protection" of its secured interest (here, its interest in the Producer's performance under the co-production agreement, as protected by the Producer's 50 percent in the television show's copyright) during the pendency of the bankruptcy proceedings.[75]

In practice, the requirement to provide adequate protection brings the incentives of the bankruptcy trustee in line with those of the secured creditor. Now, rather than simply considering what will maximize the value of the estate, the bankruptcy court and the trustee must consider the interests of the secured creditor.[76] To ensure adequate protection is provided, the Bankruptcy Code redirects any value that the bankruptcy estate would derive from a disposition of secured rights to the secured creditors themselves.[77] For example, if the Producer chose to assume the co-production agreement and subsequently assigned it to a third party, any value the Producer received from such assignment would be shifted to the Financier, rendering that assignment essentially valueless to the Producer.[78] When security interests are involved, the bankruptcy trustee cannot effect its goal of maximizing the value of the estate by contravening the terms of the co-production agreement. Instead, the safeguards illustrated above incentivize the trustee to choose to operate within the bounds of the agreement to achieve the most efficient administration of the estate.

V. PRACTICAL CONSIDERATIONS

When discussing the protective power of security interests, there are, of course, pragmatic issues to be considered. As a threshold matter, one must understand the practical steps to be taken to obtain a security interest. Then, the decision to actually take those steps must be made.

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74. H.R. REP. NO. 95-595, at 338–40 (1977).

75. 11 U.S.C. §§ 361 (defining concept of "adequate protection"), 363(e).

76. *See id.* § 363(e) ("Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."); United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983) ("At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the [debtor's] power to sell, use, or lease property as are necessary to protect the creditor.").

77. 11 U.S.C. § 361.

78. Whiting & Stanley, *supra* note 1. If the co-production agreement were rejected, it is difficult to predict how the results of such a material breach would play out (and on what timing) since these are very bespoke contractual arrangements.

A. How to Get a Security Interest

A contracting party, wary of the dangers of a possible bankruptcy proceeding, may obtain a security interest by negotiating a security agreement with its counterparties, detailing the terms of their arrangement.[79] Specifically, a security agreement should identify the counterparty's secured obligations, the collateral that will secure such obligations, the triggering events that signal the secured obligations have not been met, and any options for cure periods in the event of a default.

In addition to negotiating the terms of the security agreement, a creditor must also "perfect" the lien under applicable law before a bankruptcy court will treat it as secured.[80] The concept of perfection is intended to create a public notice system by which a claimant can establish priority over other future claimants.[81] Perfection of copyrights (one of the most significant components of film assets), for example, is achieved when the proper filings have been made, as dictated by applicable law.[82] If a lien is not properly perfected, then the trustee's "avoidance" powers will nullify any potential benefit outlined in Part III above.[83]

Unfortunately, the perfection of security interests in copyrights is a highly complex arena,[84] and there are no gold stars for attempts. An incorrect statement of the debtor's legal name in the filing[85] or a failure to specifically describe collateral[86] can mean the difference between a properly perfected interest—which is entitled to adequate

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79. 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.04.

80. *See id.*

81. *See id.*

82. *See id.* The proper procedure for the perfection of copyrights is subject to a complex analysis (and is often debated within the legal community). *See also* Thomas M. Ward, *The Perfection and Priority Rules for Security Interests in Copyrights, Patents, and Trademarks: The Current Structural Dissonance and Proposed Legislative Cures*, 53 ME. L. REV. 391, 394–97 (2001).

83. *See* 11 U.S.C. §§ 544(a), 545(2), 547(b).

84. *See* Nat'l Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass'n, 116 B.R. 194 (C.D. Cal. 1990); Aerocon Eng'g, Inc. v. Silicon Valley Bank, 303 F.3d 1120 (9th Cir. 2002); Morgan Creek Prods., Inc. v. Franchise Pictures Ltd. Liab. Co., 389 B.R. 131, 137 (Bankr. C.D. Cal. 2008); *In re* Avalon Software, 209 B.R. 517 (Bankr. D. Ariz. 1997); Broad. Music, Inc. v. Hirsch, 104 F.3d 1163, 1166 (9th Cir. 1997). *See generally* 5 NIMMER ON COPYRIGHT, *supra* note 13, § 19A.04 (discussing the different variables impacting perfection of copyrights, including registration status, federal versus state law, perfection based on type of copyright interest and the date of the copyright's creation).

85. *See* U.C.C. §§ 9-503(a), 9-506(b) (2021).

86. *See, e.g.,* First Midwest Bank v. Reinbold, 591 B.R. 353 (Bankr. C.D. Ill. 2018); Altair Glob. Credit Opportunities Fund (A), LLC v. P.R. AAA Portfolio Bond Fund, Inc., 914 F.3d 694, 710 (1st Cir. 2019).

protection in the case of a bankruptcy[87]—and an unsecured claim—which is at the mercy of the bankruptcy proceedings. It is necessary to account for the intricacies of secured transactions and copyright law to avoid these cryptic pitfalls.

