Why Personal Property Servitudes Are Disfavored:

Lessons for Digital Content

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Abstract:

Some claim the numerus clausus principle is passé, pointing to the blossoming of time shares, condominiums, easements, and servitudes, all of which have dramatically changed the landscape of real property rights in recent decades. But as restrictions on real property forms have eased, personal property forms have remained — and, indeed, have always been — severely and comparatively limited.

Why has the common law evolved to disfavor complex and nonpossessory personal property interests, while allowing comparative flexibility in real property? Building off the work of Zechariah Chafee, Glen O. Robinson, and others, 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 interacting with them would be, in the aggregate, prohibitively high if complex interests were permitted.

These reasons indicate that greater flexibility in property interests is 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. Because the characteristics of digital content 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.