

Why Personal Property Servitudes Are Disfavored: Lessons for Digital Content and Patented Goods

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Abstract:

Why has the common law evolved to disfavor complex and nonpossessory personal property interests, while allowing comparative flexibility in real property? In recent decades, the blossoming of time shares, condominiums, and servitudes has dramatically increased variation in real property rights. But as restrictions on real property forms have eased, personal property forms have remained — and, indeed, have always been — severely and comparatively limited.

This paper will posit three reasons why simple, elegant interests are the norm in personal property. First, because personal property is small, mobile, and often fungible, the information costs associated with determining which property is burdened or fragmented are significantly higher than those associated with pieces of real property. Second, because personal property is generally inexpensive, the information costs associated with determining its status are frequently not worth paying. And finally, because the number of pieces of personal property one interacts with is so great, the information costs associated with correctly understanding them would be, in the aggregate, impracticable if complex interests were permitted.

These reasons indicate that greater flexibility in property interests is most beneficial when property is distinct, valuable, and rarely encountered. In comparison, greater standardization is appropriate when property is fungible, lacks value, and is casually or frequently interacted with.

This conceptualization has implications for the debate within intellectual property law concerning the degree to which content owners may customize license agreements for using digital goods, software-embedded goods, and patented goods subject to conditional sales. Because the characteristics of intellectual-property-embedded goods bear a stronger resemblance to those of personal property than to those of real property, content owners should have less flexibility in crafting license terms than is currently permitted.