Policy Objectives that Meet Multiple Aspirations

BEYOND THE INTELLECTUAL PROPERTY SYSTEM AND ABS
Ecology of IPLC Rights and Interests
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**Internal Ecology of R&I**

- Customary Law
- Teachings of the Ancestors
- Law of the Creator
- Traditional Beliefs, Knowledge and Practices
- Sacred and Secret
- Sacred and Not Secret
- Stewardship Obligations
Ecology of IPLC Rights and Interests

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**External Ecology of R&I**

- Within States
  - Treaties, Agreements
  - Constructive Arrangements
  - Constitutional Law
  - Statutory Law
  - Common Law
  - Contracts
- International
  - Codified International Law
  - Customary International Law
  - Treaties
  - Aspirations
  - UNDRIP
  - UNDRIP Codified
  - UNDRIP Non-codified
  - Contracts
- Vienna Convention
- Overlapping Subject Matter
- Mutually Supportive
- Complementary
- Conflict of Law
- Evolution of Rights
Ecology of IPLC Rights and Interests

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**Nature of R&I**
- Inherent
- Pre-existing
- Inalienable
- Cultural Heritage
- Self-determination
- Universal HR

**Sacred and Secret**

**Customary Law**

**External Ecology of R&I**
- Within States
  - Treaties, Agreements, Constructive Arrangements
  - Constitutional Law
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**Sacred and Not Secret**
TK/GR UN International Law Landscape

UN Human Rights - UNDRIP - ICESCR - UDHR - CERD - ILO169 - CSICH

GR/TK - TK associated with Domesticated GRs - TK associated with Wild GRs - UNEP TK associated with Cultural and Natural Resources

IPR - WIPO Treaties - WTO

UPOV - ITPGRFA - FAO Policy ITP - CBD - Nagoya
The Patent Life Cycle

- Ideas and Acquisition
  - Acquisition of GRs and TK
  - ABS Requirements
  - GRs pre-1992 and 2014
  - TK of IPs / TK of LCs
  - Localized / Widespread TK
  - Pub / Unpub TK
  - TK Rights Regimes

- Patent Development
  - Patent Examination
  - Novelty/Prior Art
  - Non-Obvious/Inventive
  - Useful/Industrial App.
  - Inventorship
  - Infringement
  - (Existing Property Rights)

- Patent Filing
  - R&D Investment
  - Due Diligence
  - Prior Art
  - Patentability

- Patent Commercialization
  - Licensing
  - Infringement
  - Revocation
  - INVALIDATION
  - Reassignment

- Patent Expiration
  - Disposition of Invention, TK, GRs and Derivatives
The Halcyon Days of IP
1. Roles of Indigenous Governments and Knowledge Holders
   A. Self-determination / sovereignty
   B. Customary law of TK
   C. Custodianship/stewardship obligations

2. Worldviews of Indigenous Communities
   A. Holistic worldview
   B. 7th generation thinking
   C. Spirituality
   D. Well-being/doing well/living well/vivir bien/sumac kawsay
   E. Do no harm
   F. Humility, modesty and prudence
Customary Law Principles

2. Worldviews of Indigenous Communities (Cont)
   G. Balance / equilibrium / complementarity
   H. Respect
   I. Recognition
   J. Reciprocity
   K. Duality

3. Cultural Norms For Sharing and Protecting TKs
   A. Secret/sacred/cultural privacy/individual privacy
   B. Confidentiality
   D. Fairness and Equity: Situational (micro F&E) and Universal (macro F&E)
   E. Empowerment / capacity building
Protections: Knowledge-based

1. Loss/Extinction
2. Exclusion
3. Exploitation
4. Erroneously granted property rights
5. Any commercial use
6. Specific commercial uses
7. Commercial use without FPIC
8. Any non-commercial use
9. Specific non-commercial uses
10. Non-commercial use without FPIC
11. Inappropriate / defamatory / disrespectful use (in perpetuity)
12. Spiritually or materially harmful use
13. Co-protection and holistic protection
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law
   a. Protection by existing or sui generis IP law
   b. Protection from adverse IP consequences of traditional practices
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law

