

**TOUCHING AND CONCERNING COPYRIGHT:  
REAL PROPERTY REASONING IN *MDY Industries, Inc. v. Blizzard Entertainment, Inc.***

**Molly Shaffer Van Houweling\***

Copyright and patent law establish exclusive rights that attach to intangible works of authorship and invention. These rights are often entangled with separate property rights attached to tangible copies of those intangible works. For example, an author may own the copyright to a novel she has written while a reader owns a particular book in which that novel is embodied.<sup>1</sup> Because of the author’s copyright, there are certain things the reader may not do with the book, notwithstanding her ownership of it. She may not—subject to certain exceptions—read aloud from it from a public stage to a paying audience, for example.<sup>2</sup> This and other limitations on the reader’s use of her own personal property are not the result of any special relationship she has with the author. Instead, they adhere in the nature of the author’s intellectual property right, which runs with the intangible work of authorship (and, as a practical matter, with its tangible embodiment) to bind anyone who encounters it—including our initial reader and subsequent possessors of her book.

---

\* Professor of Law, University of California, Berkeley. Thanks to Eric Goldman and other participants in the Santa Clara Law High Tech Law Institute’s conference on “Exhaustion and First Sale in Intellectual Property,” for which this essay was prepared. Anyone may make verbatim copies of this essay so long as the following notice is retained on all publicly distributed copies:

© 2011 Molly Shaffer Van Houweling. Originally published in the *Santa Clara Law Review*. This work is licensed under the Creative Commons Attribution-NoDerivs 3.0 United States License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nd/3.0/us/> or send a letter to Creative Commons, 171 Second Street, Suite 300, San Francisco, California, 94105, USA.

<sup>1</sup> See generally 17 U.S.C. 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”).

<sup>2</sup> This would amount to performing the work publicly, see 17 U.S.C. 101 (defining “to perform . . . a work ‘publicly’” as, inter alia, “to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered”), which is an exclusive right of a copyright owner granted by 17 U.S.C. 106(4). The paying audience would take this performance out of one exception for noncommercial performances, 17 U.S.C. 110(4)(A), but it might qualify for others, see e.g. 17 U.S.C. 110(4)(B), including fair use, 17 U.S.C. 107.

These complicated intersections between intangible and tangible property rights are mediated by the idea of intellectual property “exhaustion”—which provides (through various specific doctrinal mechanisms in copyright, patent, and trademark law<sup>3</sup>) that at least some of an intellectual property owner’s rights no longer apply—they are “exhausted”—upon the lawful transfer of an authorized embodiment of her protected intangible subject matter. Although the exhaustion concept is fuzzy around the edges and frustratingly under-theorized, one function it clearly serves is to limit the extent to which the intangible rights held by intellectual property owners can interfere with the freedom of owners of tangible objects to exercise rights normally incident to personal property ownership—to use those objects “in the ordinary pursuits of life,” as the Supreme Court has put it.<sup>4</sup> In this way, exhaustion operates much like doctrines that have long limited the ways in which non-possessory interests in real property (so-called “servitudes”) can interfere with the rights of land-owners to use their land. Like those limiting doctrines, exhaustion’s limits have been subject to pressure applied by property owners eager to have the force of law behind the novel restrictions they impose on others.

In previous work I have described some of the limiting doctrines from the law of real servitudes and examined whether their rationales might also be relevant to contemporary questions about intellectual property.<sup>5</sup> In this essay I begin to look in more detail at one particular doctrinal restriction from the land servitude context—the “touch and concern” requirement. Touch and concern has long been maligned as anachronistic, indeterminate, and unnecessary.<sup>6</sup> Some courts, and the recent Restatement (Third) of Servitudes, have abandoned the requirement altogether in the land servitude context.<sup>7</sup> Ironically, the spirit—if not the exact terminology—of touch and concern may be reemerging as courts grapple with a new generation of servitude-like restrictions imposed by intellectual property owners.

---

<sup>3</sup> My focus here will be on patent and, especially, copyright. My analysis of exhaustion in these two contexts is shaped by the constitutional text that authorizes these bodies of law. Because trademark law does not share the same constitutional origin, my analysis does not necessarily apply there.

<sup>4</sup> *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1852); *see also* *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008) (quoting *Bloomer*).

<sup>5</sup> Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

<sup>6</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>7</sup> See *infra* notes \_\_\_ and accompanying text.

The glimmer of this reasoning appears in *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*,<sup>8</sup> in which the Court of Appeals for the Ninth Circuit struggled to apply a specific statutory manifestation of exhaustion in the copyright context. *MDY* suggests that the touch and concern doctrine—or at least the reasoning that underlies it—may turn out to be more useful in this new context than in the land context in which it first arose.

### **Land Servitudes, Chattel Servitudes, and the New Servitudes<sup>9</sup>**

A land servitude is a non-possessory property interest that gives its holder the right to use land in specified ways, to object to specified uses of it, or to insist on specified behavior connected to it.<sup>10</sup> Servitudes are voluntarily created by property owners, typically in writing (but sometimes by estoppel, implication, or prescription) and with some manifestation of intent to create an encumbrance that “run[s] with” the land, “pass[ing] automatically to successive owners or occupiers.”<sup>11</sup> Unlike a mere contractual agreement to, say, refrain from blocking your neighbor’s satellite dish, a servitude is enforceable against successors in interest. Therefore, if you grant your neighbor an effective servitude, she will be able to enforce the restriction against you and subsequent owners of your land.<sup>12</sup> The benefit of a servitude typically runs to successors as well—from your neighbor to the next owner of her house.

