UIC Law Review

Volume 18 | Issue 3 Article 2

Spring 1985

Cable Television Financing: Perfecting the Security Interest, 18 J. Marshall L. Rev. 593 (1985)

Diane Karp

CABLE TELEVISION FINANCING: PERFECTING THE SECURITY INTEREST

DIANE KARP*

The cable television industry is booming. Approximately 28% of American households owning a television set subscribe to cable television.[1] Current plans for industry expansion indicate that the number of subscribers may double in the next decade.[2] Westinghouse Electric Corporation,[3] for example, recently won the franchise to build and operate two cable systems in Northwest Chicago. Construction of these systems is expected to cost $328 million, making the Westinghouse systems the most costly venture in the cable television industry to date.[4]

Obviously, financing will be necessary to fund the construction of cable systems and to provide working capital. Lenders willing to finance these systems are likely to realize substantial profits in the form of interest and fees. Despite the potential for a significant return on their money, however, lenders will unlikely be able to finance cable television systems unless their loans are secured. When the loans are secured by liens on the assets of the cable system, the problem arises as to how to perfect the security interests in these assets.

The law is unclear regarding how to perfect a security interest in the assets of a cable television system. This article will discuss lenders' options for perfecting security interests in the tangible assets[5] of a cable television system under the Illinois Uniform Commercial Code (Illinois Code).[6] Because Illinois, with only minor variations, has adopted the model Uniform Commercial Code, the

* J.D., DePaul College of Law, 1979; B.A., Paterson State College, New Jersey, 1962; Associate, Mayer, Brown & Platt, Chicago, Illinois.

1. Klein & Fleming, *Lending to the Cable Television Industry*, JOURNAL OF COMMERCIAL BANKING, 27, 27-37 (July 1982).

2. *Id.*

3. Westinghouse will form an Investment Partnership to finance the construction of the systems. This investment partnership will be the general partner of two operating partnerships.

4. Wall St. J., March 30, 1984, at 1.

5. Along with the tangible assets of the cable system, the intangible assets, such as good will, can be used as collateral in a secured transaction.

6. ILL. REV. STAT. ch. 26, § 9-101 (1983).

analysis here also applies to those states which have adopted the 1972 Uniform Commercial Code.

Under current Illinois law, lenders have not been able to determine with any certainty how to perfect security interests in the tangible assets of a cable television system. As a result, lenders are compelled to make excessive precautionary filings in an attempt to insure that their security interests are perfected. Because of the uncertainty as to where to file to perfect the security interests, the Code has failed to achieve one of its primary purposes, that of providing a uniform, reliable method of perfecting security interests. This failure can be rectified by revising the definition of "transmitting utility"[7] to specifically include a cable television system.

The tangible assets of a cable television system are the various pieces of equipment used in the reception, processing and transmission of electronic signals. For the purposes of this article, it is assumed that the major tangible assets include the head-end equipment,[8] feeder cables,[9] housedrops,[10] amplifiers,[11] and decoders.[12] Additionally, the physical assets include the office, and service and studio equipment.[13]

PERFECTION OF A SECURITY INTEREST UNDER THE ILLINOIS UNIFORM COMMERCIAL CODE

The procedures required under the Illinois Uniform Commercial Code[14] to perfect a security interest in collateral are determined by the classification of that collateral. The classification, in turn, determines where the financing statement perfecting the security interest in that type of collateral should be filed.[15] Generally,

---

7. *See infra* note 19 and accompanying text.

8. The head-end equipment receives electronic signals and transmits them to feeder cables. Head-end equipment includes, among other pieces of equipment, one or more "space dish" stations and antennas. The head-end equipment is located on real property owned or leased by the cable system company. Weiss & Benjamin, *Cable Television Secured Financing*, 100 BANK L.J. 165, 166 (1983).

9. Feeder cables distribute signals received from the head-end equipment to the area being serviced by the cable system. These cables are generally strung along utility poles or underground public utility casements. *Id.* at 167.

