to be void if they fail to adequately describe the easement area or requiring the description of the easement to meet general conveyancing standards applicable to identifying parcels of land.[41]

c. **Permitted Use of an Easement.** The use of an easement is often established in the documents which create the easement and the use is restricted to that stated use.[42] In some instances, courts have permitted limited increases in the scope of use for an easement, provided that the easement holder doesn't unreasonably increase the burden which the easement places on the servient estate.[43] Situations of expanded use have arisen in the context of the introduction of new technologies (e.g., fiberoptic cable, cable television). In some jurisdictions the courts have been receptive to the modification of uses of easements to accommodate technological advancements, particularly where the modified use is deemed not to impose an unreasonable increased burden on the landowner,[44] other courts have been less receptive to permitting such modifications,[45] and some courts have tightly interpreted use provisions in easements and declined to imply any right of expanded use.[46] One state, Maine, has even enacted a statute which eliminates implied expansion rights to certain easements.[47]

The term "right of way" or "way" is sometimes used as a description of the use of an easement.[48] In such instances, the grant or reservation of a "right of way" or "way" in general terms is ordinarily construed by the courts as creating a general right of way which is usable by the easement holder for all reasonable purposes, including in some jurisdictions the right to utilize new technologies and inventions.[49]

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41 See, e.g., *Allen v. Duvall*, 311 N.C. 245, 249 (1984); *Highway Properties v. Dollar Sav. Bank*, 431 S.E.2d 95, 98-100 (W.Va. 1993); *Germany v. Murdock*, 99 N.M. 679, 681 (1983); *Vrabel v. Donahoe Creek Watershed Auth.*, 545 S.W.2d 53, 53 (Tex. 1976).

42 Bruce and Ely, *Law of Easements and Licenses*, §8.02[1].

43 *Id.*

44 See, e.g., *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 804 (1985); *Hoffman v. Capitol Cablevision System, Inc.*, 383 N.Y.S.2d 674, 676 (1976); *Cousins v. Alabama Power Co.*, 597 So.2d 683, 687 (Ala. 1992).

45 See, e.g., *Consolidated Cable Utilities, Inc. v. City of Aurora*, 439 N.E.2d 1272, 1276 (Ill. 1982); *Devon-Aire Villas Homeowners Ass'n No. 4, Inc. v. Americable Associates, Ltd.*, 490 So.2d 60, 65 (Fla. 1985).

46 See, e.g. *Brown Properties, Inc. v. Cooper*, 737 S.W.2d 471, 473 (Ark. 1987); *Benno v. Central Lake County Joint Action Water Agency*, 609 N.E. 2d 1056, 1060 (Ill. 1993); *U.S. Cablevision v. Theodoreau*, 596 N.Y.2d 485, 487 (1993); and *Gordon v. Hoy*, 178 S.E.2d 495, 496 (Va. 1971).

47 See, Me. Rev. Stat. Ann., Title 33, § 458.

48 See, e.g., Annotation, *Location of Easement of Way Created by Grant of Way Which Does Not Specify Location*, 24 ALR4th 1053.

49 25 Am.Jur.2d, Easements and Licenses, §86; see also, Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 3 ALR3d 1256.

d. Transferability of Easements in Gross. Contrary to the general rule that prohibits the assignment of easements in gross, commercial easements in gross (e.g., utility easements) have generally been held to be assignable, and several jurisdictions have statutory provisions expressly permitting the transfer of easements in gross.[50]

e. Divisibility/Apportionment of Easements in Gross. Related to the issue of the transferability of a commercial easements in gross, is the issue whether the easement holder has the right to divide or apportion its interest in the easement with others. In the context of discussing easements in gross, the term "apportionment" refers to the division of the use of an easement.[51] The courts have generally concluded that easements in gross are capable of apportionment when: (i) the instrument creating the easement permits apportionment; or (ii) the easement granted is deemed "exclusive" and the proposed apportionment will not "overburden" the easement.[52] In the context of apportionment, the term "exclusive" is generally intended to designate situations where the easement holder has the sole right to engage in the type of activity authorized by the easement, although some courts have construed the term "exclusive" as referring to the exclusion of the landowner from using the easement for the activities described in the easement.[53] The justification for permitting apportionment of exclusive easements is that the property owner has already granted away its right to use the easement area and thus there is no basis for the owner to oppose the apportionment, provided that the combined use of the easement stays within the scope of the original grant of easement and does not overburden the easement or the servient estate.[54]

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[50] 25 Am.Jur.2d, Easements and Licenses, §102; Bruce and Ely, *Law of Easements and Licenses*, §9.03[1]; see, e.g., *Banach v. Home Gas Co.*, 12 A.D.2d 373, 375 (NY 1961) ("We know of no case in this jurisdiction which has held that easements authorizing the construction of telephone lines, electric lines or gas lines are inalienable."); *Collier v. Oelke*, 202 Cal.App.2d 843, 845-846 (1962) (applying Cal. Civ. Code §1044, which permits the transfer of real property, to easements in gross); see also, Ind. Code Ann. §32-5-2-1(b) and Va. Code Ann. §55-6.

[51] See, *Witteman v. Jack Barry Cable TV*, 228 Cal.Rptr. 584 (1986); *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 804 (Ca. 1985); *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 678 (N.Y. 1976); *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825, 827 (Mo. 1985).

[52] Bruce and Ely, Law of Easements and Licenses, §9.04; *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 678 (N.Y. 1976); *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697, 699 (Okla. 1979).

[53] *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825, 828 (Mo. Ct. App. 1985); *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 676 (1976).

[54] Bruce and Ely, *Law of Easements and Licenses*, § 9.04.

In general, exclusive easements are disfavored by the courts, although courts occasionally hold easements to be exclusive even in the absence of specific language in the granting document.[55] As one court has said: "[a]n 'exclusive easement' is an unusual interest in land; it has been said to amount to almost a conveyance of the fee . . . no intention to convey such a complete interest can be imputed to the owner of the servient estate in the absence of a clear indication of such an intention."[56] The holder of a nonexclusive easement does not have the right, absent an express agreement with the real property owner, to apportion its easement, as the right of division is retained by the owner of the servient estate.[57] In some jurisdictions, the courts have been more liberal in finding easements to be exclusive and permitting apportionment, sometimes presuming exclusiveness unless specific language to the contrary is included in the instrument which created the easement.[58] In other instances, the certain language contained in the grant has been deemed to imply the intent of the parties that the easement be apportionable.[59]

The second limitation on apportionment of easements in gross is the concept of "overburden." This consists of the easement holder: (i) causing a material increase in the burden of the easement on the servient land beyond the scope of the easement granted, or (ii) imposing a new or additional burden beyond the scope of the easement granted.[60] A few courts have been more liberal than others in the overburden analysis, finding no overburden where the public interest of making technological advances available are deemed strong and the court perceives only a minor intrusiveness of the additional use as partial justification for permitting the apportionment as supporting a finding of no overburden to the servient estate.[61] While the level of intrusiveness of the additional user is a factor in any overburden analysis, it is important to distinguish the issue of overburden, where an underlying right to apportion exists, from the issues of whether

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55 *Id.* at §1.06[3]; see also, *Hoffman v. Capitol Cablevision Sys., Inc.* 52 A.D.2d 313, 315 (1976); *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 804 (1985).

56 See, e.g., *Mehdizadeh v.* Mincer, 46 Cal.App.4th 1296, 1307 (1996); see also, *City of Pasadena v. California-Mich. Land & Water Co.*, 17 Cal.2d 576, 578-579 (1941).

57 See, *Consolidated Gas Co. v. City Gas Co.*, 447 So.2d 351, 352 (Fla. 1984).

58 See, e.g., *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 804 (1985); *Hoffman v. Capitol Cablevision System, Inc.*, 383 N.Y.S.2d 674, 676 (1976); but, see *Centel Cable Tel. Co. of Ohio, Inc. v. Cook*, 567 N.E.2d 1010, 1013-1014 (Ohio 1991) (declining to infer intent for exclusive easement, but finding exclusiveness on other grounds).

