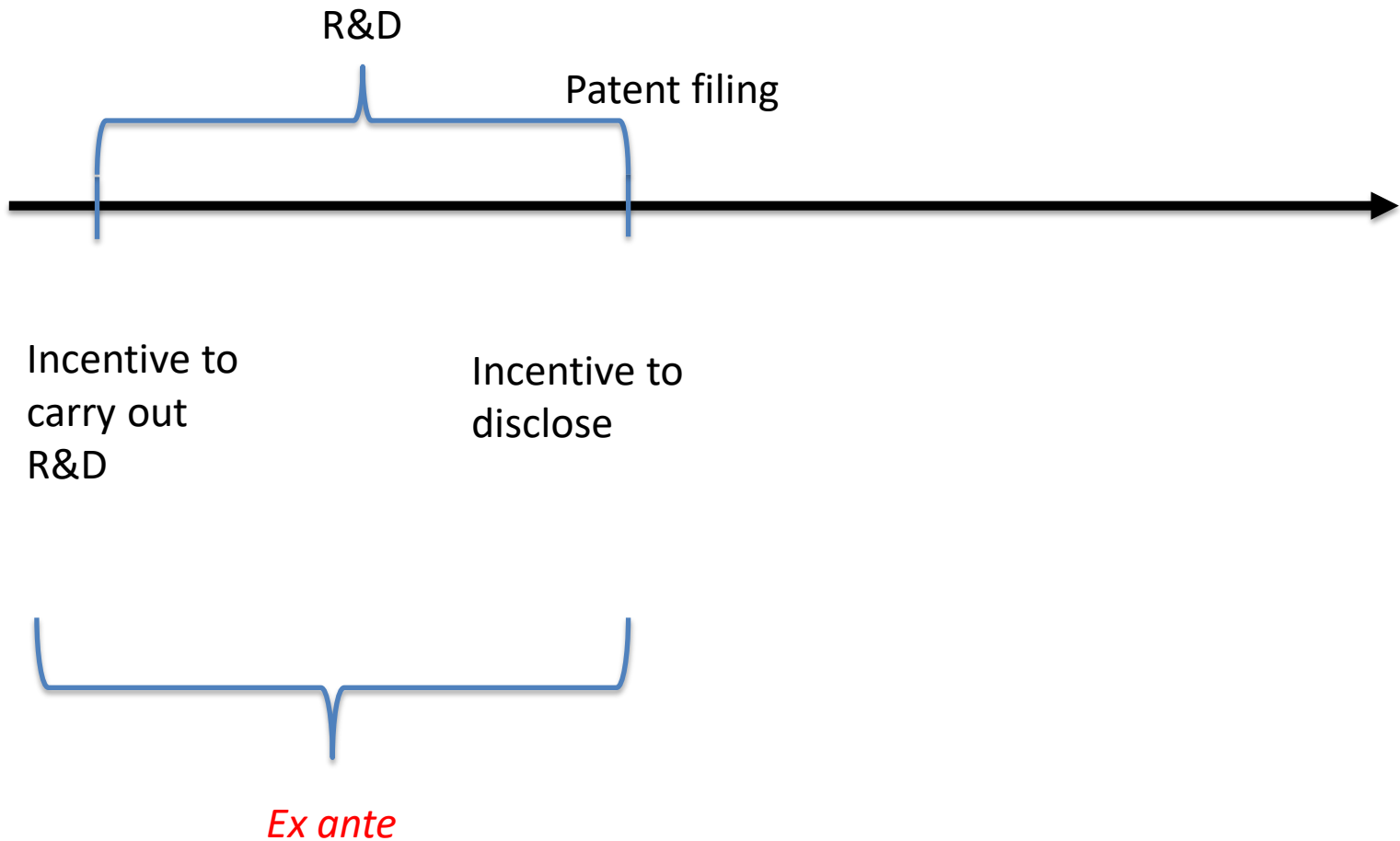


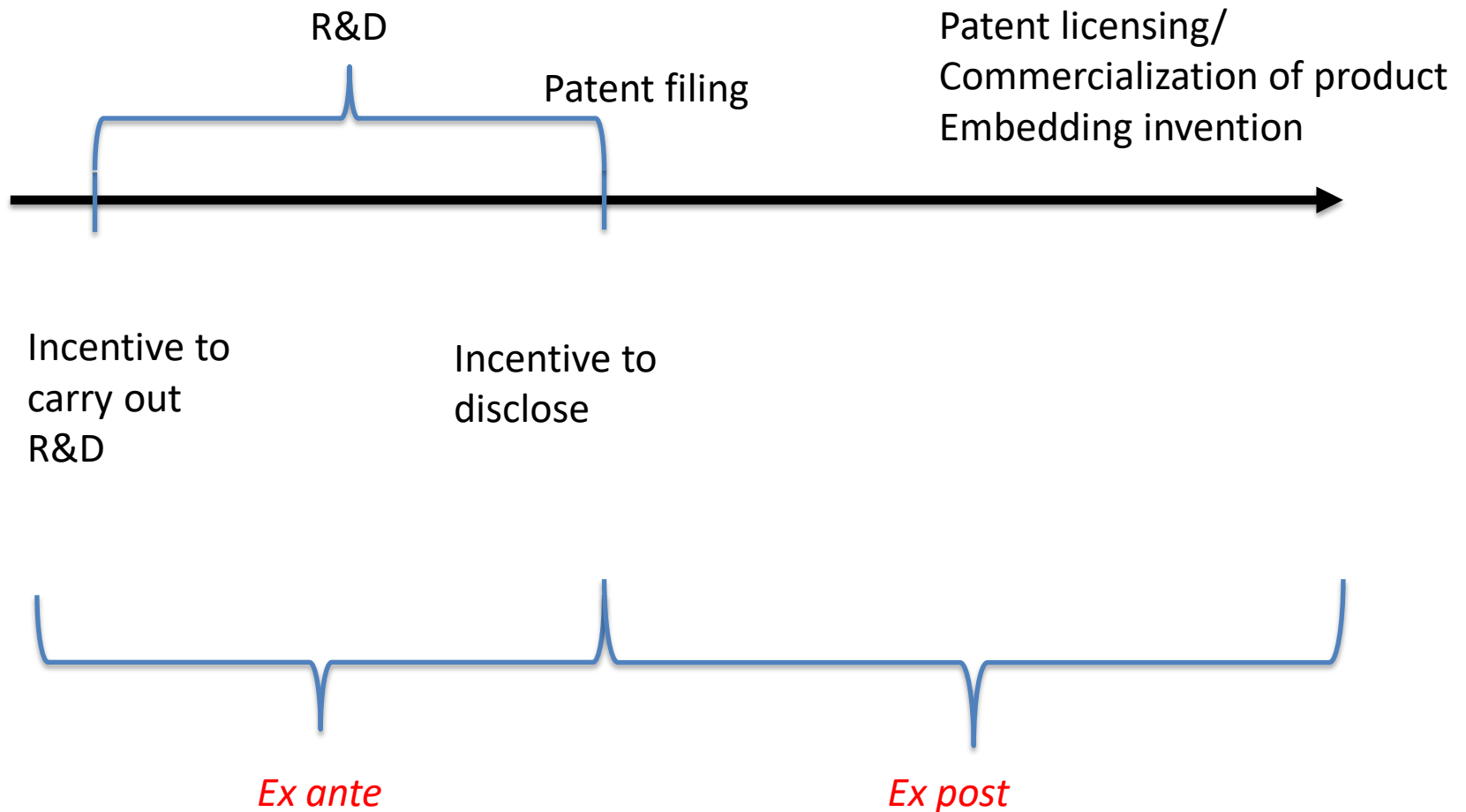
The Case for Tailoring Ex-Post Patent Strength to Innovation Diffusion

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Patent law as *ex ante* incentive



Patent law as *ex post* incentive



The (ex post, ongoing) Duty to Diffuse in Patent Law

- *Ex post* information diffusion as a positive explanation for current patent law doctrine, sp. remedies jurisprudence.
- *Ex post* information diffusion as a normatively desirable *duty* that should be encouraged by patent doctrine.

What is “diffusion”?

- Useful studies of information diffusion in both economics and sociology.
- 3 Types of diffusion “channels”
 - Codified knowledge
 - Tacit knowledge or “know-how” transfer
 - Commercial products

How available is information content from different diffusion channels?



Codified knowledge:

- best for established tech areas
- stylizes discovery process (hides failures)

Tacit knowledge:

- best for emerging Tech areas
- learning by doing
- Requires demonstrations/
- In person teaching

Commercial product

- Can be very information rich if Reverse engineering is allowed

Patent Document (low availability)

Scientific publications

Laboratory visits/demonstrations
Know-how contracts; trade shows

Commercial product (can be reverse engineered) (high availability)

Ex post Efforts to Diffuse as a Guide to *eBay*

- Studies on permanent injunction grant rates suggest non-practicing entities receive injunctions a lower frequency than practicing entities – could this be explained by a diffusion model?
- Model predicts: injunctions should be granted to good "diffusers" and denied to bad diffusers. Good diffusers may include universities and failed start-ups but exclude traditional NPEs.

Efforts to diffuse *should* result in patent strength adjustments *ex post*

- Remedies:
 - Injunctions for strong diffusers
 - Damages for weak diffusers
 - Diffusion as factor to consider in remedies calculation.
- Experimental Use Defense
 - Should be available if patent holder is a “non-diffuser”
- Unavailability to expand claim during litigation through DOE for weak diffusers
- Reverse Engineering *and* publication of
- Other levers?