Exhaustion and the Property/Contract Interface

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This paper will attempt to think through and shed light on the foundations of exhaustion doctrine, using as a starting point the analytical framework developed in Thomas Merrill and Henry Smith’s work on the Property/Contract Interface. A preliminary adumbration of the argument is as follows:

Property doctrine governs multital relationships (i.e., those imposing duties on classes of numerous unidentified parties) using immutable formalistic rules imposing uniform negative duties. The relationship between the owner of an external resource and the rest of the world (usually operationalized in practice as the relationship between a single party and some resource of which he knows himself not to be the owner) is paradigmatically multital. In rem rights and duties make it possible to administer this relationship without, on the one hand, any need for particularized knowledge on the part of the dutyholder as to the identity or preferences of the rightsholder, or on the other, any need for the rightsholder to obtain indicia of specific notice to or consent from the dutyholder as a prerequisite for enforcement of his rights. Nonowners can ascertain and comply with their duty to respect the resources of others without knowing who they are. Owners can obtain the right to have others abstain from interference with a given resource without knowing who they are.

Contract doctrine permits parties to govern paucital relationships (i.e., those imposing duties on small classes of definite parties) by choosing flexible rules that impose duties of their choosing. In personam rights require specific knowledge of identity, notice, and consent on the part of both rightsholders and dutyholders.

The doctrine governing permissible servitudes addresses a middle zone: under what circumstances should ownership of a particular resource carry with it rights and duties that deviate from the baseline in rem rules?

In one sense, IP regimes impose a set of in rem rules in which the res is an abstract resource. Because the use of an IP resource is not tied to the use of any particular tangible resource however, IP rights necessarily function in effect as a form of servitude, derogating from the rights owners of tangible property ordinarily expect to have in their owned resources. Exhaustion doctrine seeks to limit this effect of IP, by defining
circumstances under which the baseline in rem rules governing tangible resources trump the rights granted to IP owners. This in turn puts pressure on the rules distinguishing transfers of in rem ownership of tangible property from in personam licenses, because only the former trigger exhaustion. My paper will seek to think though the extent to which Merrill and Smith’s analysis of information costs is helpful in telling us how to draw the needed lines.