10. Housedrops are stations' connects which are laid underground and carry signals received from the feeder cables into the individual subscriber's home. *Id.*

11. Amplifiers are placed at various points along the cable to assure clear signals. *Id.*

12. Decoders unscramble the electronic signals before these signals reach the subscriber's television screen. They are leased to the subscriber. *Id.*

13. *Id.*

14. ILL. REV. STAT. ch. 26, § 9-101 (1983).

15. *Id.* at § 9-401. This section provides in part as follows:

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

a security interest in non-fixture collateral is perfected by filing centrally with the Secretary of State, while fixture[16] collateral requires local filings.[17] The Illinois Code, however, has special rules pertaining to the perfection of security interest in the collateral of a transmitting utility. The Code provides that:

> Notwithstanding [subsection 401(1)] . . . the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State. This filing constitutes a fixture filing . . . as to the collateral described therein which is or is to become fixtures.[18]

Thus, the threshold question in determining how to perfect a security interest in the assets of a cable television system is whether the cable television system is a transmitting utility. If it is, the distinction as to fixture and non-fixture collateral becomes unnecessary because one filing in the office of the Secretary of State perfects the security interest in all the collateral.

IS A CABLE TELEVISION SYSTEM A TRANSMITTING UTILITY?

Article 9 of the Illinois Code defines a transmitting utility as "any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the distribution, transmission, or the production and transmission of electricity, steam, gas or water, or the provision of sewer service."[19] No court, in either Illinois or a foreign jurisdiction, has addressed the issue of whether a cable television system is a transmitting utility.

The Illinois Code definition of a transmitting utility is similar to the Illinois statutory definition of a public utility in the Public Utilities Act.[20] The public utilities definition, however, refers to the "transmission of telegraph or telephone messages"[21] rather than the transmission of "electric or electronic communications."[22]

. . .

(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.

16. "[G]oods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." ILL. REV. STAT. ch. 26, § 9-313 (1983).

17. *Id.* at § 9-401. For the text of this statute, see *supra* note 15.

18. *Id.* at § 9-401(5).

19. *Id.* at § 9-105(1)(n).

20. ILL. REV. STAT. ch. 111 2/3, § 10.3(b) (Supp. 1984).

21. *Id.*

22. ILL. REV. STAT. ch. 26, § 9-401 (1983).

Because the definition of a transmitting utility in the Illinois Code is broader, it would include utilities which are not included in the Public Utilities Act definition.

An Illinois Code comment states that the special provisions pertaining to transmitting utilities were added because such entities have special problems regarding filing.[23] The comment indicates that transmitting utilities are subject to special filing rules to eliminate numerous local filings necessary under the usual filing rules of section 9-401 for the fixture collateral of a debtor which might be located in many places throughout the state. Specifically, the Code comment provides that "[a]bsent the special rule . . . fixture filings would be required in every county in which the fixtures were located—a cumbersome and expensive procedure."[24]

The Illinois Supreme Court has ruled that for purposes of regulation by the State Commerce Commission, a cable television company is not a public utility.[25] In *Illinois-Indiana Cable Television Association v. Illinois Commerce Commission*,[26] the Illinois Supreme Court construed the Public Utilities Act's definition of a public utility. The Public Utilities Act defines a public utility as a "corporation, company, association, joint stock company or association, firm, partnership or individual . . . that owns, controls, operates or manages . . . any plant, equipment or property used . . . in connection with . . . the transmission of telegraph or telephone messages. . . ."[27] The Illinois Supreme Court relied on decisions of the Minnesota[28] and California[29] Supreme Courts in holding that

23. ILL. ANN. STAT. ch. 26, § 9-401 (Smith-Hurd 1983) (Illinois Code comment to Subsection 5).

24. *Id.* The Illinois Code comment also refers to the 1972 Official Code comment 7 to section 9-401. The official comment 7 explains that the usual filing rules are not particularly suitable for a public utility. It also notes that many pre-Code statute provide special filing rules for railroads and other public utilities to avoid having to file in every county in which such debtors owned property. U.C.C. § 9-401 (comment 7) (1972).

25. Illinois-Indiana Cable Television Ass'n v. Illinois Commerce Comm'n, 55 Ill. 2d 205, 302 N.E.2d 334 (1973). The Commerce Commission had originally determined that the cable system was a public utility which was subject to regulation. The Commission found that " 'telephone' service within the meaning of the statute has come to mean a total telecommunications service . . . ." *Id.* at 208, 302 N.E.2d at 335-36. The Illinois Supreme Court, however, concluded that the words in the statute should be given their "plain and commonly ascribed meanings." *Id.* at 220, 302 N.E.2d at 342. *See also* Television Transmission, Inc. v. Public Utils. Comm'n, 47 Cal. 2d 82, 88, 301 P.2d 862, 865 (1956) ("telephone, telegraph, radio, and television corporations are each different from the other. . .").