59 See, e.g., *Joliff v.Hardin Cable Tel. Co.*, 269 N.E. 2d 588, 590 (Ohio 1971).

60 25 Am.Jur.2d, Easements and Licenses, §81; *Hayes v. Aquia Marina, Inc.*, 414 S.E.2d 820, 823 (Va. 1992).

61 See, e.g., *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 804 (1985); *Hoffman v. Capitol Cable Television System, Inc.*, 383 N.Y.S.2d 674, 676 (1976); *C/R TV, Inc. V. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994); *Joliff v. Hardin Cable Tel. Co.*, 269 N.E.2d 588, 591 (Ohio 1971).

a taking has occurred. In a takings analysis, the size and scope of any permanent occupation, or the policy reasons in support of that occupation, are irrelevant to the issue of whether a taking has occurred.[62]

f. Secondary Easements. In connection with the use, enjoyment and repair of easements, an easement holder typically also has the right to enter upon the burdened land, at reasonable times, to effect repairs and maintenance necessary for the use and enjoyment of the easement.[63] This additional access right is an incident of the underlying easement and is sometimes referred to as a "secondary easement."[64] Secondary easements must be exercised only when necessary and in a reasonable manner so as not to needlessly burden or injure the burdened landowner.[65]

3. Real Property Licenses. Real property licenses involve the owner of real property giving another party or entity revocable permission and/or authority to use its land for a specific purpose, without the licensee acquiring an interest in the real property.[66] Some commentators have described real property licenses as the permissive right to do an act on real property which would otherwise be prohibited (e.g., trespass).[67] Real property licenses have also been defined as a privilege in the land of another which: (i) entitles the licensee to use the land; (ii) arises from the consent of the land owner; (iii) is not incident to an estate in the land; and (iv) is not an easement.[68]

The scope of a real property license is determined by the extent of the privilege which is granted by the licensor. [69] A real property license allows the occupation and use of land only to the extent necessary to

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62 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 n. 16 (1982).

63 25 Am.Jur.2d, Easements and Licenses, §95; see also, 28 ALR2d 626; *Centel Cable Tel. Co. v. White Development Corp.*, 902 F.2d 905, 909 (11th Cir. 1990) ("every easement carries with it by implication the right, sometimes called secondary easement, of doing what is reasonably necessary for full enjoyment of the easement itself." (citing, *Crutchfield v. Sebring Realty Co.*, 69 So.2d 328, 330 (Fla. 1954).

64 See, *Ward v. City of Monrovia*, 108 P.2d 425, 429 (Ca. 1940); *Fourth Davis Island Land Co. v. Parker*, 469 So.2d 516, 523 (Miss. 1985).

65 25 Am.Jur.2d, Easements and Licenses, §95.

66 *Id.* at §138; Bruce and Ely, Law of Easements and Licenses, §11.01; *United States v. Anderson County*, 575 F.Supp 574, 578 (ED Tenn. 1983), aff'd, 761 F.2d 1169 (6th Cir. 1985), cert. denied, 474 U.S. 919 (1985).

67 25 Am.Jur.2d, Easements and Licenses, §139; Bruce and Ely, Law of Easements and Licenses, §§ 1.03[1] and 11.01.

68 Powell on Real Property, Licenses, §34.24 (citing Restatement of Property §512).

69 Bruce and Ely, *Law of Easements and Licenses*, §11.03.

conduct the licensed act.[70] Thus, a real property license may be exercised, based on a fair and reasonable interpretation of the real property license, only in the manner and for the specific purpose for which the consent was granted.[71] The use of a real property license is limited to the authorized activities and cannot be used for other purposes.[72] Attempted use of a real property license beyond its permitted scope constitutes a trespass by the licensee upon the licensor's real property.[73]

Unlike easements and real property leases, both of which are generally subject to the formalities of the Statute of Frauds, the only indispensable element to the creation of a license is the consent of the licensor.[74] As transient, impermanent interests, real property licenses are not subject to the Statute of Frauds.[75] In some instances, real property licenses will result when parties fail to comply with the required formalities of creating a proper easement or lease.[76]

a. Irrevocable Licenses. Although one of the distinctive features of a license is its revocability, there are certain situations where courts have placed qualifications or restrictions on a licensor's right to terminate or revoke a real property license. This can result in what have been referred to by the courts as "licenses coupled with an interest, "irrevocable licenses," "executed licenses," "equitable easements" and similar terms.[77] In rare instances, a revocable license may even be found to have ripened into an easement (an "easement by equity"), based on the concept of equitable estoppel.[78] Some commentators

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70 *Id.*; see, e.g., *Wright v. Edison,* 619 S.W.2d 797, 803 (Mo. 1981); *State v. Quinell,* 151 N.W.2d 598, 602 (Minn. 1967).

71 25 Am.Jur.2d, Easements and Licenses, §139; *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 300 (Iowa 1994).

72 Bruce and Ely, *Law of Easements and Licenses*, §11.03.; see, e.g., *Thiokol Chem. Corp. v. Morris County Bd. of Taxation*, 197 A.2d 176, 182 (N.J. 1964).

73 See, e.g., *Wright v. Edison*, 619 S.W.2d 797, 803 (Mo. 1981).

74 Bruce and Ely, Law of Easements and Licenses, §11.02; see, e.g., *Adams v. Heisen*, 423 P.2d 414, 417 (N.M. 1967) ("The essential element in the creation of a license is the permission or consent of the licensor.").

75 25 Am.Jur.2d, Easements and Licenses, §138.

76 Gaudio, American Law of Real Property, §6.03[2]; Powell on Real Property, Licenses, §34.26; See, e.g., *Walton v. Town of New Hartford*, 612 A.2d 1153, 1157 (Conn. 1992) (failed attempt to satisfy the formalities of creating an easement resulted in creation of a license); *Crigger v. Florida Power Corp.*, 436 So.2d 937, 948 n.27 (1983) (infirmity in creation of easement results in a license); *Bob Daniels & Sons v. Weaver*, 681 P.2d 1010, 1017 (Idaho 1984) (unwritten agreement establishes license, not easements).

77 25 Am.Jur.2d, Easements and Licenses, §145; Powell on Real Property, Licenses, §34.24.

78 Gaudio, American Law of Real Property, §6.03[2]; 25 Am.Jur.2d, Easements and Licenses, §145.

have noted the tendency of courts to utilize irrevocable licenses selectively as a means to reach a desired equitable result.[79]

A more limited type of restriction on revocability occurs when the licensee has an ownership interest in personal property located on the real property subject to the license. This is commonly referred to as a license coupled with a grant or interest.[80] In general, a license coupled with a grant or interest is deemed to be irrevocable to the extent necessary to allow the licensee to remove its personal property from the real property.[81] Similarly, some courts have held that the payment of valuable consideration by the licensee in exchange for the license may create restrictions on the licensor's ability to revoke the license.[82]

Another situation where the revocability of a real property license becomes an issue is where a licensee reasonably expends money or labor in reliance on the continued existence of the license. In order to avoid injustice to the licensee, courts have sometimes labeled such licenses as "executed licenses" and treated them as irrevocable.[83] This result is based on a theory of either detrimental reliance or the prevention of fraud by the licensor against the licensee.[84] Licenses do not necessarily become irrevocable because they are granted for consideration, rather it is the licensee's reasonable and material expenditures in reliance on the continuing existence of the easement which causes a license to become irrevocable.[85] In addition, the courts have tended to apply this doctrine with caution, requiring the licensee expend a substantial sum of

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79 See, e.g., Powell on Real Property, Licenses, §34.24.

80 25 Am.Jur.2d, Easements and Licenses, §142; Gaudio, American Law of Real Property, §6.03[3].

81 Gaudio, *American Law of Real Property*, §6.03[3], Page 6-74; *Hass v. Brannon*, 225P. 931, 936 (Okla. 1924) (license coupled with a grant); *Western Union Tel. Co. v. Pennsylvania Co.*,129 F 849, 863-864 (1904) (license coupled with an interest).