---

<sup>8</sup> \_\_\_ F.3d \_\_\_, 2010 WL 5141269 (9<sup>th</sup> Cir. 2010). I am not the only observer to see this glimmer. See, e.g., Greg Lastowka, “Ninth Circuit Opinion in *MDY v. Blizzard*,” Email to CyberProf listserv (Dec. 17, 2010).

<sup>9</sup> This section relies heavily on my previous work on servitudes. Van Houweling, *supra* note, \_\_\_.

<sup>10</sup> See generally RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (2000); Susan F. French, *Design Proposal for the New Restatement of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1214-15 (1998) (explaining how various types of servitudes—including “easements, profits, covenants, and equitable servitudes”—“create interests running with the land. They create nonpossessory rights in the land of another, which pass with ownership or occupancy of the benefited land or estate, and corresponding duties, which pass with ownership or occupancy of the burdened land or estate”); see also Van Houweling, *supra* note 5, at 891-905; Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

<sup>11</sup> RESTATEMENT, *supra* note 10, § 1.1.

<sup>12</sup> See, e.g., French, *supra* note 10, at 1264. On the complicated and evolving issue of when possessors who are not owners succeed to the benefits and burdens of servitudes, see RESTATEMENT, *supra* note 10, ch. 5, introductory note; GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES §§ 5.03, 9.14(b)–(c) (2d ed. 2004).

The land-use planning needs of the Industrial Revolution triggered the development of modern Anglo-American land servitude law.<sup>13</sup> Increased urban density and the potential for conflicts between neighboring property owners prompted a variety of attempts to coordinate land uses through durable private arrangements.<sup>14</sup> Nineteenth-century English courts reacted with ambivalence. They recognized *affirmative* easements—rights of way and other non-possessory rights to use burdened land.<sup>15</sup> And under very limited circumstances they enforced running duties to use land in specified ways under the rubric of “real covenants.”<sup>16</sup> But the courts resisted most attempts to enforce running use *restrictions* until the landmark 1848 case of *Tulk v. Moxhay*.<sup>17</sup> In *Tulk*, the Court of Chancery established the notion of an “equitable servitude”—a land use restriction that binds successors to the burdened land who take with notice of the restriction.<sup>18</sup> Although *Tulk* liberalized the English law of servitudes somewhat, even courts of equity following *Tulk* imposed a thicket of doctrinal limitations on attempts to impose running use restrictions.<sup>19</sup> Many of the doctrinal restrictions imposed by English courts were imported into early U.S. decisions.

Over time, however, the law in United States has become more accommodating toward real servitudes. Courts (and commentators and some state legislatures) seem to have been convinced by the argument that land servitudes can promote efficient land use and be fair even to successors in interest so long as everyone burdened has at least the opportunity for clear notice—an opportunity that modern recording systems provide.<sup>20</sup>

---

<sup>13</sup> Easements existed in Roman law and running covenants were recognized as early as *Spencer’s Case* in 1583. But “[u]ntil the Industrial Revolution greatly increased the use of servitudes, the common law did not develop a general theory of easements or servitudes.” French, *supra* note 10, at 1214; *see also* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1183 (1982).

<sup>14</sup> *See, e.g.*, A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 262 (2d. ed. 1986); French, *Strands*, *supra* note 10, at 1262; James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 13.

<sup>15</sup> *See generally* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 154 (3d ed. 1923).

<sup>16</sup> *See generally* Winokur, *supra* note 14, at 12 & n. 43.

<sup>17</sup> (1848) 41 Eng. Rep. 1143.

<sup>18</sup> As Lord Cottenham explained in *Tulk*, “the question is . . . whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.” *Tulk*, 41 Eng. Rep. at 1144.

<sup>19</sup> *See generally* SIMPSON, *supra* note 14, at 256–60 (describing development of English case law before and after *Tulk*).

<sup>20</sup> *See generally* French, *supra* note 10, at 1223 (“Servitudes law may be simplified substantially because particular rules designed to give notice are no longer needed. The modern technology of record systems

The conventional wisdom under Anglo-American law has long been that the types of servitudes that can be attached to land cannot be attached to chattels.<sup>21</sup> Several rationales have been offered for this prohibition, including the difficulty of ensuring adequate notice of chattel servitudes in the absence of the kind of recording systems that provides notice in the land context.<sup>22</sup> In the late nineteenth and early twentieth centuries, U.S. courts grappled with the tension between this general rule of the common law and the non-possessory statutory rights that copyright and patent law create.<sup>23</sup>

The issue is a complicated one. In the limited way noted above,<sup>24</sup> every copyright and patent creates the type of non-possessory right to control use chattels that the common law has traditionally refused to recognize. Although technically the subject matter of these intellectual property regimes extends only to intangible works of authorship and invention—not to the tangible objects in which those works are embodied—because of that embodiment, the regimes necessarily impose some constraints on use of the physical objects as well. The idea of intellectual property “exhaustion” can be understood as an attempt to minimize the extent to which those

---

and title search procedures, together with the protection recording acts afford, have made these rules superfluous.”).

<sup>21</sup> See, e.g., *John D. Park & Sons v. Hartman*, 153 F.2d 424 (6<sup>th</sup> Cir. 1907) (“It is . . . a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach to a mere chattel.”). See generally Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEORGETOWN L. REV. 885, 906-925 (2008); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. (Supp.) S373, S407 (2002); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 18 (2000); Zechariah Chafee, Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956); Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928). But cf. Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004).

