

A Comparative Property Perspective on Post-Sale Restrictions

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Post-Sale Restrictions on Land: Servitudes

- Easements, real covenants, equitable servitudes
- Impose rights and obligations that “run with land” to subsequent owners
- Enforceable, but (traditionally) with many doctrinal restrictions

Post-Sale Restrictions on **Personal Property**: Chattel Servitudes

- Enforceability questioned in early 20th Century cases in English and U.S. courts . . .

“A vendor cannot . . . by printing the so-called condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition **You cannot in that way make conditions run with goods.**”

McGruther v. Pitcher, [1904] 2 Ch. 306 (A.C.) (U.K)

“A covenant which may be valid and run with land will not run with or attach to a mere chattel.”

John D. Park & Sons v. Hartman, 153 F.24 (6th Cir. 1907).

Why Worry?

Van Houweling, *The New Servitudes*, 96 Georgetown L. Rev. 885 (2008)

- Notice and information costs
- “The Problem of the Future”
- Externalities

Solutions to Servitude Anxiety

- Refusals to enforce post-sale restrictions outside of narrow recognized categories
- Improved information mechanisms
 - E.g. land registries
- Dealing with the future when it arrives
 - Marketable title acts and other durational limits
 - “Changed circumstances”
- Avoiding externalities case-by-case
 - E.g. antitrust enforcement

Patent and Copyright

Impose Post-Sale Restrictions on Chattels

- Non-possessory property rights that impose *some* limits on what someone in possession of an item of personal property may do with it.
- But exhaustion and first sale limit post-sale restrictions to narrow recognized categories and thereby limit notice and information costs, the problem of the future, and negative externalities.

Comparing Copyright and Patent

- Notice and information costs
- The Problem of the Future
- Externalities

Alternatives to First Sale/Exhaustion

- Improving (and requiring) registration/notice
- Durational limits on post-sale restrictions
- Antitrust/misuse/fair use/experimental use