Publicity in secured transactions law: Towards a European public notice filing system for non-possessory security rights in movable assets?

Hamwijk, D.J.Y.

Citation for published version (APA):
Hamwijk, D. J. Y. (2014). Publicity in secured transactions law: Towards a European public notice filing system for non-possessory security rights in movable assets?

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
## CONTENTS SUMMARY

*Acknowledgments*

*Abbreviations*

### CHAPTER 1: MAIN QUESTION, RESEARCH APPROACH AND METHODOLOGY

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introducing the subject</td>
<td>1</td>
</tr>
<tr>
<td>B. Main question and brief outline of research</td>
<td>15</td>
</tr>
<tr>
<td>C. Overview of research: extended</td>
<td>16</td>
</tr>
<tr>
<td>D. Research approach</td>
<td>19</td>
</tr>
<tr>
<td>E. Methodology and scope</td>
<td>25</td>
</tr>
</tbody>
</table>

### PART I

**SCRUTINIZING THE NEED FOR PUBLICITY**

### CHAPTER 2: INTRODUCTION TO THE PUZZLING CONCEPTS OF PUBLICITY AND POSSESSION

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>35</td>
</tr>
<tr>
<td>2. Two approaches to justify the need for publicity</td>
<td>37</td>
</tr>
<tr>
<td>3. The traditional means to make public: (the transfer of) possession</td>
<td>38</td>
</tr>
<tr>
<td>4. Analyzing the relationship between publicity and possession</td>
<td>40</td>
</tr>
<tr>
<td>5. Reasons for confusion and possible explanations</td>
<td>46</td>
</tr>
<tr>
<td>6. Concluding remarks</td>
<td>53</td>
</tr>
</tbody>
</table>

### CHAPTER 3: AN EXAMPLE OF NON-PUBLIC FILING: DUTCH SECURED TRANSACTIONS LAW

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>57</td>
</tr>
<tr>
<td>2. Dutch legal rules on secured transactions law</td>
<td>57</td>
</tr>
<tr>
<td>3. Dutch legal practice of lenders and trade creditors</td>
<td>95</td>
</tr>
</tbody>
</table>

### CHAPTER 4: ANALYSIS OF THE CONSEQUENCES OF A NON-PUBLIC FILING SYSTEM

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>117</td>
</tr>
<tr>
<td>2. Unsecured creditors</td>
<td>117</td>
</tr>
<tr>
<td>3. The genuine interest of unsecured (trade) creditors and effective ways to protect them</td>
<td>132</td>
</tr>
<tr>
<td>4. Secured creditors</td>
<td>139</td>
</tr>
<tr>
<td>5. The consequences for debtors</td>
<td>148</td>
</tr>
<tr>
<td>6. Conclusions</td>
<td>150</td>
</tr>
</tbody>
</table>

### PART II

**AN EXAMINATION OF THE U.S. APPROACH: ART. 9 UCC**

### CHAPTER 5: U.S. SECURED TRANSACTIONS LAW WITH REGARD TO MOVABLE ASSETS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>157</td>
</tr>
<tr>
<td>2. The creation of an enforceable security interest and legal consequences</td>
<td>167</td>
</tr>
<tr>
<td>3. Perfection of a security interest in movable assets</td>
<td>189</td>
</tr>
</tbody>
</table>
CHAPTER 6: EXAMINATION OF THE ART. 9 UCC NOTICE FILING SYSTEM

1. Introduction ....................................................................................................................... 263
2. The Art. 9 UCC approach to proprietary conflicts .......................................................... 264
3. The Art. 9 UCC approach to fraudulent antedating ......................................................... 314
4. Conclusions ...................................................................................................................... 321

PART III
TOWARDS A EUROPEAN PUBLIC NOTICE FILING SYSTEM?

CHAPTER 7: FROM ART. 9 UCC TO BOOK IX DCFR AND BEYOND

1. Introduction ....................................................................................................................... 331
2. Can we do better, i.e. towards a European equivalent? .................................................... 334
3. Evaluation of publicity aspects of Book IX DCFR ........................................................... 338
4. Some proposals for further improvement ..................................................................... 362
5. Conclusions ...................................................................................................................... 372

CHAPTER 8: SYNOPSIS (SUMMARY)

1. Part I: Scrutinizing the need for publicity ................................................................. 379
2. Part II: An examination of the U.S. approach: Art. 9 UCC ....................................... 381
3. Part III: Towards a European public notice filing system? ..................................... 384

Bibliography
Table of cases
Index
## CONTENTS

**Acknowledgments**

**Abbreviations**

### CHAPTER 1: MAIN QUESTION, RESEARCH APPROACH AND METHODOLOGY

A. Introducing the subject ................................................................................................................................. 1  
1. The status quo: a fragmented European secured transactions law with regard to movable assets ........................................ 1  
2. A harmonization attempt to overcome the diversity: Book IX DCFR ........................................................................... 4  
3. The trend towards adopting public (notice) filing for movable assets ................................................................................. 7  
4. Public filing adhering to the principle of publicity ......................................................................................... 10  
5. The development of European secured transactions law ................................................................................. 13  

B. Main question and brief outline of research ......................................................................................................... 15  

C. Overview of research: extended ......................................................................................................................... 16  
1. Part I: Scrutinizing the need for publicity ......................................................................................................................... 16  
2. Part II: An examination of the U.S. approach: Art. 9 UCC ................................................................................................. 18  
3. Part III: Towards a European public notice filing system? ................................................................................................. 18  

D. Research approach ............................................................................................................................................... 19  
1. Object of research: ‘third parties’ and the debtor ................................................................................................................. 19  
2. Cost-benefit analysis (‘CBA’) ............................................................................................................................................... 22  
   2.1. Yardstick I: effectiveness (problem-solving approach) ................................................................................................. 24  
   2.2. Yardstick II: cost-efficiency ............................................................................................................................................... 25  

E. Methodology and scope ........................................................................................................................................ 25  
1. The role of comparative law ............................................................................................................................................... 25  
2. The (limited) role of empirical research and source materials used ......................................................................................... 26  
3. Matters of scope ............................................................................................................................................................... 27  

### PART I

**SCRUTINIZING THE NEED FOR PUBLICITY**

### CHAPTER 2: INTRODUCTION TO THE PUZZLING CONCEPTS OF PUBLICITY AND POSSESSION

1. Introduction .......................................................................................................................................................... 35  
2. Two approaches to justify the need for publicity ................................................................................................. 37  
3. The traditional means to make public: (the transfer of) possession ............................................................................. 38  
4. Analyzing the relationship between publicity and possession ..................................................................................... 40  
   4.1. When you think that ....................................................................................................................................................... 40  
   4.2. ... you are almost there ............................................................................................................................................... 43  
   4.3. ... you find yourself right back at the beginning ........................................................................................................ 44  
5. Reasons for confusion and possible explanations ..................................................................................................... 46  
   5.1. ‘Possession’: a multi-headed dragon ........................................................................................................................... 46  
   5.2. Justifications for publicity .............................................................................................................................................. 47  
   5.3. The roots of the modern publicity principle and its development .................................................................................. 50  
6. Concluding remarks ............................................................................................................................................... 53  

### CHAPTER 3: AN EXAMPLE OF NON-PUBLIC FILING: DUTCH SECURED TRANSACTIONS LAW

1. Introduction .......................................................................................................................................................... 57  
2. Dutch legal rules on secured transactions law ....................................................................................................... 57  
   2.1. General introduction ................................................................................................................................................... 57