26. 55 Ill. 2d 205, 302 N.E.2d 334 (1973).

27. ILL. REV. STAT. ch. 111 2/3, § 10.3 (1983).

28. Minnesota Microwave, Inc. v. Public Serv. Comm'n, 291 Minn. 241, 190 N.W.2d 661 (1971). In *Minnesota Microwave, Inc.*, the court considered whether closed-circuit microwave facilities for the transmission of educational television signals were within the jurisdiction of the Public Service Commission. The

the "transmission of telegraph or telephone messages" did not include the transmission of television signals.[30]

Even though an entity transmitting television signals is not considered a public utility for purposes of regulation by state administrative agencies, it does not necessarily follow that it can not be construed as a transmitting utility for purposes of Article 9. First, the Illinois Code definition of a transmitting utility[31] is broader than the statutory definitions of public utility as construed by the state courts.[32] Second, in construing the statutory definition of a public utility, the Illinois Supreme Court expressed reluctance to expand the jurisdiction of the State Commerce Commission to encompass the entire public telecommunications field without any evidence that the legislature intended the expansion.[33] A finding, however, that a cable television system is a transmitting utility under the Illinois Code would foster one of the Code's specifically enunciated policies, the elimination of multiple filings.[34]

---

court determined that the system could not be characterized as a telephone company as within the purview of the state statute. *Id.* at 250, 190 N.W.2d at 667. The court placed special import on the absence of two-way communication and on the various statutory regulations which would apply to the system if it was to be regulated by the Commission. *Id.* at 247-49, 190 N.W.2d at 666-67.

29. Television Transmission, Inc. v. Public Utils. Comm'n, 47 Cal. 2d 82, 301 P.2d 862 (1956). This case involved a community television antenna which furnished service to approximately 950 television sets. *Id.* The subscribers to the service requested the Public Utilities Commission to make an investigation regarding their complaints about the service. The Commission determined that the service constituted a telephone corporation and was subject to regulation. *Id.* at 84, 301 P.2d at 863. The California Supreme Court found that the service was not a telephone corporation. According to the court, "the service by television as well as radio is more akin to that of music halls, theaters, and newspapers than it is to that of either telephone or telegraph corporations." *Id.* at 88, 301 P.2d at 865.

30. *Illinois-Indiana Cable Television Ass'n*, 55 Ill. 2d 205, 221, 302 N.E.2d 334, 342 (1973). In reaching its decision, the court concluded that"it is the language of the statute involved which determines whether cable television is subject to its terms." *Id.* at 219, 302 N.E.2d at 341. In support of this conclusion, the court cited two cases, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) and Springfield Television, Inc. v. City of Springfield, 462 F.2d 21 (8th Cir. 1972). Both of these decisions rested upon the statutory language involved in the statute defining a public utility. *See also* Note, *Cable Television In Illinois: The Problems of Concurrent Jurisdiction*, 50 CHI-KENT L. REV. 119 (1973) (discussion of *Illinois-Indiana Cable Association*).

31. ILL. REV. STAT. ch. 26, § 9-105(1)(n) (1983). For the text of section 9-105, see *supra* text accompanying note 19.

32. *See supra* note 30.

33. *Illinois-Indiana Cable Television Ass'n*, 55 Ill. 2d at 221, 302 N.E.2d at 342. ("If the jurisdiction of the Commission . . . is to be expanded . . . that should be done by the legislature . . . .").

34. Absent a finding that a cable television system is a transmitting utility, fixture filings would be a "cumbersome and expensive" procedure of filing in every county in which the fixtures were located, regardless of how far-flung the utility or collateral may be. ILL. ANN. STAT. ch. 26, § 9-401 (Smith-Hurd 1983) (Illinois Code comment to Subsection 5).

The Illinois legislature has expressed a desire to eliminate the need for numerous filings to perfect a lien in transactions not involving the Illinois Code. A recently enacted statute provides that a mortgage executed by a public utility constitutes a valid lien on both the real and personal property described in the mortgage.[35] Similarly, a finding that a cable television system is a transmitting utility would permit a party to perfect its security interest in the personal property assets of that utility without numerous local filings. While it is unknown whether an Illinois court would hold that a cable television system is a transmitting utility, the plain language and purposes of Article 9 mandates this finding.