82 25 Am.Jur.2d, Easements and Licenses, §143; See, e.g., *Paul v. Blakely*, 51 N.W.2d 405, 407 (Iowa 1952); *Markley v. Christen*, 226 S.W. 150, 153 (Texas 1920).

83 25 Am.Jur.2d, Easements and Licenses, §145.

84 *Keystone Copper Mining Co. v. Miller*, 164 P.2d 603, 610 (Ariz. 1945); *Schuman v. Stevenson*, 219 S.W.2d 429, 433 (Ark. 1949); *Noronha v. Stewart*, 199 Cal.App.3d 485, 491 (1988); *Closson Lumber Co., Inc. v. Wiseman*, 507 N.E.2d 974, 977 (Ind. 1987).

85 *Industrial Disposal Corp. of America v. City of East Chicago, Dep't of Water Works*, 407 N.E.2d 1203, 1205 (Ind. 1980)

money, with the licensor's knowledge.[86] Some courts add the additional requirement that the expenditures by the licensee be at least partly for the benefit of the licensor.[87]

An irrevocable license is not typically perpetual.[88] Instead, an irrevocable license usually is deemed to last only as long as the period necessary to protect the reliance investment by the licensee.[89] Moreover, an irrevocable license is cannot be modified or enlarged beyond its original purpose.[90]

Alternative approaches to finding real property licenses to be irrevocable, taken by some courts, have placed limits on revocability (e.g., reasonable notice and opportunity for the licensee to remove its personal property) or required the licensor to compensate the licensee for its expenditures which benefit the licensor upon the licensor's revocation.[91]

b. Assignment of Real Property Licenses. As personal privileges, the general rule is that real property licenses may not be assigned.[92] A minority of courts have gone so far as to take the position that an attempted assignment terminates a real property license.[93] A few courts have taken a more liberal position on the assignment issue, holding that real property licenses which arise from commercial transactions are deemed assignable, unless the parties have expressed an intention to the contrary.[94] In addition, where the license is coupled with an interest, a number of jurisdictions will permit assignment of

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86 Bruce and Ely, Law of Easements and Licenses, §11.06[2][b].

87 See, e.g., *Camp v. Milam*, 277 So.2d 95, 99-100 (Ala. 1973); *O'Hara v. Chicago Title & Trust Co.*, 450 N.E.2d 1183, 1191 (Ill. 1983); *Ethan's Glen Community Ass'n. v. Kearney*, 667 S.W.2d 287, 291 (Texas 1984).

88 See, e.g., *Stoner v. Zucker*, 148 Cal. App.2d 384, 388 (1906)(license continues to run for so long as the nature of the license requires); *Bob's Ready to Wear, Inc. v. Weaver*, 596 S.W.2d 715, 720 (Ky. 1978)(duration of a license may be limited even where licensor is estopped to revoke the license).

89 See, e.g., *Eliopulos v. Kondo Farms, Inc.*, 643 P.2d 1085, 1088 (Id. 1982).

90 See, *Camp v. Milam*, 277 So.2d 95, 100 (1973) (the irrevocable status of the license does not expand or increase the nature and extent of its use).

91 Bruce and Ely, Law of Easements and Licenses, §11.06[1]; Annotation, *Right of Licensee for Use of Real Property to Compensation for Expenditures Upon Revocation of License*, 120 ALR 549 (1939); see also, *Lake Martin/Alabama Power Licensee Ass'n. v. Alabama Power Co.*, 547 So.2d 404, 408 (Ala. 1989); *Hector v. Metro Ctrs.*, 498 N.W.2d 113, 117 (N.D. 1993); *Sinclair Pipe Line Co. v. United States*, 287 F.2d 175, 178 (1961).

92 Bruce and Ely, Law of Easements and Licenses, §11.04.

93 *Id.*; Powell on Real Property, Licenses, §34.25; see, e.g., *Waterville Estates Ass'n v. Town of Campton*, 446 A.2d 1167, 1169 (NH 1982); *Waltimyer v. Smith*, 556 A.2d 912, 914 (PA 1989).

94 See., e.g., *Tarlow v. Arntson*, 505 P.2d 338, 342 (1973) (normally inferred that parties intend license to be assignable).

the license in connection with the licensee's sale of the interest.[95] Of course, the common law rules pertaining to the assignment of real property licenses can be altered by agreement of the parties and, in practice, commercial licensee's will often negotiate for some form of assignment rights.

The issue of whether a real property license is assignable is distinct from the issue of apportionment, which can apply to exclusive commercial easements in gross, as discussed above in *Part II(A)(2)(e)*. As real property licenses constitute personal privileges, division of that privilege or apportionment would not be permitted, in the absence of an express provision in the license permitting the licensee such additional privileges.[96] A license is unlike an easement, where there may be "sticks" in the bundle which constitutes the easement which may potentially be apportioned and shared by the easement holder with others. Instead, a real property license involves only the privilege of the licensee to use some "sticks" in the bundle, and does not create any ownership interest in those sticks for the licensee. Thus, an attempt by a licensee to share its use privileges under a real property license with a separate or piggybacked user would constitute use of the real property license beyond its permitted scope and be a trespass by the additional user (and potentially the licensee) upon the licensor's real property.[97] This is to be distinguished from instances where a licensee's contractor or employees utilize the licensee's access and use rights. In that situation the other parties access is part of the licensee's use, rather than a separate use.[98] For example, a licensee would normally be entitled to have a third party contractor service the licensee's equipment used in connection with the license, and that contractor would enter onto the real property under the authority of the licensee's use and access rights.

4. Real Property Leases. The next category of use and access rights is the real property lease.[99] Unlike other estates in real property, which are typically created by deed or may be based on a gift

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[95] Bruce and Ely, *Law of Easements and Licenses*, §11.04; see, e.g., *Booker v. Cherokee Water Dist.*, 651 P.2d 452, 453-454 (Colo. 1982); *Radke v. Union Pac. R.R.. Co.*, 334 P.2d 1077, 1087 (Colo. 1959); *Paul v. Blakely*, 51 N.W.2d 405, 407-408 (Iowa 1952); *Smyre v. Board of Comm'rs*, 132 P. 209, 210 (Kan 1913).

[96] See, generally, Bruce and Ely, *Law of Licenses and Easements*, §11.04; 25 Am.Jur.Wd, Easements and Licenses, §140.

[97] See, e.g., *Wright v. Edison*, 619 S.W.2d 797, 803 (Mo. 1981).

[98] Bruce and Ely, *Law of Easement*, § 11.03.

[99] When discussing leases, it is important to distinguish between real property leases (e.g., the right to occupy and use office space) and personal property leases (e.g., the right to use computer equipment). One type of "lease" creates an estate in the land, while the other, at most, creates a privilege (i.e., license) to access the real property where the personalty is located. It is possible that a personal property lease includes an implied license related to the personal property (i.e., license coupled with an interest). However, the existence of such a license would depend on the owner

or devise, leases are often said to have a dual nature, in that they are commonly viewed as both a conveyance of a protected possessory interest in real property and a contract between the landlord and tenant.[100] Black's Law Dictionary describes real property leases as "[a] contract for exclusive possession of lands . . . for terms of years . . . usually for a specified rent or compensation." The key characteristic of a lease, as a use and access right, is the right to exclusive possession of the premises. In the absence of that fact, the transaction is instead an easement, profit a prendre or real property license.[101] A lease creates an actual estate in the land, typically referred to as the leasehold estate, consisting of the right to exclusive possession of a demised premises for a specified period of time.[102]

a. Use. The uses which are permitted on leased real property are dictated by the terms of the lease itself and the laws of the jurisdiction in which the property is located.[103] Generally, a use provision in a lease is either restrictive or permissive. A restrictive use provision allows an expressly stated use (e.g., office use, wireless telecommunications site) and prohibits any other use of the premises. A permissive use provision, on the other hand, will often state an intended use but leave open the possibility for other lawful uses of the premises. The states vary on whether a generally stated use provision is deemed to be restrictive or permissive. Some states imply permissive use unless the lease expressly states a contrary intent.[104] Other states will imply that a statement in a lease of a specific use is intended to restrict the tenant to the stated use.[105]

b. Appurtenant Rights. Similar to the concept of secondary easements discussed above in *Part II(A)(2)(f)*, a lease of a real property will typically include certain ancillary or appurtenant

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of the personalty having the use and access rights which could be allocated to the lessee of the personalty.

