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*A Compensatory Liability Regime to Promote the  
Exchange of Microbial Genetic Resources for Research  
and Benefit Sharing*

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## *Compensatory Liability Regime*

**Presentation based on book by Jerome H. Reichman, Tom Dedeurwaerdere, and Paul F. Uhlir, *Designing the Microbial Research Commons: Novel Intellectual Property Strategies for Accessing and Using Essential Public Knowledge Assets*, Yale University Press (forthcoming, 2011).**

**All views expressed are those of the authors and not necessarily of their institutions of employment.**

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## *Compensatory Liability Regime*

**Great promise of an integrative vision of a “New Biology”:**

- **Improving public health and mitigating pandemics;**
  - **Enhancing agricultural production and food security;**
  - **Protecting the environment and conserving biodiversity;**
  - **Addressing the energy challenge through biofuels;**
  - **Other urgent social needs...**
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## *Compensatory Liability Regime*

**Original principle for bio-resources: common heritage of mankind.**

**Since early 1990s:**

**Longer, broader, and stronger intellectual property laws, and related contracts and material transfer agreements (MTAs):**

- Use in one lab only;**
- No redistribution without permission;**
- Limitations on derivatives;**
- Built-in reach-through claims on all derivatives;**
- Need to negotiate all subsequent uses and transfers.**

**And**

**Growing restrictions on access to bio-resources of non-OECD countries under the CBD.**

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## *Compensatory Liability Regime*

**Growing restrictions in both OECD and non-OECD countries have resulted in a lose-lose scenario, especially for global research community.**

**One approach by researchers to bypass onerous restrictions has been informal exchange, outside existing rules:**

- **Ad hoc, non-standard verbal agreements;**
- **Or some science-friendly MTAs (e.g., ECCO, Creative Commons), but still inadequate;**
- **Mounting pressures to conform and adopt more restrictions;**
- **High transaction costs and reduced research progress.**

**Need another model...**

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## *Compensatory Liability Regime*

**Proposal for a compensatory liability regime—“take & pay”:**

- **For biological materials with no known or unlikely derivative commercialization prospects;**
- **Participants must meet high quality standards;**
- **No distinction between “non-profit” and “for-profit” users;**
- **Tracking of transfers of all materials;**
- **Attribution and reputational benefits enhanced;**
- **Biosafety standards unaffected and preserved;**
- **Standard contractual MTA model with pre-set royalty structure in the event of commercial success;**
- **CBD compliant;**
- **Royalties AND research rights preserved; and**
- **Non-exclusive access and use.**

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## *Compensatory Liability Regime*

### **Benefits of a compensatory liability regime:**

- **Much lower transaction costs;**
- **Similar to the ITPGRFA;**
- **Counters spread of ever-more restrictive MTAs to basic research materials;**
- **No upstream exclusive rights;**
- **Promotes research;**
- **But does not prevent exclusive deals for materials with known or likely commercial value.**

**Fosters a win-win situation.**

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## *Compensatory Liability Regime*

### **Issues that need to be addressed:**

- **Registration;**
  - **Tracking mechanisms and the limits of contractual privity;**
  - **Valuation and allocation of compensatory shares (3-5%?);**
  - **Mediation and settlement of disputes; and**
  - **A governance and administration structure.**
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# *Compensatory Liability Regime*

## **Some sources by the authors:**

- Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, Vanderbilt Law J. (2001).
  - Reichman & Uhler, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist IP Environment*, 66 Law & Contemporary Problems (2003).
  - Rai, Reichman, Uhler & Crossman, *Pathways Across the Valley of Death: Novel Intellectual Property Strategies to Accelerate Drug Discovery*, Yale Journal of Health, Policy, Law, and Ethics (2008).
  - Reichman, Dedeurwaerdere, Uhler, *Designing the Microbial Research Commons: Novel Intellectual Property Strategies for Accessing and Using Essential Public Knowledge Assets*, Yale University Press (forthcoming, 2011).
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