2. Avoidance of lock-out: preemption, prejudicial use of copyright terms that limit protections under other instruments (human rights, cultural heritage)
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law

2. Avoidance of lock-out

3. Avoidance of lock-in: freezing past injustices through binding outcomes to past agreements that don’t recognize sui generis or evolving human rights regimes (non-retrospectivity)
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law
2. Avoidance of lock-out
3. Avoidance of lock-in

4. Dispossession/crowding out by definition: e.g. moral rights, public domain
   a. Moral rights as a copyright concept does not capture all of the rights associated with TK as cultural heritage and human rights
   b. Public domain, similarly, constitutes the exhaustion of rights
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law
2. Avoidance of lock-out
3. Avoidance of lock-in
4. Dispossession/crowding out by definition
5. Access and benefit sharing has some significant limitations
   a. Front loaded – looks mostly at procedural justice for contracts
   b. Market-based does not capture a range of expressed aspirations
   c. Leads to outcomes where benefits are exhausted and control is lost
   d. IPR-based ABS may not serve benefits for larger societies, or benefit many IPLCs over the long term
   e. Benefits from knowledge sharing v practices
   f. Underestimates potential harms to IPLCs: Lack of protection against non-IP, non-monopolistic misuses and misappropriation of the cultural resources or heritage associated with traditional knowledge
1. Recognition of harms and recognition of benefits compatible with customary law
2. Avoidance of lock-out
3. Avoidance of lock-in
4. Dispossession/crowding out by definition
5. Limitations of Access and benefit sharing

6. Dispossession/crowding out by expansion of scope: unqualified use of terms (e.g. public domain, common heritage of human kind, broader interests of society, inappropriate balancing tests)
Protections: International Law

1. Recognition of harms and recognition of benefits compatible with customary law
2. Avoidance of lock-out
3. Avoidance of lock-in
4. Dispossession/crowding out by definition
5. Limitations of Access and benefit sharing
6. Dispossession/crowding out by expansion of scope

7. Non-regression and progressive realization of human rights and existing rights and interests: recognition of indigenous peoples and the progressive realization of the rights and interests of indigenous peoples
Cross-cutting Issues

1. Indigenous Peoples v. Local Communities

2. Definition of traditional: Characteristics approach
   a. In UNDRIP there is no definition of indigenous peoples
   b. Despite 25 years of work, no complete description available
   c. Many fundamental concepts in IP law undefined or partially defined (e.g. fair use)

3. Beneficiaries: Indigenous peoples and local communities in terms of control, FPIC and MAT
Cross-cutting Issues

4. Nature of the rights: Beyond right to say no and right to compensation
   a. Right to control the decision over sharing
   b. Right to control for of benefit sharing
   c. Right to control future uses of the shared knowledge
   d. Right to say no, and to provide benefits through practice

5. Public availability / widely diffused
   a. Attributable
   b. Non attributable
   c. IP balancing tests versus inherent rights, comity, courtesy, legal reciprocity and mutual accommodation
   d. Balancing tests versus proportionality
   e. Public domain
      1. No International law of the public domain
      2. Why is it in the public domain?
6. Protection must be holistic and complementary

7. Protection must be responsive to status: Granted rights, inherent and inalienable rights, inherent and alienable rights.

8. Care must be taken in applying the public domain, or referring to claims that larger majorities may make against the cultural heritage of minorities

9. In regards to Indigenous Peoples: UNDRIP and ILO169 should be used as minimum standards.
Policy Objective 3, as currently developed, is inadequate:

c. [Ensuring] [promoting] [facilitating] [complementarity] [mutual supportiveness] with international agreements relating to the protection of genetic resources [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources] [and those relating to IP].

The policy must also:

Ensure that measures undertaken for patent review respect international agreements and constructive arrangements within states for the protection of the rights and interests of indigenous peoples and local communities, including, inter alia, human rights, cultural rights, collective rights and other issues that makea contribution to human dignity.