[100] Powell on Real Property, Landlord and Tenant Estates, §16.02[2]; Gaudio, *American Law of Real Property*, §5.01; see, e.g., *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 843 (Cal. 1985).

[101] 49 Am.Jur.2d, Landlord and Tenant, §5; Gaudio, American Law of Real Property, §5.03[6].

[102] *Darr v. Lone Star Indus., Inc.*, 94 Cal.App.3d 895, 900 (1980); *Commercial Wharf E. Condominium Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 74 (Mass. 1990); *Town of Kearny v. Municipal Sanitary Landfill Auth.*, 363 A.2d 390, 394 (N.J. 1976).

[103] See generally, Friedman on Leases, §27.301.

[104] See, e.g., Cal. Civ. Code §1997.210(b) (Absent a use restriction in the lease, the tenant may make any reasonable and lawful use of the premises.)

[105] See, e.g., S.D. Comp. Laws Ann. §43-32-11 (If premises are leased for a specific puprose, the tenant must not use the premises for other purposes.).

rights which are necessary in connection with the tenant's use of the premises.[106] For example, a lease for an office on one of the upper floors of an office building would include an appurtenant easement or license for the tenant to use the plaza, lobby and elevators of the building to access its premises, as well as the right to use restrooms located in common areas of the building. Where the appurtenance in question is not expressly provided for in the lease, most courts will require a showing by the tenant of the necessity of the appurtenance.[107] Most sophisticated commercial and retail leases will delineate the tenant's appurtenant rights, including items such as access to common areas, parking and utility service.

c. **Assignment and Subletting.** With few exceptions, absent a restriction in a lease, the tenant has at least some right to transfer its interest in a lease (e.g., assignment, sublet, license), in whole or part, to others.[108] This majority view is based on public policy considerations which favor preservation of the right to alienate estates in real property.[109] Some states have statutes which place parameters on this right, such as requiring the landlord's consent to any transfer of the tenant's interest.[110] The parties to the lease are generally permitted to agree to restrictions on the tenant's right to transfer its rights under the lease, and this topic is often one of the key points discussed by the parties in lease negotiations. Restrictions in a lease on a tenant's right to transfer its interest through assignment, subletting or licensing tend to be interpreted by the courts conservatively, with ambiguities being decided in the tenant's favor.[111] In some instances, the landlord's placement of restrictions on the tenant's ability to assign, sublet or otherwise transfer its interest may act to limit the landlord's remedies in the event of a default by the tenant.[112]

Again, it is axiomatic that a tenant can only transfer rights which it possess. Thus a tenant could not assign its lease or sublet a portion of its premises to another party for purposes which are not permitted under the lease.

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106 See, e.g., 49 Am.Jur.2d, Landlord and Tenant, §626.
107 See, *Id.* at §625; Friedman on Leases, §3.2.
108 Friedman on Leases, §7.2.
109 See, *Kendall v. Ernest Pestana, Inc.*, 40 Cal.3d 488, 494 (1985).
110 Friedman on Leases, §7.301; see, e.g., Tex. Code § 91.005.
111 Friedman on Leases, §7.303.
112 See, e.g., Cal. Civ. Code §1951.4.

5. **Rights of Way.** The term "right of way" can be used to refer to the nature of the use on a property, the location of the use or to refer to the nature of the use and access rights. A right of way is not a specific category of use and access rights like an easement, lease, license or profit a prendre. Instead, the term right of way is often used to refer to a type of easement or fee interest on which is located a specific use. Black's Law Dictionary states:

> "[the] [t]erm "right of way" sometimes is used to describe a right belonging to a party to pass over land of another, but is also used to describe that strip of land upon which railroad companies construct their road bed, and when so used, the term **refers to the land itself**, not the right of passage over it. [citation omitted] As used in reference to right to pass over another's land, [a right of way] is **only an easement**; and grantee acquires only right to a reasonable and usual enjoyment thereof with owner of soil retaining rights and benefits of ownership consistent with the easement. [citation omitted]"

The majority of American courts have deemed that the grant of a right of way constitutes an easement for right of way purposes, unless the instrument creating the right of way specifically grants a fee interest.[113] One of the practical reason for this presumption is that long narrow strips of land serve little or no function other than for use as roads or rights of way, thus common sense dictates a presumption that parties do not intend to create otherwise unusable interest in land.[114] Notwithstanding this presumption, there are numerous cases where rights of way have been held to be fee interest, although in a number of those instances the fee interest is deemed to be subject to defeasance if the land is not used for right of way purposes.[115]

Rights of way are generally split into two categories -- public and private. Public rights of way typically have the characteristic of common enjoyment by the general public, such as public roads.[116] Private rights of way, on the other hand, generally relate to particular users or class of users, as opposed to the

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[113] *Board of County Supervisors of Prince Wm. Cty. v. United States*, 48 F.3d 520, 527 (Fed Cir. 1995), *cert. denied* 516 U.S. 812 (1995); *Cappelli v. Justice*, 496 P.2d 209, 213 (Or. 1972) ("In common parlance the term 'right of way' signifies an easement."); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 271(1942) (Under the General Railroad Right-of-Way Act, grants or right of way are only easements (use and occupancy only) and not fee title to the land); also see, Bruce and Ely, The Law of Easements and Licenses in Land, §1.06[1]; see also, Annotation, *Deed as Conveying Fee or Easement*, 136 ALR, 379, 391 (1942).

[114] See, *Hartman v. J&A Dev. Co.*, 672 S.W.2d 364, 365 (Mo. 1984); *Brown v. Penn. Cent. Corp.*, 510 N.E.2d 641, 644 (Ind. 1987).

[115] 25 Am.Jur.2d, Easements and Licenses, §7; Bruce and Ely, *Law of Easements and Licenses*, §1.06[2]; see also, e.g., *Concord & Bay Point Land Co. v. City of Concord*, 229 Cal.App.3d 289, 296 (1991), *Patricca v. Zoning Bd. of Adjustment of City of Pittsburg*, 590 A.2d 744, 748 (Pa. 1991).

[116] 25 Am.Jur.2d, Easements and Licenses, §7; 39 Am.Jur.Wd, Highways, Streets and Bridges, §1; *Alameda County v. Ross*, 32 Cal.App.2d 135, 143 (1939).

general public.[117] The distinction between public and private rights of way and easements has been explored in recent years by several in connection with defining the scope of 47 U.S.C. §541(a)(2).[118] Where a grant of private right of way has been made in general terms, the courts will ordinarily broadly construe the easement to be useable for all reasonable uses.[119] However, the courts have generally recognized that a private right of way cannot be used in a manner which creates a greater burden on the servient estate than was intended by the grantor.[120]

In spite of the lack of precision typically used when references are made to "rights of way," whether determined to be a fee interest or easement, a consistent theme which emerges in the right of way related case law, is that the term right of way is linked to the concept of transit across real property. This basic characteristic applies whether the right of way in question refers to a road, railroad tracks, pipelines, power lines or telecommunications cables. In each instance, the essential physical function of the right of way is to provide a required right of passage to transit an item across a parcel of land. In spite of the vast array of items requiring transit across the real property (e.g., people, animals, trains, water, electrical current, etc.) and numerous infrastructures constructed for such transit, ranging from dirt paths to fiberoptic cables, this common theme of passage or transit across the real property is the consistent and fundamental characteristic of a right of way.

