

Legal Strategies For MDU Owners

How does an MDU owner deal with issues of existing wiring infrastructure?

By Carl Kandutsch ■ *Esq.*

Imagine you are the owner of multiple-dwelling unit buildings. All residents of your properties have either video or broadband Internet services, or both, provided by a large franchised cable operator (“MSO”). However, some residents have expressed their desire for an alternative provider. You have spoken with an alternative, namely, a private cable operator. This PCO is ready and willing to serve residents with a superior product, but on the condition that he can use the existing wiring infrastructure that was installed many years ago throughout the buildings by a predecessor of the current MSO (i.e., a previous franchised cable operator).

Your lawyer has written a letter to the MSO attempting to invoke the FCC’s rules governing the disposition of cable inside wiring, which are intended to make the existing wiring available to competitors in certain circumstances.

However, your lawyer has received only rebuffs from the MSO. The MSO states, for example, that it bought a cable company that installed the wiring twenty years ago, and that the right-of-entry agreements (“ROEs”) are exclusive and that they are still in effect, blocking any competitor from providing service to anyone in any of the buildings.

Furthermore, the MSO points out that the ROEs are “perpetual,” meaning that they don’t expire as long as the incumbent MSO retains its franchise to provide video services to the community. According to the MSO, the ROEs give it a “legal right to remain on the premises,” such that the FCC

inside wiring rules do not apply, and the MSO threatens to sue you if you allow the competitor to access the existing wiring, even the home run wires that lead to units occupied by residents who prefer the PCO’s services over the MSO’s.

Neglected Legal Strategies

The purpose of this article is to suggest three more or less neglected legal strategies that an MDU owner might use to fight back against a recalcitrant incumbent MSO in order to introduce video and broadband competition into his properties. The three strategies focus on how to deal with so-called “perpetual” ROE agreements, situations where the wiring was installed by a predecessor of the current MSO, and situations where the wiring may be the property of the MDU owner.

1. Perpetual Contracts may be terminated at will.

In general, a “perpetual” contract is an agreement (such as an ROE) that grants the incumbent MSO the right to maintain its wiring in the MDU and provide service to residents for an indefinite period of time, or for the duration of the MSO’s cable franchise term, any transfer thereof, and any subsequent extensions. Such contracts are not favored by the law because performance would in effect call for something like indentured servitude — an obligation that lasts forever — and therefore tend to disrupt normal commercial expectations.

The author is aware of literally dozens of judicial decisions from a wide variety of states (dealing with a variety of

industries) saying that a contract of indefinite duration is terminable “at will” by either party after performance for a “reasonable time.” What constitutes a “reasonable time” is a question of fact that depends upon the circumstances of each case.

But, it is logical to assume that keeping an ROE in effect for a significantly longer period of time than what is required for the MSO to recover its capital investment in wiring infrastructure is unreasonable.

No Need To Feel Locked In

The point is that an MDU owner need not feel “locked in” by an ROE agreement that has no fixed termination date. If the incumbent MSO has exercised its exclusive right to provide service in a building for a “reasonable time,” the MDU owner may notify the MSO that the agreement has been terminated, and that the existing wiring infrastructure will be made available to a competing PCO on either a “building by building” or a “unit by unit” basis in accordance with FCC rules.¹

In the event that the MSO resists, it should be emphasized that the FCC rules clearly place the burden of proof on the MSO; the rules are presumed to apply “unless and until the incumbent provider obtains a court ruling or an injunction within forty-five days following the initial notice” blocking competitive access to the inside wiring.²

Therefore, if the MSO does not obtain such a court injunction within the forty-five day period, the MDU owner is legally justified in asserting unilateral control over the wiring, for example,

by making it available to a competitive PCO.³ If the FCC framework is taken seriously, the MSO's subsequent cries of "trespass," "conversion" or "theft" will ring hollow, because the MSO has invited upon itself the legal consequences of recalcitrance that are obvious to anyone who has bothered to read the FCC rules.

2. ROEs signed by the MSO's predecessor may be void.

Notice that in the imaginary scenario described at the outset, I stipulated that the existing wiring was installed many years ago by a "predecessor" (call it "MSO1") of the incumbent MSO. Suppose, for example, that the wiring was installed by a cable company (which wrote the "perpetual" ROE agreement) that held the local franchise until it was purchased by the current MSO, which now holds the franchise. In that case, the ROE agreement may not be binding on the MDU owner because: (1) the owner's ROE agreement is with MSO1, not with the current MSO; and (2) if the agreement was automatically extended whenever MSO1's franchise was renewed, then the agreement lapsed as soon as the current MSO took over the franchise from MSO1. This legal argument is not available, however, if the ROE specifies that it is automatically extended for the term of the MSO's franchise, "and any transfers thereof." In that event, the ROE may still be voidable, as discussed above, because it is "perpetual" and a reasonable time has passed.

