NEGLIGENT INNOVATION

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Innovation is the buzzword of our time. Everyone wants to be an innovator. Corporations strive to be innovative. All this hype is for good reason. Innovation is accepted as the single most important driver of economic growth. We should be obsessed with innovation. As such it is not at all surprising that innovation and technological commercialization lie at the heart of justifications for the patent system. In fact, of the various patent theories, the commercialization theories advocate for the strongest, most unapologetically property-like patent protection. But there is something quite odd about these theories and indeed with our patent system: they never actually require commercialization. A patentee is not obligated to take on the risky work of development and commercialization. Once obtained, a patentee can lie low and just wait for others to commercialize. The patentee can (and often does) then emerge to extort a share of the actual innovator's profits. Our patent system enables non-innovators to hold-up and tax actual innovators. And the commercialization theories and their adamant demands for strong patent rights provide cover for these non-innovators.

This perverse outcome is problematic and it results from a fundamental oversight. Though considered a tort, patent law has lost sight of the fact that torts redress actual injuries. And for a patent system predicated on innovation the relevant injury should be injury to innovation. This article aims to correct that oversight by building a tort-based patent system focused on preventing injury to actual innovators. Not only does this provide unapologetically strong protection for actual innovators, but it also prevents these strong protections from being co-opted by non-innovators. In addition, this tort basis clarifies other significant confusion. It gives new understanding to the independent inventor liability debate by bringing to bear the lessons of accident law. It re-orients that debate from its current concerns with independent invention and instead focuses on *independent innovation*. The result is that some (but not all) independent inventors should be liable for infringement. Independent inventors are liable when they fail to coordinate their efforts and they are *negligent innovators*. Furthermore, this tort basis answers fundamental questions about patent timing. The tort basis enables patents to attach early to police against piracy and copying but allows damages for inadvertent infringement to accrue only as the patentee commercializes.

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