6. **Profits A Prendre.** Also referred to sometimes as a "right of common" or "profits," a profit a prendre is the right of one party to enter upon the lands of another to participate in the profits of the soil and/or to take part of the soil or produce of the land.[121] While constituting an interest in real property, similar to an easement, and not an estate, a profit a prendre is distinguishable from an easement in that under an easement the grantee does not have the right to participate in the profits of the land which is subject to the

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117 25 Am.Jur.2d, Easements and Licenses, §7; *Ryder v. Petrea*, 416 S.E.2d 686, 688 (Va. 1992); *Byrd Co., Inc. v. Smith*, 591 So.2d 844 (Ala. 1991).

118 See, *Century Southwest Cable Television v. CIIF Associates*, 33 F.3d 1068, 1070 (9th Cir. 1994); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812, 817 (8th Cir. 1993); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council*, 991 F.2d 1169, 1173 (4th Cir. 1993); *Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir.1992), *cert. denied*, 506 U.S. 862 (1992).

119 See, Annotation, *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms*, 3 ALR3d 1256, 1266.

120 *Id.* at 1270.

121 25 Am.Jur.2d, Easements and Licenses, §4; Black's Law Dictionary.

easement.[122] Common examples profits a prendre include the right to harvest timber, quarry gravel, mine coal, extract gas and oil or graze livestock.[123] A profit a prendre typically includes the entry and access rights to the real property reasonably necessary to accomplish the purpose of the profit a prendre, and in most respects is treated using the same rules as apply to easements.[124] Thus, a profits a prendre to harvest timber would necessarily include the entry and access rights to the subject real property necessary for the profit holder to come upon the land to cut and remove the trees. Similarly, a profits a prendre to extract sand and gravel deposits would necessarily include the right to excavate on the land for those materials.

7. **Franchises.** The concept of public franchises is derived from English law and originally referred to royal privileges or prerogatives which were delegated to a subject of the crown.[125] In the United States, public franchises involve the delegation of some aspect of sovereignty to an individual or entity, and constitute a special privilege conferred by the government which is generally not a common right.[126] American public franchises serve a wide spectrum of purposes, often related to the provision of regulated utility services.[127] A public franchise can include a delegation by government to the franchisee of a proprietorial type interest in public land (e.g., public streets), similar to (and sometimes deemed to be) an easement or a license in public land.[128]

B. Distinctions Among Easements, Real Property Licenses and Leases.

As observed by some courts and commentators, it can be challenging at times to distinguish between an easement, license and lease.[129] While often considered by the courts, the title to a particular document or

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122 25 Am.Jur.2d, Easements and Licenses, §4.

123 For cites to specific examples, see Bruce and Ely, *Law of Easements and Licenses*, §1.04, fn. 1.

124 Bruce and Ely, *Law of Easements and Licenses*, §1.04; see also, *Evans v. Holloway Sand & Gravel, Inc.*, 106 Mich.App. 70, 78 (1981) (noting similarity of a profits a prendre and easement); Restatement of Property, §450 spec. note (1944) (concluding that in the United States identical rules are applied to easements and profits a prendre).

125 Powell on Real Property, Some Franchises, §431.

126 *Id.* at §433; *Bank of Augusta v. Earle*, 38 U.S. 519, 595 (Ala. 1839).

127 Powell on Real Property, Some Franchises, §433; see, e.g. *Pearce v. Commercial Tel. & Tel. Co.* 115 N.E. 379, 382 (Ill. 1917).

128 Powell on Real Property, Some Franchises, §§ 431 and 433; see, e.g., *Group W. Cable, Inc. v. City of Santa Cruz*, 679 F.Supp. 977, 979 (ND Cal. 1988); *Utah Light & Traction Co. v. Public Serv. Comm'n.*, 118 P.2d 683, 689 (Utah 1941); *Arkansas State Hwy. Comm'n v. Arkansas Power & Light Co.*, 330 S.W.2d 77, 79 (Ark. 1959); *City of New York v. Comtel, Inc.*, 293 N.Y.S.2d 599, 608-609 (1968), *aff'd*, 25 N.Y.S.2d 852 (1969).

129 See, e.g., *Robert's River Rides, Inc. v. Steamboat Dev.*, 520 N.W.2d 294, 300 (Iowa 1994).

the reference to technical words associated with specific use and access rights are typically not dispositive of the legal character of that right (i.e., easement, license or lease).[130] In differentiating these three categories of use and access rights, the courts look to the substance of the agreement, rather than the form or label, with primary focus on the intent of the parties creating the arrangement (e.g., what specific rights did the parties intend to create), rather than the parties' characterization.[131] In the end, it is the substance of the access and use rights which is paramount.[132]

The potential challenge in distinguishing between easements, leases and real property licenses arises in part because the physical use of real property occupied under a easement, lease or real property licenses can appear to be very similar. For example, a utility could obtain a right to construct and maintain its distribution system across a parcel of land pursuant to an easement, lease, real property license or even by acquiring the fee interest in the land. To an outside observer each of these situations might appear identical. However, the rights possessed by the utility in each of these situations would be quite different. A useful analogy is to consider the relationship of a driver to a car. Whether the vehicle is owned, leased, rented or borrowed, the driver's use of the vehicle as well as the basic physical attributes of the car and its ability to transport the driver from Point A to Point B are the same. As modes of transportation, the cars in each situation and their apparent uses are identical. However, in other respects, the nature of the driver's interest in the vehicle dictates divergent rights and outcomes. For example, if the driver owns the car, he or she would have the right to sell it, loan it, donate it to charity or use the vehicle as collateral to secure debt. The driver of a rental or borrowed car, on the other hand, would have none of these rights. Similarly, when judged on basis of the physical use an easement, lease and real property license may appear very similar; however, the nature of the underlying interest and its attendant rights and obligations are very different.[133]

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130 25 Am.Jur.2d, Easements and Licenses, §138; Bruce and Ely, *Law of Licenses and Easements*, §11.01; see, e.g., *Kapiolani Park Preservation Soc'y v. City and County of Honolulu*, 751 P.2d 1022, 1028-1029 (HI 1988); *Cooper v. Boise Church of Christ*, 524 P.2d 173, 175-176 (Idaho 1974); *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994).

131 Bruce and Ely, *Law of Easements and Licenses*, §11.01; see, e.g., *Charlton v. Champaign Park Dist.*, 442 N.E.2d 915, 918 (Ill. 1982); *Dime Laundry Serv., Inc. v. 230 Apartments Corp.*, 466 N.Y.S.2d 117, 119-120 (1983).

132 See, *Application of Rosewell*, 387 N.E.2d 866, 870 (Ill. 1979); *State ex rel. Tucker v. District Court*, 468 P.2d 773, 778 (Mont. 1970), *Dime Laundry Service, Inc. v. 230 Apartments Corp.*, 466 N.Y.S.2d 117, 119 (1983).; *Lee v. North Dakota Park Service*, 262 N.W.2d 467, 474 (ND 1977).

133 See, Powell on Real Property, Landlord and Tenant Estates, §16.02[4]; Gaudio, *American Law of Real Property*, §5.02[1] (Question of whether particular use and access rights constitute possessory rights (lease) or nonpossessory rights (easement or license) is important to the resolution of a variety of issues).

Another factor which can cause confusion in distinguishing between easements, leases and real property licenses is that land use arrangements are often a combination or hybrid of use and access rights. For example, a retailer occupying space in a regional shopping mall will typically lease its shop space and obtain the necessary access rights through the common areas to that shop in the form of an easement or a license typically included as part of the lease agreement. Similarly, a wireless telecommunications carrier may lease specific rooftop space for its equipment and antennae in conjunction with a license with the building owner for riser access rights. As discussed, easements sometimes include the ancillary access rights necessary for the use and enjoyment of the easement (i.e., secondary easements) and leases often include appurtenant license or easement rights related to the tenants use and enjoyment of its premises.

