

Is There A Tragedy Of The Anticommons In Life Sciences and What (If Anything) Should Be Done About It?

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Commons and Anticommons

- Commons – lack of property rights leads to overuse
- Patents – a property right that enables the right to exclude
- The tragedy of the Anticommons: too many (complementary) patent rights leads to underuse

Examples of Industry Solutions to Fragmented Rights

- Patents
 - Sewing Machines
 - Davenport Beds
 - Automobiles
 - Aircraft manufacturing
 - Synthetic rubber
- Copyright
 - Music distribution and publishing (ASCAP, BMI)
- Other
 - Water basin authorities

Recent Patent Pool Business Review Letters

- MPEG LA (video compression)
- DVD 3C
- DVD 6C
- 3G

Can and Will Bio-Pharma Participants Form Patent Pools?

- Heller & Eisenberg's critique:
 - High transactions costs
 - Heterogeneous rights holders (for profit, universities)
 - Cognitive biases (over/under-valuation)
- NIH
 - Licensing “frustrations”
- OECD
 - Role for government monitoring?

Examples of Biotech Patent Pools

- Golden Rice
- Green Fluorescent Protein
- Animal Cloning Technologies (stART)?
- Proposed Essential Patent Pool for AIDS

Other Industry Solutions to Fragmented Rights?

- Walsh, Arora, and Cohen (NAS)
 - Invent-around solutions
 - Licensing
 - Infringing
- SNP Consortium
 - Pre-empting upstream patenting by placing info in the public domain

Summary

- Anecdotal evidence thin on bio-pharma patent pools
 - Technology – not formed around standards
 - What are “essential” patents?
 - Unsettled IP rights (litigation)
 - Is licensing/ cross-licensing common?
 - Public Domain strategy useful?
- Too soon to tell?