<sup>22</sup> See, e.g., Hansmann & Kraakman, *supra* note 21, S407 (arguing that “[p]art of the reason [that it is so “much simpler to establish partial rights in real property than in personal property”] is that the registries developed for verifying ownership of land are available to record these other [partial] interests as well, hence avoiding many of the additional system and nonuser costs that effective verification of these rights would otherwise require”). See generally Van Houweling, *supra* note 21, at 906-925.

<sup>23</sup> See generally Van Houweling, *supra* note 5, at 910-924 (discussing cases).

<sup>24</sup> See discussion *supra* page \_\_\_\_\_. [Insert cross reference to Introduction.]

constraints cover what we might call “ordinary” uses of copies of copyrighted works and of physical objects that embody patented inventions.<sup>25</sup>

When the lawful owner of a patented phonograph machine uses it to play records, for example, he does not thereby infringe the patent—notwithstanding the Patent Act’s prohibition on unauthorized “use” of patented inventions.<sup>26</sup> Courts have explained that the initial authorized sale of a patent-embodying item “terminates” or “exhausts” the patent holder’s rights, and this doctrine has come to be known as patent exhaustion.<sup>27</sup> In copyright, many ordinary uses of copies of copyrighted works simply do not implicate an exclusive right of the copyright holder at all, as there is no exclusive right to “use” in the Copyright Act.<sup>28</sup> Using a physical book by reading it, for example, does not require authorization. Showing a book to someone else, or selling (or giving, or lending, etc.) the book to someone else to use, is also not covered by copyright—notwithstanding the copyright owner’s exclusive rights to display and distribute and copies to the public<sup>29</sup>—because of limiting doctrines in copyright that are analogous to patent exhaustion.

These copyright doctrines, like patent exhaustion, were initially articulated by courts.<sup>30</sup> But they were also codified, at least in part, in the Copyright Act of 1909.<sup>31</sup> which introduced a statutory provision commonly referred to as the “first sale doctrine.”

---

<sup>25</sup> *E.g.* Bloomer v. McQuewan, 55 U.S. 539, 549 (1852) (“[T]he purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. . . . [W]hen the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly.”).

<sup>26</sup> 35 U.S.C. 271(a).

<sup>27</sup> *E.g.* Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617, 625 (2008) (“The longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item.”).

<sup>28</sup> 17 U.S.C. 106.

<sup>29</sup> 17 U.S.C. 106(3) & 106(5) (establishing the copyright owner’s exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending” and “to display the copyrighted work publicly”).

<sup>30</sup> *See generally* Aaron K. Perzanowski & Jason Schultz, “Digital Exhaustion,” forthcoming 58 UCLA L. REV. \_\_\_\_ (2011) (draft manuscript at <http://ssrn.com/abstract=1669562>).

<sup>31</sup> Copyright Act of 1909, § 41. The provision is now 17 U.S.C. 109, which specifies in relevant part that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord” and that “the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.”

As Perzanowski and Schultz explain, the codified first sale doctrine of current section 109 only incompletely captures the principle of copyright exhaustion developed in the courts. *See* Perzanowski & Schultz, *supra* note 30, draft at 29-45.

The codified first sale doctrine currently resides in section 109 of the Copyright Act, where it limits copyright holders' rights to control display and distribution of copies of their works subsequent to the initial authorized sale of those copies.<sup>32</sup> More recently, Congress added a separate provision in section 117 that limits copyright holders' reproduction rights in a way that privileges ordinary uses of copies of computer software.<sup>33</sup> This limit, known as the "essential step" exception, allows an owner of a copy of a computer program to reproduce that copy to the extent necessary to use the program on her computer.<sup>34</sup>

Despite these legislative recognitions of the exhaustion concept in the copyright context, and the Supreme Court's recent reiteration of the importance of patent exhaustion in *Quanta Computer, Inc. v. LG Electronics*,<sup>35</sup> these doctrines have over the past several decades begun more and more to resemble the law of land servitudes. Non-possessory restrictions that once met with judicial hostility have been accommodated, at least in cases in which the burdened party acquired the intellectual property-embodiment chattel with notice of the restrictions.<sup>36</sup> There are reasons to doubt whether enforcement of these "new servitudes" is generally desirable.<sup>37</sup> But for now I want to focus on another question: assuming it is possible for intellectual property owners to impose—with notice—use restrictions on chattels that embody their works, what substantive limitations should there be on the terms of those restrictions? In the land context, this question has traditionally been addressed with the "touch and concern" requirement.<sup>38</sup>

---

<sup>32</sup> 17 U.S.C. 109.

<sup>33</sup> See generally Perzanowski & Schultz, *supra* note 30, draft at 42-45.

<sup>34</sup> The relevant language of the provision says "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided . . . that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner . . ." 17 U.S.C. 117(a).

<sup>35</sup> 553 U.S. 617 (2008).

<sup>36</sup> See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9<sup>th</sup> Cir. 2010); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992); *United States v. Wise*, 550 F.2d 1180 (9<sup>th</sup> Cir. 1977).

<sup>37</sup> See Van Houweling, *supra* note 5; see also, e.g., Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, \_\_\_ BERKELEY TECH. L.J. \_\_\_ (forthcoming 2011); Aaron K. Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. \_\_\_ (forthcoming 2011); John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L.J. 115 (1997).

<sup>38</sup> See *infra* note \_\_\_ and accompanying text.

