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### *Risky IP*

Intellectual property scholars often assume that the relevant actors are risk-averse. We worry that inventors will avoid valuable research because unclear patent claims cast long shadows of infringement litigation risk on wide fields of inquiry. Criticism of aggressive cease and desist letters from copyright and trademark owners similarly trades on stories of fearful artists avoiding activity that they are legally entitled to engage in because of uncertainty regarding the boundary between permitted and impermissible behavior.

In this article, I challenge intellectual property's foundational risk assumption. An emerging body of research in cognitive science suggests that creativity is positively associated with risk-seeking. Recent literature in economics also reveals that innovation and risk-seeking go hand-in-hand. And sociological studies of innovation indicate that breakthrough work is often done by people with a greater than average appetite for risk. While there are no doubt some risk-averse actors in various domains touched by intellectual property law, the default assumption of risk-aversion is unjustified. A better approach would start with the premise that intellectual property actors are risk-seeking, not risk-averse.

I then evaluate what intellectual property law should look like if we assume risk-seeking actors rather than risk-averse ones. For example, risk generated by intellectual property law's uncertainty may function as a filter that selects for more creative actors. Suppose a person has a choice between writing a novel and working for a law firm. If creative people prefer more risk than uncreative people, and if intellectual property law makes writing novels riskier than working for law firms, then intellectual property law pulls creative people into the novel-writing field and pushes uncreative people into the law firm world. This selection effect may therefore make us less concerned about otherwise attractive legal interventions—like a more robust doctrine of equivalents in patent law—that we have avoided because the associated risk was thought to deter desirable activity.