

How Do Creators Respond to Risk?

Author : Christopher J. Buccafusco

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Andres Sawicki, *Risky IP*, Univ. of Miami Legal Research Paper No, 16-18 (2016), available at [SSRN](#).

Intellectual property laws govern activities that are inherently risky. Authors and inventors can only estimate the consumer demand for their contributions. And many creative activities run the risk of infringing existing IP rights. Accordingly, it is essential for policymakers and scholars to understand how creators think about risk.

To date, most people who have written about IP law and risk have assumed that creators will be risk averse. In a new paper, [Andres Sawicki](#) challenges these accounts and argues that the kinds of people that IP law typically regulates—creative people—tend to be risk seeking. Accordingly, where others saw the risk inherent in IP as a problem, Sawicki sees it as potentially beneficial.

Sawicki begins by discussing the various features of IP that involve risk, including the fundamental riskiness of all market-based creative ventures as well as IP doctrines such as patent law's definiteness requirement and copyright law's fair use standard that introduce additional uncertainty. When previous scholars have noted these issues, they have tended to assume that creators faced with risk will tend to be risk averse, because, after all, most people are risk averse. Thus, most people prefer receiving \$100 to playing a lottery in which they have equal chances of receiving \$200 or nothing.

Sawicki reviews a large and growing body of literature from psychologists who study creativity that suggests that, at least for creative people, this account is not entirely true. Research suggests that more creative people tend to have a greater tolerance for risk than do less creative people and that a fundamental feature of successful creativity is the ability to recognize and capitalize on risks. Sawicki is careful to note that the literature in this area is not entirely conclusive, but he makes a plausible case that successful creators are likely to view risk and uncertainty differently from other folks.

Based on this claim and a set of important simplifying assumptions, Sawicki then offers a number of testable hypotheses about how creators' risk preferences will influence their behavior. He suggests that creators will tend to seek out opportunities to engage in activities with uncertain benefits over otherwise equivalent ones with certain benefits. And he suggests that risky environments are more conducive to creativity.

If these claims are correct, Sawicki argues, creators' higher risk tolerance could make IP-style incentives a more efficient proposition than previously recognized. Relative to a stable salary, prize, or tax incentive of equivalent value, the probabilistic and uncertain value of IP rights might ultimately generate higher creative output. In addition, Sawicki argues that efforts to make IP rights more certain may undermine some of the value that we get from risk-seeking creators.

As always, and as Sawicki recognizes, the devil will be in the details. Sawicki's claims rest on various simplifying assumptions that may turn out to be wrong (a prospect he openly admits). For example, he assumes that a person's risk preferences in one domain (such as artistic creativity) will be similar to those in another domain (such as financial risk). And he tends to assume that the framing effects noted by Daniel Kahneman and Amos Tversky may have minimal effects on creators' decisions. Whether or not these assumptions are correct is a matter for future empirical research, and Sawicki's paper has done a terrific job of pointing out the most promising directions for that work.

If Sawicki's descriptive account of creator behavior is correct, IP law may be able to take advantage of creators' risk tolerance to generate more incentive bang for its buck. But creativity and risk taking are not always valuable. When creators enter a field they face a variety of existing IP rights that may impinge on their goals. They can choose to license those rights or adopt the more risky strategy of designing around them. To the extent that downstream creators are excessively risk seeking, then, they will tend to choose the latter option at inefficient rates. Instead of licensing existing solutions, they will waste R&D resources in risky ventures. Ultimately, however, IP scholarship needs an accurate account of how creators are likely to respond to these and other risks.

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