### **The Touch and Concern Requirement in the Law of Land Servitudes<sup>39</sup>**

Among the servitude-limiting doctrines imposed by English courts and initially adopted by U.S. courts was the requirement that running duties or restrictions (whether recognized as real covenants or equitable servitudes)<sup>40</sup> “touch and concern” both the burdened and benefitted land.<sup>41</sup> What the burdened party is required to do (or to refrain from doing) must have some connection to her land and to the land of the party seeking to enforce the servitude.<sup>42</sup> Imagine that a landowner sells half of her land subject to a purported real covenant binding the buyer and her successors in interest to sing “Happy Birthday” annually for the benefit of the owner of the retained parcel. The touch and concern doctrine could be applied to render such a non-land-use-related servitude unenforceable against successors.

The touch and concern requirement has been defended on several grounds.<sup>43</sup> One justification for the doctrine is that it promotes notice, because restrictions and duties that

---

<sup>39</sup> This section relies heavily on my previous work on servitudes. Van Houweling, *supra* note 5.

<sup>40</sup> See generally KORNGOLD, *supra* note 12, at 348 (“Under the prevailing rule, the courts hold that a covenant must touch and concern the land in order for it to run. This is a requirement in actions both at law and in equity.”); French, *Strands*, *supra* note 10, at 1277.

<sup>41</sup> As Restatement Reporter Susan French helpfully summarizes, “[t]raditional servitudes doctrine requires that covenant burdens and benefits touch and concern the land if they are to pass automatically to successors of the original covenanting parties. The doctrine . . . applies regardless of the parties’ intent, limiting the kinds of covenants that can be made into servitudes.” Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEBRASKA L. REV. 653, 653 (1998) (citing *Spencer’s Case*, 77 Eng. Rep. 72 (K.B. 1583)). See generally KORNGOLD, *supra* note 12, at 349 (“The authorities mostly agree that touch and concern means that in order for a covenant to run, there must be some fundamental link between the promise and the burdened and benefitted land. The question of touch and concern must be analyzed on both sides of the covenant.”).

<sup>42</sup> One widely-cited articulation of the test is whether the servitude “operate[s] to make more valuable some of the rights, privileges, or powers possessed by the covenantee or to relieve him in whole or in part of some of his duties.” Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914). A variation provides that “[i]f the promisor’s legal relations in respect to the land in question are lessened—his legal interest as an owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee’s legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches and concerns the land.” CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” 97 (2d ed. 1947).

<sup>43</sup> See generally KORNGOLD, *supra* note 12, at 352-53 (summarizing commentary critiquing and defending the doctrine).

are tied to land use are relatively easy to discover upon physical inspection.<sup>44</sup> Another is that non-land-use-related restrictions and duties are likely to satisfy merely the idiosyncratic whims of the original parties—and therefore to become obsolete with the passage of time. As Uriel Reichman argues, “obligations not related to actual property use are highly individualized. They tend, therefore, to become inefficient in the short run following a transfer.”<sup>45</sup> Relatedly, Reichman objects to limiting the autonomy of future generations without the type of land-use justification that the doctrine requires. As he argues, “[p]rivate property is sanctioned by society not only to promote efficiency, but also to safeguard individual freedom. Servitudes are a kind of private legislation affecting a line of future owners. Limiting such ‘legislative powers’ to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom.”<sup>46</sup>

Although Reichman is not its only defender,<sup>47</sup> the touch and concern doctrine has more often been scorned by commentators and evaded by courts. One objection is that its purported purposes are better served by other mechanisms. Notice can be provided through land recording systems, for example.<sup>48</sup> And substantively obsolete or unreasonable servitudes can be judicially modified or terminated *ex post* as needed.<sup>49</sup>

As for Reichman’s argument that limiting the autonomy of future generations is not justifiable without an “objective purpose of land planning,” this rationale for the touch and concern doctrine is vulnerable in the absence of some agreed-upon set of land planning purposes. If a landowner gets special enjoyment (and attaches additional value to her land) because she is secure in the knowledge that her neighbors and their

---

<sup>44</sup> See Hansmann & Kraakman, *supra* note 21, at S402 (noting that servitudes touching and concerning the land “are much easier to verify upon physical inspection of property”).

<sup>45</sup> Reichman, *supra* note 13, at 1233.

<sup>46</sup> Reichman, *supra* note 13, at 1233.

<sup>47</sup> See, e.g., A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 809 (1998); Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925 (1988). Cf. Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 646-649 (1985) (noting useful purposes served by the doctrine but conceding that its ambiguity produces uncertainty costs).

<sup>48</sup> See generally French, *supra* note 41, at 654.

<sup>49</sup> See, e.g., KORNGOLD, *supra* note 12, at 353 (arguing that “[t]he current touch and concern test . . . may not be the best way to control inefficient and eccentric covenants in all cases,” and that “courts should straightforwardly face the issues inherent in difficult covenants . . . and resolve them in terms of articulated policies as well as the values of freedom of contract, and the policy against land restrictions”); French, *Strands*, *supra* note \_\_\_\_, at 1308; French, *Touch and Concern*, *supra* note 41, at 654.

successors will forever be required to sing “Happy Birthday” to her and to her successors, then imposing that requirement arguably *is* a “land planning” purpose—unless we have some theory of “land planning” that rejects such whims. In his critique of touch and concern, Richard Epstein argues that the purposes of land ownership cannot be cabined in that way:

Insistence that the attachment of merely personal obligations to land is likely to frustrate, rather than enhance, the objectives which a private land holding system seeks to realize presupposes that we have some collective vision of what that system is supposed to do. Yet one traditional argument for both freedom of contract and private property is that they define domains in which individuals may establish both the means and the ends for themselves, to pursue as they see fit (so long as they do not infringe upon the rights of third parties). Private property is an institution that fosters individualized, if not eccentric, preferences; it does not stamp them out. We may not understand why property owners want certain obligations to run with the land, but as it is their land, not ours, some very strong reason should be advanced before our intentions are allowed to control.”<sup>50</sup>

