Note on Attachment “By Control”

As it turns out, the question whether “control” constitutes not only an alternative means of achieving “perfection” (alternative to “filing”), but also an “alternative” means of achieving “attachment”, is “it depends”. On what? On how one chooses to describe the “ordinary” means of attachment to which “attachment by control” is supposed to be an alternative. If one thinks of the ordinary means of attachment as simply “getting a security agreement”, then “control” is NOT an alternative. Look at UCC § 9-203(b)(3)(D), which provides for attachment where the secured party “has control [of the collateral] . . . pursuant to the debtor’s security agreement”. Clearly, then, there must be a “security agreement” even when attachment takes place “by control”. But if, on the contrary, one thinks of the ordinary means of attachment as “getting an authenticated security agreement”, then, yes, “control” IS an alternative. Note that UCC § 9-203(b)(3)(D), unlike UCC § 9-203(b)(3)(A) (which describes “ordinary” attachment), does not say that the “security agreement” must be authenticated. Thus, in the case of control, though it is true that a security agreement is required, it is not true that this security agreement must be authenticated. To the contrary, it could, as Professor Kilborn’s précis correctly notes, be “oral” or perhaps even “tacit” under extraordinary circumstances.