ARE THE TANGIBLE ASSETS OF A CABLE TELEVISION SYSTEM FIXTURES?

Because it is unknown whether a cable television system will be considered a transmitting utility, a security interest in the tangible assets of the cable television system could be perfected by properly classifying the assets and filing the financing statements in the appropriate place. The courts, however, have not addressed the proper classification of the tangible assets of a cable television system under the Uniform Commercial Code.

Article 9 of the Illinois Code provides that goods are fixtures "when they become so related to particular real estate that an interest in them arises under real estate law."[36] Article 9 neither precisely defines the term nor states any tests to determine when goods become fixtures. The few Illinois cases which concern the issue of when goods become fixtures are not helpful to determine whether the assets of a cable television system are fixtures. The cases were factually dissimilar, contained very little analysis to support their conclusions, or were not decided under Article 9.[37]

---

35. ILL. REV. STAT. ch. 95, § 51 (Supp. 1984). This section provides that:

> Any mortgage heretofore or hereafter executed by a public utility (as defined in Section 10 of "An Act concerning Public Utilities," approved June 29, 1921, as amended), or by any corporation that may own or operate, within the state, any plant, equipment or property that shall be used for or in connection with the conveyance of oil or gas by pipe line, in the manner provided for the execution of mortgages upon real estate, may include both real and personal property; and any mortgage heretofore or hereafter executed by such public utility . . . shall constitute a valid lien upon all and every part of the property of the mortgagor . . . and such mortgages shall be governed by the provisions hereinafter stated for mortgages of real property.

Id.

36. ILL. REV. STAT. ch. 26, § 9-313(1)(a) (1983). *See generally* R. KRATOVIL & R. WERNER, REAL ESTATE LAW 18-25 (1983) (discussion of general law regarding fixtures).

37. *In re* Carlyle, 22 B.R. 743 (Bankr. C.D. Ill. 1982) (cash register determined not to be a fixture under the Illinois Commercial Code); Rowlen v. Her-

Commentators disagree as to how to define the term fixture for purposes of Article 9. One commentator asserts that a fixture should be defined solely by reference to common law or real estate law.[38] In contrast, Professor Gilmore contends that the common law tests for fixtures are not controlling in an Article 9 context.[39] He notes that under common law, the damage caused by removal of an item is one factor to be considered in determining whether it a fixture. Section 9-313(8) permits removal of an article regardless of the damage the removal will cause, provided reimbursement is made for that damage.[40] Because removal of an item is an irrelevant consideration under Article 9, the common law approach is not dispositive.

The courts have not enunciated the tests to determine when a chattel is a fixture under the Uniform Commercial Code. In the absence of a statutory test, a court would most likely apply the common law tests to determine whether a chattel is a fixture in an Article 9 context. At least one court has, in fact, adopted this approach. A California court applied the common law tests of fixtures to determine whether a water heater was a fixture for purposes of Article 9.[41] It seems likely that an Illinois court addressing the issue of whether the assets of the cable television system are fixtures would follow the example of California and apply the common law tests.

The common law tests for determining whether a chattel has become a fixture were enunciated in *Teaff v. Hewitt*.[42] These tests have been followed by a majority of courts.[43] Under *Teaff*, the fol-

---

man, 129 Ill. App. 2d 45, 262 N.E.2d 739 (1970) (abstract only; partition proceeding involving an air conditioning system); Davis Store Fixtures, Inc. v. Cadillac Club, 60 Ill. App. 2d 106, 207 N.E.2d 711 (1965) (tavern equipment held to be personality).

38. Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L.R. 1319 (1962). The author asserts that the uncertainty regarding when an article constitutes a fixture poses a dilemma at the time a filing must be made to protect a security interest. Mr. Coogan provides some suggestions for clarifying the fixture provisions of the Code.

39. G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 30.4 (1965).

40. ILL. REV. STAT. ch. 26, § 9-313(8) (1983) (the secured party "must reimburse" . . . for the cost of repair").

41. Arlett v. Household Fin. Corp., 22 Bankr. 732 (E.D. Cal. 1982). According to the court there are four tests to be applied to determine whether the article is a fixture. *Id.* at 734. The first is "the manner of the article's annexation to the realty." *Id.* Second, "the articles adaptability to the use and the purpose for which the realty is used." *Id.* Third, "the intention of the party making the annexation." *Id.* Last, "the relation of the parties to the annexed property." *Id.*

42. 1 Ohio St. 511 (1853). *Teaff*, the leading case on the law of fixtures, defines a fixture as "an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it." *Id.* at 527.