Epstein’s rejection of any “collection vision” for property may represent an extreme view. But he is not alone in criticizing the touch and concern doctrine for failing to provide a satisfactory theory of the purposes that servitude restrictions may validly serve.<sup>51</sup>

In sum, the touch and concern doctrine has been justified in terms of limiting notice and information costs, preempting servitude obsolescence, and keeping enforcement of non-possessory property rights consistent with the purposes of private land ownership. But it has been criticized on the grounds that insufficient notice and obsolescence are addressed by superior alternative mechanisms, and that using the purposes of land ownership as a touchstone will either be hopelessly indeterminate or else will impose limitations that reflect an unjustifiably cramped notion of the ends of property ownership. In light of these and other criticisms, some U.S. courts have relaxed

---

<sup>50</sup> Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982).

<sup>51</sup> Even Jeffrey Stake, a defender of touch and concern, acknowledges that the foremost articulation of the touch and concern doctrine “runs in a circle.” Stake, *supra* note 47, at 929.

the touch and concern requirement.<sup>52</sup> The recent *Restatement (Third) of Property: Servitudes* abandons touch and concern altogether.<sup>53</sup>

### **Reviving Touch and Concern to Control the New Servitudes**

Contemporary attempts to impose novel running restrictions on use of intangible works of authorship and invention—and thus on the tangible objects in which those works are embedded—can be analyzed as servitudes.<sup>54</sup> Some observers use the servitude characterization to call these restrictions into question.<sup>55</sup> To others, judicial enforcement of servitude-like restrictions on users of intellectual creations and their embodiments is consistent with the liberalizing attitude toward land servitudes and rightly represents the preeminence of freedom of contract over hostility to restraints on resource use and transfer.<sup>56</sup>

The judicial reception has been mixed, but at least some courts have allowed both patent and copyright owners to impose (and to enforce through infringement lawsuits) running restrictions on uses of copies of their intellectual works.<sup>57</sup> The primary mechanism by which this move has been accomplished, notwithstanding the exhaustion

---

<sup>52</sup> See RICHARD R. POWELL, POWELL ON REAL PROPERTY § 60.04 (2005); Sterk, *Freedom*, *supra* note \_\_\_\_ at 649 n.141 (noting paucity of case law invalidating servitudes for failure to satisfy the touch and concern requirement).

<sup>53</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.4, 2.6, 3.2 and introductory notes to chs. 2 & 3 (2000).

<sup>54</sup> See Van Houweling, *supra* note \_\_\_\_; see also Robinson, *supra* note \_\_\_\_, at 1478; Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1138-39 (1999); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 407-408 (2005); John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 45 (2004); Michael J. Madison, *Reconstructing the Software License*, 35 LOY. CHI. L.J. 275, 306 (2003); Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 121, 148 (1999); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1211 (1998); Wendy J. Gordon, *Intellectual Property as Price Discrimination*, 73 CHI.-KENT L. REV. 1367, nn. 1-2 and accompanying text (1998); Thomas M.S. Hemmes, *Restraints on Alienation, Equitable Servitudes and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577 (1994).

Note, however, the distinctions drawn in Robert P. Merges, *The End of Friction? Property Rights and Contract in the 'Newtonian' World of On-Line Commerce*, 12 BERKELEY TECH. L. J. 115 (1997).

<sup>55</sup> Radin, *supra* note \_\_\_\_\_. Cf. Elkin-Koren, *supra* note \_\_\_\_.

<sup>56</sup> Robinson, *supra* note 4.

<sup>57</sup> E.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9<sup>th</sup> Cir. 2010); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992); *United States v. Wise*, 550 F.2d 1180 (9<sup>th</sup> Cir. 1977).

doctrines described above, is by characterizing a user's relationship to the embodiment of a work as a mere "license" to use it.<sup>58</sup> The scope of this "license" is then determined by consulting an "End User License Agreement" or "Terms of Use" provided by the copyright or patent owner.<sup>59</sup>

As a practical matter, this accomplishes the same result as those cases that liberalized the law of land servitudes: allowing original parties to transfer possession of an object and to characterize that transaction in a way that imposes property-based restrictions that run to subsequent possessors of the object, whether or not there is any contractual relationship between the ultimately benefited and burdened parties. But recognizing the possibility of running use restrictions—the intellectual property equivalent of *Tulk v. Moxhay*—does not resolve the question of what (if any) substantive limitations there should be upon those restrictions. Should there be, in other words, a touch and concern doctrine for intellectual property servitudes?

On first utterance, the notion seems laughable. Why address digital-age intellectual property puzzles by reviving a land law doctrine that has, even in its native doctrinal context, been characterized as "anachronistic,"<sup>60</sup> "superseded," "a confusing artifact of history,"<sup>61</sup> a "hoary requirement . . . relegated to the dustbin,"<sup>62</sup> and "a feudal relic best abandoned"?<sup>63</sup> And, indeed, no court to have addressed this question has in fact expressly invoked the much maligned "touch and concern" doctrine. But, as at least one other observer has noted,<sup>64</sup> the Ninth Circuit's recent decision in *MDY Industries*,

---

<sup>58</sup> See generally Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, \_\_\_ BERKELEY TECH. L.J. \_\_\_ (forthcoming 2011); John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L.J. 115 (1997).