B. Popular Arguments Against Getting Security Interests (and Why They Don't Hold Up)

The value of a security interest in a co-production arrangement is often readily apparent only after a bad experience has occurred. Conversely, the arguments against getting a security interest are easier to discern: it isn't worth the extra money, it is only helpful in the (unlikely) event that things go awry, or it will cause delays. Below, the authors provide counterarguments to each of these claims.

1. "Security Interests Are Not Worth the Extra Cost"

Security interests require extra negotiation, and competent legal counsel is important to avoid procedural pitfalls.[88] Where a significant portion of the collateral is intellectual property, additional considerations are warranted (such as the proper location for perfection) in order to navigate the interaction between state and federal law.[89] The underlying effect is that security interests create more expenses on the front end.[90] But, similar to an insurance policy, security interests serve as a backstop for unexpected contingencies.[91] Any initial costs are far outweighed by the opportunity costs associated with *not* getting a security interest. Consider the cost of negotiating the initial co-production agreement, in addition to the time and effort spent on the co-producing partnership. An unexpected bankruptcy from a producing partner can cause all of those rights to fracture, potentially nullifying all effort that has been put into that production.[92]

87. *See generally* 11 U.S.C. § 363(e).

88. *See supra* Section IV.A.

89. *See generally Nat'l Peregrine*, 116 B.R. 194.

90. *See* Whiting & Stanley, *supra* note 1. The cost of negotiating security documentation is often equivalent to the cost of negotiating the remainder of the documentation, and it is also much more likely to require outside counsel than the negotiation of a co-production agreement with no security interest. *See id.*

91. *See id.*

92. *Id.*

2. "Nothing Bad Will Happen"

Because the entertainment industry is one driven by the power of relationships and a sense of trust in a partner's creative vision, it can be enticing to fall back into the comfortable mindset that "nothing will go wrong." But a multitude of counterexamples[93] expose the unsavory truth: many things can and do go awry, even in the most trusting of partnerships.

More importantly, the underlying premise of this claim—that security interests only matter if things go poorly—is inaccurate. Security interests can provide vitally helpful information at the outset.[94] For instance, through the course of negotiating the security agreement, the party providing the security interest must make certain representations and warranties around other creditors and lien holders in its assets.[95] This allows the party receiving the security interest to gain increased visibility on its co-producing partner's creditworthiness, including where its assets sit and what outside debt it holds.[96] Neither of these factors is self-evident or even easily discovered without self-disclosure. However, both of these factors have an impact on the enforceability of contractual rights both inside and outside of bankruptcy.[97] For instance, if the Producer's assets have all been pledged—via secured transaction—to a third party who ultimately forecloses on those assets, then the Financier's own potential recourse against the Producer is adversely affected.[98] However, the knowledge gained through the negotiation of security interest documentation—and the risk allocation provided through the representations, warranties, and indemnities provided by the Producer—can give the Financier comfort that its partner actually has the means to accomplish what it is being asked to accomplish under the terms of the co-production agreement.

3. "Obtaining a Security Interest Will Cause Delays"

In a world run by production schedules, release dates, and delivery deadlines, it's no surprise that timing is always a concern.

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93. Annapurna's narrow avoidance of bankruptcy, Distribber's surprising downfall, and Relativity's two bankruptcies in three years are just a few examples. *See* Whiting & Stanley, *supra* note 1.

94. *See* ALAN S. GUTTERMAN, BUS. TRANSACTIONS SOLS. § 124:120 (2023).

95. *See id.*

96. *See id.* § 124:121.

97. *See* Whiting & Stanley, *supra* note 1; JONATHAN P. FRIEDLAND, STRATEGIC ALT. FOR & AGAINST DISTRESSED BUS. § 1:5 n.1 (2023).

98. *See generally* FRIEDLAND, *supra* note 96.

Adding another line to the list of documents required can be an unwelcome suggestion. However, by incorporating the security interest concept into a company's production contract templates, the security interest becomes part of the required process, allowing companies to reduce the perceived amount of time spent negotiating an "extra" item.[99]

Furthermore, the process of obtaining a security interest can actually reduce the overall risk of delays in the future. As mentioned above, negotiating security interests can force further information on a partner's outside debts to light.[100] By learning of those debts earlier, the company can address them at the onset of its relationship with its partner, thereby reducing future turbulence which may have otherwise occurred at inopportune times (e.g., during the ultrasensitive production schedule or in the days leading up to a hard delivery date deadline).

VI. CONCLUSION

Bankruptcies of entertainment companies present a multivariable Venn diagram of unsettled legal circles. The complex intersection of copyright co-ownership, contracts, secured transactions, and bankruptcy is made that much more complex by the loosely structured, precedent-flouting nature of the entertainment business.[101] Each movie and television project is unique, and each written agreement—to the extent one is timely arranged—reflects those idiosyncrasies. Though these complexities demand unique attention, incorporating more secured interests in financing agreements will provide more protection for the entertainment assets that companies work so tirelessly to create.

99. Whiting & Stanley, *supra* note 1.

100. *See supra* notes 93–96 and accompanying text.

101. *See generally supra* Parts I, II, & IV.