43. *See* Kripke, *Fixtures under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 45 n.2 (1964).

lowing factors are used to determine whether a chattel is a fixture: 1) its actual annexation to the realty or something appurtenant thereto; 2) its appropriation to the use or purpose of the realty to which it is connected; and 3) whether the intention of the party making the annexation is to make the article a permanent accession to the freehold.[44] The intention to permanently annex the property is inferred from the nature of the article, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.[45]

Illinois courts have applied common law tests similar to those enunciated in *Teaff* to determine whether an article is a fixture.[46] In applying these tests, Illinois courts have focused primarily on intent.[47] The manner and degree of annexation is considered evidence of the intention of the party. A party is deemed to have intended to make a chattel a permanent accession to the realty if removal will cause "material injury to the freehold."[48] In the past, most courts have construed "material injury" to mean serious physical damage.[49] A few courts, however, have construed material injury to mean any injury to the realty which materially diminishes its value.[50] Illinois courts have adopted the majority interpretation of material injury.[51]

Section 9-313(8) of Article 9 of the U.C.C. rejects the "material injury" test but continues to assess damage to the realty in terms of

---

44. Teaff v. Hewitt, 1 Ohio St. 511, 530 (1853).

45. *Id.* at 529-30.

46. *See, e.g.*, National Boulevard Bank of Chicago v. Citizens Utils. Co. of Ill., 107 Ill. App. 3d 992, 438 N.E.2d 471 (1982). Specifically, the state stated that:

> Chattels become real estate when annexed to the freehold under such circumstances that it appears clearly from an inspection of the property itself, taking into consideration the character of the annexation, the nature and adaptation of the articles annexed to the uses and purposes of the freehold at the time of the annexation, and the relation of the annexing person to the freehold in question, that a permanent annexation to the freehold was intended.

Id. at 1001, 438 N.E.2d at 478.

47. *See, e.g.*, B. Kreisman & Co. v. First Arlington Nat'l Bank of Arlington Heights, 91 Ill. App. 3d 847, 415 N.E.2d 1070 (1981). The court stated that the intent of the parties was preeminent and that the additional factors are generally utilized to find evidence of that intent. *Id.* at 852, 415 N.E.2d at 1074. *See also* Owings v. Estes, 256 Ill. 553, 100 N.E. 205 (1912); Wanzer v. Smorgas-Brickan Developers, Inc., 130 Ill. App. 2d 378, 264 N.E.2d 435 (1970).

48. *See, e.g.*, Landfield Fin. Co. v. Feinerman, 3 Ill. App. 3d 487, 279 N.E.2d 30 (1972) (hotel equipment did not constitute fixtures as no damage was inflicted upon freehold by the removal).

49. *See, e.g.*, Davis Store Fixtures, Inc. v. Cadillac Club, 60 Ill. App. 2d 106, 207 N.E.2d 711 (1965).

50. *See* 5 R. POWELL, REAL PROPERTY § 660.2, at 57A-6 - 57A-8 (1984).

51. *See, e.g.*, Davis Store Fixtures, Inc. v. Cadillac Club, 60 Ill. App. 2d 106, 207 N.E.2d 711 (1965) (removal of screws did not constitute material injury).

physical damage. The Comment provides that "a secured party entitled to priority may in all cases sever and remove his collateral, subject . . . to a duty to reimburse any real estate claimant . . . for any physical injury caused by the removal."[52] Thus, this section modifies the common law by permitting removal but "obligat[ing] the secured party to indemnify holders of an interest in real estate other than the debtor against the cost of repair of any physical injury in the process of removal."[53]

Applying the common law tests, it seems clear that the assets of the Cable System are not fixtures. The cables are most likely not permanently attached to the realty. Presumably the aerial cables are attached to the utility poles by means of clamps or bolts which should be relatively easy to remove. While the method of attachment may have some bearing on whether underground cable and housedrops will be considered permanently annexed, it is unlikely that underground cable or the housedrops will be any more permanently attached than the aerial cables.[54]

Moreover, while removing any underground cable, including the housedrops, may temporarily disturb the property, it is doubtful that this removal would result in irreparable, material injury to the property. Thus, under the common law, the housedrops need not be considered permanently attached. This finding is compatible with the Illinois Code's policy of allowing removal with the reimbursement of any damage caused by the removal.

