A Comparative Property Perspective on Post-Sale Restrictions

Molly S. Van Houweling
Professor of Law
University of California, Berkeley
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 20\textsuperscript{th} 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.”

“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?

• 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