Finally, the same logic applies if the ROE was signed by a predecessor of the current MDU owner, who purchased the buildings from the prior owner. If the ROE was executed before the building was sold to its current owner, and does not specifically extend beyond such a transfer, it is probably void and not binding on the current owner.

3. The existing inside wiring may be considered property of the MDU owner.

Let us assume that the incumbent MSO rejects your reasonable invocation of the FCC's inside wiring rules as described above. At this point, the

MDU owner may resort to more aggressive tactics, understanding that the MSO will probably concede control over the wiring only if ordered to do so by a court.

You may be on solid ground in asserting not only that the ROE is void, but also that you own the wiring infrastructure because the wiring constitutes

a "fixture" that is part of your building. To the extent the inside wiring is the property of the MDU owner, the owner need not utilize the FCC rules at all⁴, but may simply exercise immediate control and make the wiring accessible to the competing PCO.

Although the law of fixtures varies somewhat from state to state, most ju-

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risdictions agree that an object affixed to real estate is part of that real estate (i.e., a fixture) when three conditions are satisfied: (1) the object is physically attached to the property; (2) the object is adapted to the use of that part of the property to which it is connected; and (3) the intention of the person making the annexation is to make the object a part of the property.⁵ The third condition is the most significant, and the requisite intent may be inferred from the nature of the object annexed, the mode and purpose of the annexation, and other circumstances.

Courts Rule For Owners

According to this author's research, a majority of courts that have considered the question of whether cable inside wiring (both home run and home wiring) is a "fixture" belonging to the property owner, have answered the question

automatically give up on the fixture argument.

The crucial question is one of intent: Did the MSO intend to make the wiring part of the building or not? Contractual language reserving ownership for the MSO is only one of several indicia of intention, and on my reading of the case law, actions speak louder than words. Although it would be a mistake to cast it as anything like an ironclad legal rule, the courts appear to find that an MSO's failure to remove unused wiring is the best indicator of an intent to make it part of the real estate. While I have not seen a case in which such a failure to remove was interpreted against specific contractual language reserving ownership for the MSO, several courts have ruled that inside wiring is a fixture despite the fact that the MSO's franchise agreement requires that the MSO maintain the wiring.

refuses to acknowledge that point, the owner should consider whether state law would support the claim that the wiring is actually a fixture belonging to him rather than to the MSO. There is a solid legal ground supporting each of these arguments, and MDU owners should be prepared to use them.

The legal concepts discussed above are not esoteric or marginal; rather, they embody old and well-established principles of contract and property law. I see no reason why these arguments cannot be effective tools in any dispute over the ownership or control of cable wiring in MDU buildings. Like Edgar Poe's *Purloined Letter*, we often fail to see the truth only because it is right in front of our eyes.

I am very interested in MDU and PCO views about my legal arguments. Please write me at the email address below.

The contractual language may reserve the ownership rights of the MSO, but the MDU owner could still win.

in the affirmative. Conditions (1) and (2) are generally satisfied when cable wiring is installed in conduits designed for such purposes and located within or behind walls. With regard to condition (3), the case law indicates that the decisive indicator of the annexing party's intention is whether the MSO routinely removes the wiring when the subscriber's service is terminated.

A failure to remove wiring when it is no longer being used (such as cable home wiring in a subscriber's unit, or the cable home run wiring leading to that unit) strongly indicates an intention to allow the wiring to become a fixture, that is, part of the building.

What if the ROE provides that the inside wiring is to remain the property of the MSO? Any MDU owner considering use of the "fixture" argument should carefully examine the ROE agreements to see whether they reserve ownership of the wiring to the MSO. Even if they do, this is not a reason to

Conclusion

The purpose of the FCC's inside wiring rules is to enhance video competition in the MDU market by giving property owners the right, under certain circumstances, to make the wiring infrastructure available for use by competing video providers.

Given the nature of the problem, it is not surprising to see incumbent MSOs resist competition by asserting that their perpetual and often exclusive ROE agreements block application of the rules altogether. This is how monopolies behave.

My purpose in this article is to suggest that MDU owners are not powerless in this situation, and that the common law provides various legal weapons that can and should be utilized in an aggressive way when circumstances merit. If the MSO insists that its perpetual ROE blocks application of the FCC rules, the MDU owner should reply that the ROE is void. And, if the MSO

Endnotes:

[1] The rules for "building by building" access to cable inside wiring are set forth in 47 C.F.R. §§76.804(a) et. seq., and the rules for "unit by unit" access may be found in sections 804(b) et. seq.

[2] 47 C.F.R. § 76.804(c).

[3] 47 C.F.R. § 76.804(a)(4) provides that an incumbent MSO that fails to comply with the FCC-mandated deadlines is deemed to have abandoned the wiring.

[4] Because the FCC rules only apply to the extent the incumbent MSO "owns" the wiring, they do not apply to the extent the wiring is considered a "fixture" and therefore property of the MDU owner.

[5] Some courts also consider a fourth factor, namely, the degree of difficulty and the extent of any economic loss involved in removing the object from the real estate. ♦

About The Author

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