The second test is the chattels' adaptability to the use and purpose of the realty. This test focuses on the relationship between the chattel and the use of the realty to which it is attached.[55] An item constructed for, or fitted to, a particular parcel of land or a building is specifically adapted to the realty. For example, wall-to-wall carpeting stapled to unfinished subflooring was held to be sufficiently adapted to the realty to become a fixture.[56] Similarly, a gas burner system in a smokehouse was deemed to be a fixture where the gas burner system was permanently installed and necessary to the operation of the smokehouse.[57]

---

52. U.C.C. § 9-313(8) (Comment 9) (1972).

53. ILL. ANN. STAT. ch. 26, § 9-313 (Smith-Hurd 1983) (Illinois Code comment to subsection 8).

54. *See* Rollins Cablevue, Inc. v. McMahon, 361 A.2d 243, 247 (Del. Super. Ct. 1976) (aerial cables held not to be permanently attached because they could be easily removed), *aff'd*, 382 A.2d 250 (1977).

55. 35 AM. JUR. 2d *Fixtures* § 12 (1967).

56. Merchants & Mechanics Fed. Sav. & Loan Ass'n v. Herald, 120 Ohio App. 115, 201 N.E.2d 237 (1964) (court focused on whether owner intended carpet to be permanent and whether carpet was cut for that specific room).

57. Scalzo v. Marsh, 13 Wis. 2d 126, 108 N.W.2d 163 (1961).

In a cable television system, the feeder cable and the headend equipment are not closely related to the functions served by the realty to which they are attached. The major part of the cable television system, the feeder cable, is attached to a utility pole which is designed and constructed to provide electricity or telephone service, rather than cable television reception. Similarly, it is unlikely that the headend equipment is specially designed for location on one particular parcel of land or building so as to preclude its use in another location. Because these components are not specially adapted to the realty to which they are attached, such components could not be considered fixtures.

The housedrops, on the other hand, appear to have no use or purpose other than carrying the television signals from the feeder cables to the subscriber's home. For this reason, a court applying the common law test is likely to conclude that these housedrops have been designed for use on the subscriber's land and are specifically adapted to the realty and thus, are fixtures.

According to the Illinois courts, the most crucial test is the intention of the party making the annexation.[58] The applicable cable ordinance provides some evidence of the intention of the party making the annexation. The Chicago Cable Communication Ordinance, for example, states that the cable operator annexing the cables to the existing utility poles and other realty must remove or modify any installation when deemed necessary by the City or other appropriate governmental authority.[59]

Additionally, cable television operators often lease space on utility poles under agreements which permit the owner to require removal of the television cable if the space is needed for their service needs.[60] Such agreements are evidence that the annexation is not intended to be permanent. In addition, the agreement may also allow the cable operator to remove the housedrops if the subscriber terminates cable service. Such a provision would be further evidence of the cable operator's intention that the annexation is not permanent.

The final test used by Illinois courts is the relationship of the parties to the annexed property. The headend equipment and cables which are owned and installed by the cable system operator are often on leased property. As between the cable system operator

58. *See supra* note 46 and accompanying text.

59. CABLE COMMUNICATION ORDINANCE, CHICAGO, IL., MUNICIPAL CODE § 113.1-30(D) (1984).

60. Rollins Cablevue, Inc. v. McMahon, 361 A.2d 243 (Del. Super. Ct. 1976), *aff'd*, 382 A.2d 250 (1977). *See also* Cable Television Co. of Illinois v. Illinois Commerce Comm'n, 82 Ill. App. 3d 814, 403 N.E.2d 287 (1980) (the court held that the Illinois Commerce Commission has the power to regulate pole attachment leasing agreements).