As a result of the superficial resemblance of easements, leases and licenses in real property, the distinction between these types of use and access rights can at times be subtle.[134] As discussed above, the fundamental characteristics which distinguish these categories are: (i) *possession* as opposed to *use*, (ii) *revocability* as distinct from *irrevocability*, and (iii) *real property interest or estate* as distinguished from a *mere privilege*. In addition to these fundamental differences, the distinctions between these three forms of use and access rights has significant legal effects in the following situations:

- **Formality of Creation:** Easements and leases are typically subject to the requirements and formalities of the Statute of Frauds, real property licenses are not.[135]
- **Tax Treatment:** Easements and leases can be taxable as real property interests, real property licenses are not.[136]
- **Divisibility:** Exclusive commercial easements in gross are generally apportionable.[137] Division of interests under a lease (e.g., subleases) will be dictated by the terms of the assignment and subletting

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134 Bruce and Ely, *Law of Easements and Licenses*, §11.01; See, *Closson Lumber Co., Inc. v. Wiseman*, 507 N.E.2d 974, 976 (Ind. 1987) ("In many instances the legal distinction between a license and an easement becomes blurred"); *Evans v. Taraszkiewicz*, 125 A.D.2d 884, 885 (N.Y. 1986) ("[d]istinguishing an easement from a license is not always an easy task . . .")

135 Bruce and Ely, *Law of Easements and Licenses*, §3.1; 25 Am.Jur.Wd, Easements and Licenses, §§ 138 and 139.

136 See, e.g., *United States v. Anderson County*, 575 F.Supp. 574, 578 (ED Tenn. 1983); also see *New England Telephone and Telegraph Co. v. City of Franklin*, 685 A.2d 913 (N.H. 1996) (Telephone company use of a public right of way as constituting a license, not an easement.)

137 Bruce and Ely, *Law of Easements and Licenses*, §9.04; *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 678 (1976); *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697, 699 (Okla. 1979).

provisions of the particular lease as well as the laws of the specific jurisdiction.[138] Real property licenses, are not divisible unless expressly provided for in the license agreement.[139]

- **Condemnation:** As real property interests, easements and leases are treated as compensable property in condemnation, whereas real property licenses are generally not considered a compensable interest in an eminent domain action.[140]

- **Legal Protections & Remedies:** The rights and remedies available can vary dramatically depending on the type of interest involved. For example, tenants in some states receive substantial statutory and common law protections which are unavailable to easement holders or licensees.[141] Similarly, a tenant will often have contract rights or causes of action available which would not pertain to an easement holder.[142]

- **Expiration & Revocability:** In general, real property licenses are much easier to terminate or revoke then an easement or a lease.[143] Similarly, by their very terms, most leases and real property licenses have a limited duration or term.[144] In contrast, easements often have unspecified terms and can be of perpetual duration.[145]

While this list above is not intended to be comprehensive, it does illustrate that the legal importance and practical implications of the distinctions between an easements, leases and real property licenses.

C. **Fixtures.** Related to the issue of utility use and access rights to real property is the identity of ownership of the physical distribution infrastructure used to facilitate the utility's access and use (e.g., poles, conduits, cable, risers etc.). Once again, this relates directly to one of the primary issues raised in NPRM, the meaning of the phrase "owned or controlled" in 47 U.S.C. §224(f)(1). A key factor in determining

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138 See generally, Friedman on Leases, §7.3.

139 Bruce and Ely, Law of Easements and Licenses, §11.04.

140 *Id.* at §§ 1.01, 3.01, 10.13 and 11.01; 26 Am.Jur.2d, Eminent Domain, §§ 174 and 181; See, *United States v. 126.24 Acres of Land,* 572 F.Supp. 832, 834 (WD Mo. 1983); *Griffith v. Montgomery County*, 470 A.2d 840, 846-847 (Md. 1984), cert denied, 469 U.S. 1191 (1985); *Lee v. North Dakota Park Serv.*, 262 N.W.2d 467, 473 (ND 1977) (real property license is not property in the constitutional sense).

141 See, e.g., Cal. Civ. Code §§ 1942, 1946, 1951.2, 1951.4.

142 Powell on Real Property, Landlord and Tenant Estates, §16.02[2]; Gaudio, *American Law of Real Property*, §5.01; see, e.g., *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 843 (Cal. 1985).

143 25 Am.Jur.Wd, Easements and Licenses, §143; Bruce and Ely, *Law of Easements and Licenses*, §11.06; see, e.g., *Clean Corp. v. Foston*, 634 A.2d 1200, 1202-1203 (Conn. 1993); *Port Susan Chapel of the Woods v. Port Susan Camping Club*, 746 P.2d 816, 820 (Wash. 1987).

144 Bruce and Ely, *Law of Easements and Licenses*, §11.07; 25 Am.Jur.Wd, Easements and Licenses, §141; Friedman on Leases, §4.1.

145 25 Am.Jur.Wd, Easements and Licenses, §§ 108 and 109.

ownership of physical infrastructure is the task of determining whether the items in question constitute "fixtures."

Fixtures have been described as the species of property lying in the "gray area" which divides real and personal property.[146] While the precise parameters vary from jurisdiction to jurisdiction, a "fixture" is generally an item of personal property which has become affixed to and part of the real estate either through attachment to or use in association with a parcel of real property.[147] Common examples of items which are often deemed to be fixtures include HVAC (heating, air conditioning and ventilation) and fire suppression systems. Fixtures do not include items which, although once personal property, have lost their separate identity through incorporation into the construction of improvements on real estate through the accession doctrine (e.g., lumber, bricks , structural steel, etc.).[148] As with real property law in general, the precise legal definition of what constitutes a fixture is an issue of state law. Consequently, the Uniform Commercial Code (UCC) defers to the individual states on this issue.[149]

Whether an item is deemed a fixture (i.e., part of the real property) or personal property has significant legal implications, including: (i) whether the item may be removed by other than the owner of the real property, (ii) tax status of the item (i.e., sales tax typically does not apply to a fixture, value of the fixture is a component of valuation for real estate tax purposes), (iii) how creditors create and perfect security interests in the item (e.g., a fixture becomes part of the security for a mortgage, whereas security interests in personal property are secured by UCC filings), (iv) whether the item is deemed included in a sale or transfer of the underlying real property; and (v) how the item is addressed in condemnation actions.[150] For example, in a condemnation action, nonfixtures remain the property of the condemnee, who often must incur the cost of removal, whereas fixtures (as part of the real property) must be compensated for in a condemnation action.[151]

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146 Powell on Real Property, Fixtures, §648; 35 Am.Jur.Wd, Fixtures,§1.

147 *Id.*, also see, Gaudio, *American Law of Real Property*, §7.01[1].

148 Powell on Real Property, Fixtures, §652; Gaudio, *American Law of Real Proeprty*, §7.01[1].

149 UCC § 9-313(1)(a).

150 35 Am.Jur.2d, Fixtures, §3; see, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 382-384 (1945); *United States v. Certain Property*, 344 F.2d 142, 144-146 (2d Cir. 1965).

151 *United States v. General Motors*, 323 U.S. 373, 383-384 (1945); Powell on Real Property , Fixtures, §651[6]; see also, Annotation, *Condemnation, Fixtures as Realty*, 151 A.L.R. 1429 (1944).

1. **Common Tests.** Because of the practical difficulties in creating a comprehensive principle for defining fixtures, there is no clear single statement or definitive rule in determining whether an object constitutes a fixture.[152] Instead, the fixture issue is typically examined in the context of the specific facts and circumstances of the individual case. Over time, the courts have developed various means of analyzing this issue and several tests for determining whether a particular item constitutes a fixture. The classical three prong fixture test, which was originally articulated in *Teaff v. Hewitt*, consists of an examination of the following factors: (i) whether there has been actual *annexation* of the item to the real estate; (ii) the *adaption* and appropriateness of the item to the use or purpose to the real estate, and (iii) the *intention* of the party making the annexation to make the article a permanent accession to the real estate.[153] Another test used by some courts, referred to as the "institutional test" or the "assembled industrial plant doctrine," places the focus on the necessity of the item of personal property for the operation of the real estate.[154] The institutional test is based on the public policy notion that society is better served when property essential to the operation of real estate is preserved intact, and that public welfare is benefitted by encouraging the financing of industrial plants.[155] A third fixture test, takes an objective view of the item in question, examining whether an ordinary buyer, mortgagee or judgment creditor would reasonably expect an item to be a part of the real estate.[156] In the end, each of the varying fixture tests are permutations of the *Teaff v. Hewitt* test, with the variety arising from differences in emphasis on the various prongs -- annexation, adaption or intent.[157] The majority of courts have placed the emphasis on the intent prong of the *Teaff v. Hewitt* test.[158]

2. **Trade Fixtures.** The murkiness of fixture law is further complicated by the trade fixture exception. A "trade fixture" is generally an item of personal property placed on real property by the party in furtherance of its trade or business conducted on the real estate. Unlike ordinary fixtures, which typically

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152 Powell on Real Property, Fixtures, §649[1]; 35 Am.Jur.2d, Fixtures, §1.

