

The Commercialization Interest in Intellectual Property Law

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In today's commercial landscape, transforming an invention, script, score, or design into a commercially viable product ("commercialization") often entails significant risk and expense. These risks and costs are not usually borne by authors and inventors ("creators"), but by separate commercializing entities ("commercializers"). Traditional reward theories of intellectual property focus on the creation of inventions and works, and typically pay little attention to commercialization, usually assuming that commercialization efficiently follows after creation. More recent prospect theories of intellectual property do well to take issue with this assumption. However, these theories incorrectly conclude that strong, real property-like rights are necessary to spur robust commercialization. In contrast to the reward and prospect theories, I contend that the optimal scope of rights for commercialization is largely fact-specific. In this respect, I recommend several legal reforms to spur commercialization and also propose a new type of IP "commercialization" right that may effectively complement, or even substitute for, traditional forms of protection.