<sup>59</sup> See generally Rothchild, *supra* note \_\_\_\_.

<sup>60</sup> James L. Winokur, *Ancient Strands Rewoven, or Fashioned Out of Whole Cloth? First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 143 (1994).

<sup>61</sup> Robinson, *supra* note \_\_\_\_, at 1461 n. 36 (observing that "[t]he latest Restatement of Property, reflecting a growing body of scholarly opinion that believes the touch and concern doctrine is just a confusing artifact of history, concludes that it is 'superseded,' leaving only specific limitations on certain restraints, such as those that impose unreasonable restraints on alienation or violate some other public policy.").

<sup>62</sup> Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 278 (1997).

<sup>63</sup> A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 809 (1998) (defending the doctrine to some extent, but observing that "[t]o many, the touch and concern doctrine is a feudal relic best abandoned").

<sup>64</sup> See Greg Lastowka, "Ninth Circuit Opinion in *MDY v. Blizzard*," Email to CyberProf listserv (Dec. 17, 2010).

*Inc. v. Blizzard Entertainment, Inc.*<sup>65</sup> employs an analysis of a running restriction on a copy of a copyrighted work that echoes—and perhaps improves upon—touch and concern.

### ***MDY v. Blizzard's "Nexus" with Touch and Concern***

In *MDY*, the Ninth Circuit addressed a dispute between Blizzard Entertainment and Michael Donnelly regarding Blizzard's popular online game "World of Warcraft." Donnelly initiated the lawsuit, asking the district court to declare that he did not infringe copyright or any other right Blizzard had in the game when he sold his own software, "Glider," to World of Warcraft players. Glider is a "bot" program that automatically plays the World of Warcraft game so that users can proceed to advanced levels of the game even while away from their computers. As Donnelly's website explained, "[y]ou can do something else, like eat dinner or go to a movie, and when you return, you'll have a lot more experience and loot."<sup>66</sup>

Blizzard countersued on various theories and the district court held Donnelly liable for secondary copyright infringement, violation of the Digital Millennium Copyright Act, and tortious interference with contract.<sup>67</sup> My focus in this essay is on the secondary copyright infringement claim, on which the Ninth Circuit held for Donnelly.<sup>68</sup>

The court's copyright analysis turned in part on the "essential step" provision in section 117(a)(1) of the Copyright Act. The provision, described briefly above, declares that "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided . . . that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner."<sup>69</sup> As with other manifestations of the exhaustion idea, this provision limits the

---

<sup>65</sup> \_\_\_ F.3d \_\_\_, 2010 WL 5141269 (9<sup>th</sup> Cir. 2010).

<sup>66</sup> *MDY*, 2010 WL at \*2.

<sup>67</sup> *MDY*, 2010 WL at \*3 (providing procedural history).

<sup>68</sup> *MDY*, 2010 WL at \*8.

<sup>69</sup> 17 U.S.C. 117(a)(1).

extent to which copyright holders may deploy their non-possessory rights to limit ordinary uses of copies of their works by lawful possessors.<sup>70</sup> And, also as with other types of exhaustion, some courts have allowed copyright owners to forbid even “essential step” copies by characterizing transactions by which users acquire their initial copies as “licenses” as opposed to “sales.”

The applicability of the essential step provision was important in *MDY* because the kernel of Blizzard’s copyright infringement argument was that the users were directly infringing its copyrights (and that Donnelly was secondarily liable for helping those users) when they played World of Warcraft using Glider. The only aspect of the players’ use that implicated Blizzard’s exclusive rights under copyright was the copying of World of Warcraft into the temporary memories of their computers for purposes of playing the game—just the type of behavior that the essential step provision seems to privilege.

Indeed, Donnelly argued that the players’ use of the World of Warcraft software fell within the essential step exception and was therefore not infringing. Blizzard countered that the users were not shielded by the essential step defense because they were not “owner[s]” of copies as that term is used in section 117. On this question, the Ninth Circuit agreed with Blizzard. Copies of the game software were distributed with an End User License Agreement (EULA) that the court interpreted, together with the Terms of Use (ToU) for the World of Warcraft online service, as imposing so many restrictions on transfer and use that the users should be considered mere “licensees” rather than owners.<sup>71</sup> To reach this conclusion, the Ninth Circuit followed its own controversial logic from *Vernor v. Autodesk*,<sup>72</sup> in effect allowing the copyright holder to impose, via ToUs and EULAs, servitudes that restrain otherwise permissible, “ordinary,” behavior of users despite their lawful possession of copies of copyrighted works.

I leave to another day the important question of whether *Vernor* was correctly decided and applied in *MDY* (while noting that this question is made even more interesting by the same court’s recent application of *Vernor* to reach the opposite result in

---

<sup>70</sup> On possession and ownership of copies, see generally Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1248–49 (2001).

<sup>71</sup> *MDY*, 2010 WL at \*5.

<sup>72</sup> 621 F.3d 1102 (9<sup>th</sup> Cir. 2010).

*UMG v. Augusto*<sup>73</sup>). What is key for purposes of this essay is that the Ninth Circuit simultaneously recognized the possibility of this type of servitude and imposed substantive limits on its terms, as I explain below. In the land context, this type of substantive scrutiny of the terms of servitudes has typically been conducted through the doctrinal lens of the maligned “touch and concern” requirement. The Ninth Circuit breathes new life into that moribund concept with its analysis in *MDY*.