153 *Teaff v. Hewitt*, 1 Ohio St. 511, 511 (1853).

154 See, Gaudio, *American Law of Real Property*, §7.02[1]

155 See, e.g., *Commonwealth v. Haveg Indus. Inc.*, 192 A.2d 376, 378 (Pa. 1963).

156 See, Gaudio, *American Law of Real Property*, §7.02[1].

157 *Wayne County v. Britton Trust, No 104299*, 568 N.W.2d 671 (Mich. 1997).

158 See, *United States v. 52.67 Acres of Land, More or Less*, 150 F.Supp 347 (E.D. Ill. 1957) (federal courts have almost universally accepted the intention test); *Seatrain Terminals of Cal., Inc. v. County of Alameda*, 83 Cal.App.3d 69, 75 (1978) (intent is crucial overriding factor with the other two criteria only subsidiary ingredients); see also, Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code - Part I*, 15 Hostra L. Rev. 191, 198.

may not be removed, and trade fixtures remain the personal property of the original owner.[159] Traditionally, the required characteristics of a trade fixture are: (i) the item be annexed to the real property, (ii) the item be related to the proper and efficient conduct of the user's trade or profession on the real property, and (iii) the item can be removed from the real property without permanent injury to the underlying real property.[160] The trade fixture issue most frequently arises in the context of divided ownership, such as with a lease or real property license.

At common law, a party is typically entitled to remove its trade fixtures at the end of its occupancy or use of the real property, provided that any damage related to that removal is repaired.[161] However, in some instances the courts will deny trade fixture status if the construction of the improvements in question was part of the consideration for the underlying access agreement (licenses or lease), if items are installed as replacements for previously existing articles, or where the item is deemed to be for the benefit of the owner of the real estate.[162] For example, in *T-V Transmission, Inc. v. County Board of Equalization* a Nebraska court held that service drops to customer's residences installed by a cable television provider under a real estate license where fixtures and thus could not be removed by the cable television company.[163] In another case, a telephone company's communication equipment (including certain poles, wires and other items) were found to constitute trade fixtures.[164]

3. **Mutual Agreement & Severance.** Items may also retain their status as personalty by agreement between the owner of the personalty and the owner of the real property, although there can be limitations on the enforceability of such agreements in certain situations.[165] Similarly, an item which is a fixture can again become personalty through the severance (actual or constructive) of the item from the real property, effectively reversing the process of an item transforming from personalty to a fixture.[166]

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159 Gaudio, *American Law of Real Property*, §7.03[4].

160 Powell on Real Property, Fixtures, §653.

161 See e.g., *Milford v. Tennessee River Pulp & Paper Co.*, 355 So.2d 687, 690 (Ala. 1978) (general right of licensee to remove trade fixtures); see also, Gaudio, *American Law of Real Property*, §7.03[4].

162 See, *T-V Transmission, Inc. v. County Board of Equalization*, 338 N.W.2d 752, 754 (Neb. 1983); *Rothman v. Butin*, 351 P.2d 893, 896 (Colo. 1960); Brown, *Personal Property*, §546 (3d ed. 1975).

163 *T-V Transmission, Inc. v. County Board of Equalization*, 338 N.W.2d at 367.

164 See, *New England Telephone and Telegraph Co. v. City of Franklin*, 685 A.2d 913,917 (N.H. 1996).

165 See e.g., *Holt v. Henley* 232 U.S. 637, 641 (1914); *Premonstratensian Fathers v. Badger Mut. Ins. Co.*, 46 Wis.2d 362, 373 (Wis. 1970).

166 *Peiser v. Mettler*, 50 Cal.2d 594, 606 (1958); *Marsh v. Spradling*, 537 S.W.2d 402,405 (Mo. 1976).

PART III
Analysis Of Utility Access And Use Rights

The discussion above in *Part II* provides the legal framework to examine the nature of utility use and access rights interest in real property.[167] Understanding the precise legal nature of those utility rights is an essential step in determining the answers to a number of the questions, as well as analyzing the appropriateness of certain proposals, raised in the NPRM. For example, the nature of these use and access rights is at the core of several of the Commission's main inquiries in the NPRM – the meaning of the phrases "owned or controlled " and "right-of-way" as used in the context of 47 U.S.C. §224(f)(1).

In general, there are three main categories of access and use rights by which a utility obtains the necessary interests to construct and maintain its distribution networks: (a) real property which is owned in fee by the utility; (b) rights to use publicly owned or controlled real property (e.g., public streets and highways); and (c) access and use rights to privately owned real property. The Real Access Alliance anticipates that the Commission will receive extensive comments from both utility providers and public entities regarding pertinent issues related to the impact of the NPRM on the first two categories of these use and access rights. As the Real Access Alliance's members are primarily involved with the ownership and management of privately owned real property, the discussion in this *Part III* focuses on the nature of utility's access to private real property.

The three most common forms of utility access and use rights to private real property are easements, leases and real property licenses. It is useful to conceptualize these three forms of use and access rights as three points on the continuum of ownership rights, with easements and leases creating the highest degree of control over the real property (i.e., most sticks from the bundle) and real property licenses representing a much lower grade of control (a mere personal privilege). The nature of the utility's use and access rights often can vary depending on what point in its distribution chain the rights are located. For instance, an

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[167] A number of aspects of the discussion in this *Part III* are based on the experience of the authors, information provided by major utility companies, property management firms, riser management companies and rooftop managers, and prior research on real property law telecommunications related issues conducted by one of the authors of this memorandum in connection with materials which appear in California Continuing Education of the Bar (CEB), *Office Leasing -- Drafting and Negotiating the Lease* and the writing of *An Owner's View of Telecommunications Site Agreements*, ABA Probate & Property, Pg. 53 (January/February 1998).

electrical utility might own its power generating facility and perhaps some of its major distribution rights of way in fee, with secondary distribution rights of way and elements in the form of easements and individual service drops from the utility's distribution grid to particular properties in the form of written or oral service agreements, which typically constitute real property licenses.

The nature and form the use and access rights chosen or obtained by the utility at any point along this distribution chain is often influenced by several factors, including: (i) the nature of the use; (ii) physical location of the use; (iii) relationship of the parties; (iv) availability eminent domain rights; and (iv) cost of obtaining a particular type of use and access rights. While specific circumstances will naturally vary, the impact of these factors leads to some general patterns of certain types of use rights typically occurring in certain situations. For example, where a utility is piggybacking onto another party's easement as a result of an apportionment, the piggy backed utility will typically have a real property license (rather than an easement to the easement) to use the easement. Awareness of these general patterns is useful in determining the practical implications of a number of the proposal in the NPRM.

A. Factors

1. **Nature of Use.** This first factor involves the nature of the particular use for which the utility needs the use and access rights to a particular property. In general, utility uses of privately owned real property can be split into two primary groups -- "service related" uses and "nonservice related" uses. In this instance, service related refers to situations where the access and use rights of the utility are directly related to the utility's provision of its services to the particular parcel of land. For example, this would apply where an electric utility or local exchange carrier extends service lines from their respective grid or local loop for the purposes of servicing a particular parcel of real property. Non-service related use, on the other hand, refers to situations where a utility obtains use and access rights to private real property which are unrelated to the provision of that utility's services to the land in question. Examples of this situation would include rights acquired for purposes of establishing a utilities distribution infrastructure (e.g., transmission lines and supporting structures) across a property or the establishment of wireless telecommunications sites (e.g., Cellular, PCS, SMR, etc.).

