

Commercialization Awards

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The United States has a system of intellectual property rights (IPR) that includes patents for new and nonobvious inventions. Patents are believed to indirectly promote innovation in part by creating incentives to bring inventions to market (i.e. "commercialize") at a faster pace than would otherwise occur. Now, stressing patents' virtues as commercialization incentives, some patent law scholars have proposed introducing entirely new forms of "commercialization patents" based on the theory that this would significantly reduce the risks associated with commercializing inventions and spur socially beneficial innovation and entrepreneurial activity. Although I agree that various market failures may impede commercialization even in the presence of invention patents, in this Article I show that the United States already has a system for promoting private sector commercialization of inventions that does not require creating new forms of exclusive rights: direct financing for inventors and other entrepreneurs in the early stages of technology development and commercialization. These are sometimes called "commercialization awards." The Article shows that, although they do so in different ways and with varying degrees of success, commercialization awards respond to similar theoretical market failures as commercialization patents: the difficulty of appropriating returns on investments that generate significant new information ex post to invention; transaction costs in IP licensing that can hinder commercialization; and trust and information asymmetries that make it difficult for entrepreneurs to raise capital even in the presence of invention patents. The Article concludes that although commercialization patents are better at reducing risks associated with spillovers and competitive "free-riding," commercialization awards are better at resolving market failures associated specifically with entrepreneurship. Research suggests awards can be effective at enhancing company survival and facilitate entrepreneurs' ability to raise funding from investors with deeper pockets. While recognizing the limits and risks of "government-set" incentives, the Article asserts that appropriately designed commercialization awards can effectively mobilize what I call "marginal commercializers": those who could not commercialize their inventions without government intervention. Although there is no way to prove that one form of incentive is superior to the other, the Article recommends focusing on improving existing options before introducing an unproven legal innovation in the form of commercialization patents.

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