

The New Servitudes

MOLLY SHAFFER VAN HOUWELING*

In the age of electronic commerce, consumers routinely acquire intangible products without engaging in any direct human interaction. These products—computer programs, digital music, et cetera—often arrive bearing terms that purport to limit the sticks in the consumers' bundles of rights in ways that depart from the background limitations imposed by intellectual property law. For example, a consumer who has downloaded a computer program from the Internet might be presented with a screen of text imposing myriad restrictions on how the program may be used; installation commences only when the consumer clicks "I agree." Courts in the United States have increasingly enforced such restrictions—labeling them "click-wrap licenses" and applying to them the same contractual concepts that govern face-to-face exchanges of promises. Similar licensing approaches—albeit with quite different substantive terms—have been extended into the realms of "free software" and "free culture."

The law of tangible property offers a different lens through which to view these contemporary techniques for distributing and controlling intangible products. When someone buys land that is purportedly subject to use restrictions imposed by a prior owner, those restrictions are sometimes enforced as "servitudes"—non-possessory property interests that attach to land and impose their

* Assistant Professor of Law, University of California at Berkeley, Boalt Hall School of Law. Anyone may make verbatim copies of this article so long as the following notice is retained on all publicly distributed copies:

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