and the owners of the leased property, the cable system operator has a greater interest in the headend equipment and cables. As between the cable system operator and the individual subscriber who is charged for the installation on the subscriber's property, it is unclear whether the subscriber has a strong interest in protecting his property from any damage caused by removal of the housedrops. The cable system operator, however, has a strong interest in retaining ownership and control of all components necessary to the operation of the cable television system. In balancing these two conflicting interests, the Illinois Code's provision that the secured party must pay for any physical injury caused by the removal of the collateral tips the scale in favor of the cable operator. Thus, a court may permit the cable operator to remove the housedrops as long as it reimburses the subscriber for any damage.[61] Thus, under the common law it is likely that an Illinois court will find that the components of a cable television system are not fixtures, with the possible exception of the underground feeder cables and housedrops.[62]

APPLICATION OF THE COMMON LAW OF FIXTURES TO CABLE TELEVISION SYSTEMS IN TAX CASES

Tax courts applying the common law test of fixtures to determine how to tax the assets of a cable television system have reached conflicting results.[63] In *Rollins Cablevue, Inc. v. McMahon*,[64] the court had to determine whether the television cable system, comprised of a trunk cable, feeder cable and underground cable, was real property in order to subject it to assessment and taxation. Applying common law principles, the court concluded that the various cables were not fixtures because they were not permanently annexed to the realty.[65] In arriving at this conclusion, the court considered the cable system as one entity and relied on the fact that the owners of the poles to which a substantial part of the cable was annexed could require the removal of the cable. Because a substantial part of the cable system was not permanently annexed, the

61. ILL. REV. STAT. ch. 26, § 9-313(8) (1983) (requires reimbursement for damage caused by removal).

62. Assuming the cables are fixtures, perfection of a security interest in these cables would require numerous fixture filings. In contrast, if the headend equipment is a fixture, it could easily be perfected with one fixture filing.

63. Tele-Vue Sys., Inc. v. County of Contra Costa, 25 Cal. App. 3d 340, 101 Cal. Rptr. 789 (1972) (portion of cable t.v. located inside viewers' homes became permanent fixtures); Rollins Cablevue, Inc. v. McMahon, 361 A.2d 243 (Del. 1976) (aerial cables held not to be fixtures), *aff'd*, 382 A.2d 250 (1977); T-V Transmission, Inc. v. County Bd. of Equalization, 215 Neb. 363, 338 N.W.2d 752 (1983) (cables attached to aerial poles held to be permanent fixtures).

64. 361 A.2d 243 (Del. 1976), *aff'd*, 382 A.2d 250 (1977).

65. *Id.* at 246-47.

court concluded that none of the components of the system was a fixture subject to taxation.

In contrast, the Nebraska Supreme Court in *T-V Transmission, Inc. v. County Board of Equalization*,[66] concluded that the underground cable running to the subscriber's home was permanently attached to the realty. The court held that it was a fixture which was not taxable as personal property.[67] Unlike the *Rollins Cablevue* court, the court in *T-V Transmission* did not consider the cable television system as one entity.[68] Instead, it focused on the characteristics of the discrete part of the cable system which ran from the utility pole to the subscriber's home. The court noted that when a subscriber discontinued cable service, a terminator was placed on the connect running to the subscriber's home. The aerial drop, however, from the utility pole and the cables which ran through a grounding block attached to a cold water pipe and through the walls of the house were not removed.[69] It further noted that the cable television system made no claim to these cables, did not retrieve them, and did not have an easement across the subscriber's yard to install or remove them. Finally, the court focused on the fact that the station connects were not only underground but had very little salvage value. The court took all these factors into consideration and concluded that the connects were fixtures.[70]

It is unknown whether an Illinois court construing the definition of fixtures for purposes of Article 9 will adopt the analysis of the *Rollins Cablevue* court and treat all the components of the cable television system as a single entity. Since the interests being protected by a tax court have little relationship to the interests being protected by Article 9, it seems unlikely that a court addressing the meaning of fixtures under Article 9 will apply the *Rollins Cablevue* analysis. Because the components of the cable television system are discrete and easily identifiable, an Illinois court will probably treat them separately and determine how each should be classified. It is equally unlikely that an Illinois court construing the meaning of a fixture under Article 9 will be influenced by the *T-V Transmission* court because this court was concerned with equitably distributing the tax burden, a concern which is not relevant in this analysis. It is

66. 215 Neb. 363, 338 N.W.2d 752 (1983).

67. *Id.*

68. *Id.*

69. *Id.* at 365, 338 N.E.2d at 753.