In the land servitude context, courts that apply the touch and concern doctrine are fundamentally determining whether a restriction should be treated as a property right or (because it fails to “touch and concern” and is therefore not a valid servitude) as a mere contract (with the limitations on privity and remedies that come with that label). In *MDY*, the Ninth Circuit drew an analogous distinction between property (copyright) and contract, using a touch-and-concern-like approach to determine whether the restrictions at issue could be enforced as property rights.

Specifically, once the court had determined that the users did not qualify for the essential step exception, it was left with Blizzard’s argument that the temporary copies users made while playing the game were infringing. Although its EULA and ToU gave paying users permission to play the game (and thus to make temporary copies of it), Blizzard argued that the permission was conditioned on compliance with the terms set forth in the EULA and ToU, including a prohibition on use of “third-party software designed to modify the World of Warcraft experience.”<sup>74</sup> Under that argument, no compliance means no license to use the software; no license (plus no essential step exception) means that playing the game (which necessarily involves copying) amounts to infringement by the users and secondary liability for Donnelly. In other words, Blizzard demanded a property remedy for violation of the restrictions that it had crafted into its EULA and ToU.

To the Ninth Circuit, there was an alternative possibility: although the court said the that this type of condition could be enforceable as a property right—even against lawful possessors of copies of the software—it imposed a substantive screen to determine

---

<sup>73</sup> *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9<sup>th</sup> Cir. 2011).

<sup>74</sup> *MDY*, 2010 WL at \*4.

whether these particular restrictions should be considered “conditions” that qualify for servitude-like treatment, or as mere contractual “covenants.”<sup>75</sup> The distinction is legally significant because a plaintiff asserting a breach of covenant is left to solely contractual remedies against defendants in contractual privity.<sup>76</sup> As the court explained, “[w]e refer to contractual terms that limit a license’s scope as ‘conditions,’ the breach of which constitute copyright infringement. We refer to all other license terms as ‘covenants,’ the breach of which is actionable only under contract law.”<sup>77</sup>

This aspect of the case, thus, came down to the same fundamental question that courts face when they apply the touch and concern doctrine to land servitudes: does the substance of this restriction make it eligible for enforcement it as an in rem property right—which binds possessors of the land beyond the bounds of contractual privity—or must the parties rely instead on whatever promises they have made between each other (and on the limited remedial options in breach of contract actions)?

As with servitudes, the intent of the initial parties to any restriction is one aspect of determining whether it should be considered a property interest as opposed to a mere contract. And so the Ninth Circuit looked in part to the way the World of Warcraft ToU and EULA characterized the key restrictions at issue. But if this were the only relevant consideration, a well-drafted license could characterize any manner of restrictions as conditions of the license. If a user were to play the game without complying with those restrictions, the play (insofar as it involves making a copy that is outside of section 117) would establish a prima facie case of copyright infringement. A license could say, for example: “permission to reproduce this software for purposes of playing the game is granted only on the condition that the player submits three positive reviews to the GameRate videogame review website.” If conditions were not subject to any substantive scrutiny, then failure to submit the positive reviews would take the player’s copying

---

<sup>75</sup> *MDY*, 2010 WL at \*5-7.

<sup>76</sup> See *MDY*, 2010 WL at n. 3 (explaining why “a copyright holder may wish to enforce violations of license agreements as copyright infringements” as opposed to mere breaches of contract).

<sup>77</sup> *MDY*, 2010 WL at \*5.

outside the scope of the license and therefore into the realm of copyright infringement.<sup>78</sup>

The Ninth Circuit describes this possibility:

Blizzard—or any software copyright holder—could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player’s abstention from the disfavored conduct. The rationale would be that because the conduct occurs while the player’s computer is copying the software code into RAM in order for it to run, the violation is copyright infringement.<sup>79</sup>

If we were to borrow Epstein’s logic from the land servitude context, there is nothing wrong with this scenario: if a copyright owner who can forbid copying altogether decides instead to condition permission to copy on compliance with some idiosyncratic whim, so be it. To see why the touch and concern requirement may be more useful in this context than in its native domain, recall that Epstein’s biting critique of limitations on land servitudes turned on the absence of “some collective vision of what [a private land holding system] is supposed to do.”<sup>80</sup> Whatever the validity of Epstein’s claim in the land context,<sup>81</sup> it does not apply to intellectual property—where the purpose of the exclusive rights is constitutionally defined as “the promotion of progress in science and the useful arts.”<sup>82</sup> If the essence of the touch and concern inquiry is to probe whether a given restriction affects the value of burdened and benefitted resources, however “value” is defined in the given property scheme, then the inquiry simply makes more sense where value can be defined with reference to the property scheme’s clearly-specified purpose.

An example from another type of copyright dispute helps to demonstrate the point. In *Campbell v. Acuff-Rose Music, Inc.*,<sup>83</sup> the Supreme Court’s fair use analysis turned in part on the statutory factor of “the effect of the use upon the potential market

---

<sup>78</sup> A similar logic would allow a copyright owner to impose running restraints on distribution or display of copies, if they had managed to evade the first sale doctrine of 17 U.S.C. 109 following the logic of, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9<sup>th</sup> Cir. 2010).

<sup>79</sup> *MDY*, 2010 WL at \*7.

<sup>80</sup> See *supra* note \_\_\_ and accompanying text.

<sup>81</sup> I certainly do not mean to endorse Epstein’s view in the land context, but only to demonstrate its clear inapplicability to intellectual property.