This service/nonservice distinction is important because in the nonservice scenario the utility typically has a greater concern with protecting its use and access rights from both the landowner and third parties. In nonservice related circumstances, the uses of the real property by the utility and the landowner are typically separate and insulated from each other. A utility has an obvious need to maintain the integrity and contiguity of its distribution infrastructure, as any distribution chain is only as strong as its weakest link. Thus prudent business practices dictate that the utility obtain use and access rights for its distribution infrastructure which are not subject to unexpected extinguishment or termination, as can happen with a real property license. Easements (interests in real property) and leases (estates in real property) provide the utility with greater control (i.e., more sticks) and also create the opportunity, if desired, for the utility to acquire title insurance coverage to protect its use and access rights. Such insurance coverage is not available for a real property license.

In contrast, the "service related" scenario typically occurs in a permissive and cooperative situation. Quite often it is the landowner who approaches the utility with a request for the utility to provide its service to the landowner's property. In the service scenario, the need for the utility to obtain defensible use and access rights is greatly reduced. If the landowner prevents the utility from obtaining the necessary access to the serviced property, the owner risks the potential loss of that utility's service to the property. In multi-tenant situations, the landowner often has an obligation under its leases to maintain the utility distribution infrastructures within the building in order to provide its tenants with access to utility services, with the tenant paying for the costs of such services, either to the landlord or directly to the applicable utility provider. If the landowner interfered with a utility's service access to the building and caused the disruption of utility service to its tenants, the landlord would face the ire (as well as potential damage claims) from its tenants and potential breach of contract damages to the utility under the service agreement between the landowner and the service provider. Consequently, the landowner and the utility typically have a common interest in maintaining reasonable access rights for the utility and maintaining the integrity of the infrastructure which delivers the utility's services to the tenants.

Two other components of the use factor are the intensity and duration of the use required by the utility. For example, use of real property for right of way purposes (i.e., transiting its utility service across the property) typically involves a less intensive use of the property, requiring only use and access rights,

whereas construction of a tower or monopole for transmission of telecommunications signals typically necessitates the utility acquiring exclusive use over the portion of the property which it uses. Similarly, utilities often will try to acquire perpetual use and access rights for real property used in connection with the utility's distribution network. In other situations, such as office space, work yards or wireless telecommunications sites, the utility may have a shorter term use and access needs.

2. **Physical Location.** Another factor which can influence the form of the use and access rights is the physical location of the use. Depending on the particular location of the use and access rights, certain forms of use and access rights may be more appropriate, available or desirable. For example, even in a service related scenario, is still sometimes desirable for access and use rights related to underground distribution lines to be permanently documented in the form of easements rather than real property licenses, particularly in commercial settings. Because of the dangers and inconveniences associated from severed cables, there is often an understandable desire to minimize the chances of excavation accidents or improvements being inadvertently placed on the surface above the utility's underground infrastructure. Where these concerns exist, a recorded easement can provide the benefit of creating a permanent record of both the existence and precise location of the utility lines.

In contrast, utility access and use rights within buildings are typically not structured in the form of an easement. Instead, interior access and use rights are more commonly delineated as real property licenses for service related rights and as leases or real property licenses in the case of nonservice related uses (e.g., telecommunications switching station, wireless telecommunications site). Where the access is to a shared area of the building infrastructure which the owner uses in conjunction with others (e.g., utility closets, risers and chases), rather than a discernable exclusive use space, licenses are the typical vehicles for access and use rights. In these situations, building owners and managers need to be able to maintain the ability to coordinate users, maintain security and safety and plan the prudent use of limited physical resources (e.g., riser space). Licenses provide the owner with the necessary control and flexibility to accomplish these goals and thus are often the preferred form in this scenario.

3. **Relationship of Parties.** The relationship between the utility and the party from which the utility acquires its use and access rights can also influence the nature of that right. As discussed above, where

the use is service related, the relationship between the utility and the landowner is one of customer and provider, and thus typically in a cooperative and permissive environment. In contrast, with the nonservice situation there may be no relationship between the parties other than during the negotiation for the access and use right agreement. Another instance where the relationship between the parties may be a factor is in the context of an apportioned easement. There, the additional utility derives its use rights through the easement holder, rather than from the underlying property owner. This arrangement can be entered into voluntarily or pursuant to statutory requirements, such as 47 U.S.C. §541(a)(2). Commonly, additional users on apportioned easements enter into a license agreement with the easement holder.[168]

4. **Availability of Eminent Domain Rights.** The ability of a utility to obtain use and access rights through eminent domain can influence the form of rights. The availability of condemnation rights to utilities as a tool for use and access rights acquisition can vary widely from state to state. Some states have delegated fairly broad condemnation rights to certain regulated utilities, while other states have been more restrictive in their delegation of the power of eminent domain.[169] On a practical level, the right to acquire property through eminent domain provides a utility with leverage in negotiations with the landowner and, if such negotiations should fail, provides a means for the utility to obtain the use and access rights it seeks. In a situation where a utility desires broad easement rights (e.g., exclusive easement for broad range of uses) and the landowner is only willing to grant lesser use and access rights (e.g., a real property license or nonexclusive easement), the utility's ability to acquire the desired easement through eminent domain can influence its decision on whether to settle for more restrictive use and access rights.

5. **Cost of Obtaining Rights.** Finally, the cost of the type of use and access rights is a factor. Typically, the intensity of the use and access rights will bear a relationship to the costs of those rights. Using the bundle of sticks analogy, the more sticks the higher the cost. For example, an exclusive easement for all utility purposes would typically be more costly than a real property license for utility purposes across the same strip of land. Similarly, in the absence of an abandonment of an easement by a utility, most easements run indefinitely. Thus when purchased, the cost of the easement is often based on the assumption that the

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168 See, e.g., *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 800 (1985).

169 See, e.g., Cal. Publ. Util. Code §616 (California); NY CLS Trans. Corp.§27 (New York); §220 ILCS 5/8-509 (Illinois); Fla. Stat. §362.02 (Florida); Tex. Util. Code §181.084 (Texas).

utility is purchasing a perpetual right. Leases and licenses, on the other hand, provide means of use and access rights which can be paid for over time and typically do not require the upfront investment involved with an easement. Where a utility does not need particular use and access rights indefinitely, a lease may be more appealing form of use and access rights. A utility can often structure and negotiate lease and license agreements such that the utility effectively is only required to pay for the use and access rights the utility actually needs, for the period of time when those rights are needed.

B. General Patterns of Use Rights. Because of the impact of the five factors discussed above, certain general patterns of utility use and access rights emerge. While there will always be exceptions to these general patterns as a result of varied factual settings and differing rules between jurisdictions, these general patterns provide a useful practical context in which to explore the questions and issues presented in the NPRM.

1. Exterior, Nonservice Related. Use and access rights for nonservice related uses which occur outside of a building and which are used for a utility's distribution infrastructure are often held in the form of an exclusive or nonexclusive easement. These easements may be dedicated by a land developer in connection with the platting or subdivision of land, negotiated by the utility with the landowner or obtained through eminent domain. In situations where the utility requires exclusive possessory interest on the land (e.g., wireless telecommunications facility), rather than simple use and access rights, leases are common.

2. Exterior, Service Related. Service related exterior uses are commonly done though a real property license, oral or written, which is often a component of the basic service agreement between the owner and utility. An exception to this rule sometimes occurs where the utility's facilities are located underground and there is a concern regarding accidents or disruption of service. In these instances, easements may be used.

3. Interior, Service Related. Utility use and access rights within a building, related to servicing the building, most frequently occur in the form of a real property license, oral or written. Where a utility, in connection with its use and access rights under its license makes a significant investment in infrastructure on the property, the license interest may rise to the level of a license coupled with an interest