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Against the Prospect Theory of Patents: How the Costs of Communicating Technical Information Interact with the Prospect Feature of Patent Law to Decrease Commercialization of Innovation

Abstract: Consideration of recent research on the costs of commercializing technical information leads to a policy prescription that is consistent with the commercialization theory of patent law: the prospect feature of patent law should be seen as a flaw, not a feature, and should be eliminated, or at least limited, in whatever ways possible for new technologies and disruptive technologies. Only by delaying patentability until closer to the time of standardization of knowledge and commercialization can we ensure that adequate incentive is present to take the invention from invention to commercialization. Moreover, because innovators often cannot tell what will be the costs of formalizing and standardizing innovation, they will regularly make incorrect decisions on how much to invest in rent-seeking behavior in early stages of innovation. Sometimes they will invest too much, too early, and end up with too little incentive to standardize and commercialize their innovations. In these cases, what Duffy saw as a feature of patent law—the prospect feature that encourages innovators to patent years before commercialization—is actually a flaw because not only will innovators have wastefully dissipated all rents they project to be available from a certain innovation, but that rent dissipation will not ultimately produce a standardized, formalized product that can be commercialized.