<sup>82</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>83</sup> 510 U.S. 569 (1994).

for or value of the copyrighted work.”<sup>84</sup> In his analysis of that factor, Justice Souter posed the interesting question whether it should count against a claim of fair use that the defendant has employed the copyright holder’s expression to ridicule the copyright holder and therefore to hurt the marketplace value of his work. He concluded that it should not, explaining that “[w]e do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”<sup>85</sup> Why not? Surely a “lethal parody” has an effect on the “value of the copyrighted work” as value is measured by the copyright owner. And yet Souter insists that this diminution in value is simply not cognizable under the Copyright Act. This conclusion makes perfect sense only if one recognizes that the Copyright Act protects the value of copyrighted works not to satisfy the whims of copyright owners, but rather for a specific purpose: to promote intellectual progress. Souter’s logic here reflects the notion that progress would be undermined, not promoted, by deploying copyright to protect copyright owners from critique.

Importing this logic into a touch-and-concern-style analysis might yield a rule something like this: a running restriction on use of a chattel embodying a copyrighted work or patented invention is enforceable only where its enforcement would promote progress in science and the useful arts. This is not so far from what the Ninth Circuit appears to have done in *MDY*.

The Ninth’s Circuit’s substantive screen for sorting conditions from mere covenants is this: “We conclude that for a licensee’s violation of a contract to constitute copyright infringement, there must be a nexus between the condition and the licensor’s exclusive rights of copyright.”<sup>86</sup> One way to understand this requirement is that enforceable license conditions are only those that forbid behavior that would violate an exclusive right of the copyright holder if undertaken without a license. For example, a license might say “the licensor may copy the work for non-commercial but not for commercial purposes.” The condition—no non-commercial *copying*—restricts behavior

---

<sup>84</sup> *Campbell*, 510 U.S. at 590.

<sup>85</sup> *Campbell*, 510 U.S. at 591-92.

<sup>86</sup> *MDY*, 2010 WL at \*7.

that but for the license would be a copyright infringement. There is undeniably a “nexus” between the condition and the licensor’s exclusive rights in such a case.<sup>87</sup> The Ninth Circuit seems determined to include a broader range of conditions than this—but it is not clear how much. For example, the court says:

A licensee arguably may commit copyright infringement by continuing to use the licensed work while failing to make required royalty payments, even though a failure to make payments otherwise lacks a nexus to the licensor’s exclusive statutory rights. We view payment as *sui generis*, however, because of the distinct nexus between payment and all commercial copyright licenses, not just those concerning software.<sup>88</sup>

Here the court is unclear about whether a payment requirement has the requisite nexus to an exclusive right or it enforceable despite the lack of a nexus. Similarly, although the court concludes that the restriction on playing World of Warcraft with a bot like Glider lacks a nexus to an exclusive right, it fails to explain why the fact that playing World of Warcraft with Glider *involves making an unauthorized copy* of Blizzard’s copyrighted game on the user’s computer does not provide that nexus.

The ultimate answers would likely be the same but the rationales would be clearer if the court had framed the nexus requirement somewhat differently: whether there is a nexus between the condition and the *purposes served by* the exclusive rights of the copyright holder. If this is the question, then the nexus for royalty payments is clear. Allowing a copyright holder to insist that it be paid when its work is copied (which is how royalty payments typically operate) is fully consistent with the economic and constitutional logic of copyright. My hypothetical license that conditions permission to copy on submission of favorable game reviews, by contrast, lacks a nexus with the purposes of copyright and is instead in tension with those purposes. Any claim by the copyright owner that the value of its work is harmed by violations of this condition is no more persuasive than the argument in *Campbell* about harm caused to an original song by a biting parody.<sup>89</sup> The copyright owner may in fact be harmed by such behavior. But copyright law should not care—and should not make its power and remedies available to

---

<sup>87</sup> See, e.g., *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

<sup>88</sup> *MDY*, 2010 WL at n. 4.

<sup>89</sup> *Campbell*, 510 U.S. at 591-92.

prevent such harm. As for the limitations on bot-enabled play at issue in *MDY* itself, the question is a closer one. The Ninth Circuit’s articulation of the nexus test does not provide a satisfactory answer. But by pointing us toward the reasoning of touch and concern—which I hope more fully to operationalize for the copyright context in future work—it suggests a surprisingly promising approach.

### **Conclusion**

Ironically, the touch and concern doctrine may prove to be more useful as a way to assess “the new servitudes” than it has been in the land context in which it initially arose. The Ninth Circuit’s opinion in *MDY* offers an example of a court attempting, in the copyright servitude context, to identify a limiting doctrine that both recognizes the possibility of running restrictions even on “ordinary” uses of copies of protected works and limits those restrictions based on the purposes the underlying property regime is designed to serve.

Having a limiting doctrine is valuable in part because the established systems for providing notice of real servitudes are not replicated in the realm of copyright.<sup>90</sup> So one rationale for jettisoning “touch and concern” (that land recording systems provide a superior mechanism for making servitudes noticeable) is absent here. But beyond concern with notice—and thus even in cases in which there is actual notice by the party who would bear the burden—intellectual property law’s animating principles provide courts with a touchstone for deciding which restrictions deserve to be enforceable via copyright (or patent) law.

Identifying the underlying purposes of real property (and thus the contours of touch and concern) is a difficult and contentious endeavor. The purposes of intellectual property, by contrast, are constitutionally defined. That is not to say that the standard of “promoting progress in science and the useful arts” has a clearly agreed upon meaning or that it will be easy to operationalize, although I hope to have more to say about that in

---

<sup>90</sup> Cf. Molly S. Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 630-32 (2010).

future work. But it does provide a starting point for thinking about the new servitudes—  
informed but not constrained by the logic and lessons of the old.