70. *Id.* The *T-V Transmission* court relied, in part, on the rulings of two tax administrative agencies, Bylund v. Department of Revenue, [2 Or] ST. TAX REP. (CCH) ¶ 203-402 (May 18, 1982); Hoppe, King County Assessor v. Televue Sys., Inc., [2 Wash.] ST. TAX. REP. (CCH) 201-289 (July 20, 1976). In both of these cases, the administrative agencies ruled that the system, except for the cable from the utility pole to the house, which was stipulated to be the personal property of the television company, constituted a fixture.

more likely that they will adopt the approach of the California court in *Arlett v. Household Finance Corp.*[71] by applying the common law to determine whether the components of the cable television system are fixtures. Under this approach, it is likely that the court will find that none of the components of the cable television system is a fixture.

THE EFFECT OF CLASSIFYING THE ASSETS AS FIXTURES

A security interest in fixtures is perfected by filing statements in the office where the mortgage on the real estate is located.[72] Special rules apply to unperfected security interests in fixtures. Section 9-313(5)(b) provides that "[a] security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . the debtor has a right to remove the goods as against the encumbrancer or owner."[73] Assuming that an equipment and inventory financing statement is filed with the Illinois Secretary of State and that an Illinois court holds that the assets are fixtures, unless another secured party of the bank's debtor has properly filed local fixture filings, the banks will not be harmed with regard to the subscribers. The Chicago Cable Communication Ordinance, for example, provides that the cable operator "shall remove, replace or modify . . . the installation of any of its facilities as may be deemed necessary by the City or other appropriate governmental authority. . . ."[74] Under this provision the debtor should retain the right to remove the feeder cables, at least those cables which are not underground. The headend equipment presumably belongs to the cable system operator and is removable. Thus, even if some elements of the cable system are deemed fixtures, lenders will be protected with respect to those elements which the debtor has the right to remove and it appears that the cable system operator has the right to remove most, if not all, of the system. Without fixture filings, however, the lender may not have an enforceable security interest in any bankruptcy proceeding against creditors of the lender's debtor in any of the tangible personal property held to be fixtures.

---

71. 22 Bankr. 732 (E.D. Cal. 1982). *See supra* note 41 and accompanying text.

72. ILL. REV. STAT. ch. 26, § 9-401(1) (1983).

73. *Id.* at § 913(5)(b).

74. CABLE COMMUNICATION ORDINANCE, CHICAGO, IL., MUNICIPAL CODE § 113.1-30(D) (1984).

THE PROPER CLASSIFICATION OF THE TANGIBLE ASSETS OF THE CABLE TELEVISION SYSTEM

The tangible assets of the cable company are most likely equipment or inventory. The Illinois Code defines equipment as goods used or purchased for use primarily in business, as well as all goods not included in the definitions of inventory, farm products or consumer goods.[75] It defines inventory as goods held for sale or lease.[76] Applying these definitions, the parts of the cable system including the amplifiers, the office, service and studio goods, are equipment and the decoders leased to subscribers are inventory.

The proper place to file a financing statement to perfect a security interest in equipment or inventory, unless the equipment is a fixture, is the office of the Illinois Secretary of State.[77] Thus, even if the cable television is not a transmitting utility, a central filing with the Secretary of State will perfect a security interest in most, if not all, of the assets of the cable television system.

CONCLUSION

The Illinois Code is unclear as to how to perfect the security interests in a cable television system. Most likely a central filing as to equipment and inventory with the Secretary of State perfects the security interests in the personal property tangible assets of a cable television system. If the system is deemed to be a transmitting utility, this filing will perfect the security interest in all tangible assets. Moreover, if the system is not a transmitting utility and none of the components are held to be fixtures, the central filing will perfect a security interest in all tangible assets.

If the system, however, is not a transmitting utility and some of the components of the system are held to be fixtures, a security interest in the tangible assets will be jeopardized. If a court concludes that some of the components of the system, such as the underground feeder cable and the housedrops, are fixtures, the central filing will not perfect the security interest with respect to these components. In that event, lenders will not have an enforceable security interest in these components which, by themselves, have little salvage value, but which are essential to the functioning of the system. The Illinois legislature can eliminate all this confusion by simply amending the Illinois Uniform Commercial Code to specifically include a cable television system within the definition of a transmitting utility.

---

75. ILL. REV. STAT. ch. 26, § 9-109(2) (1983).

76. *Id.* at § 9-109(4).

77. *Id.* at § 9-401(1).