An Indigenous View of TK Databases

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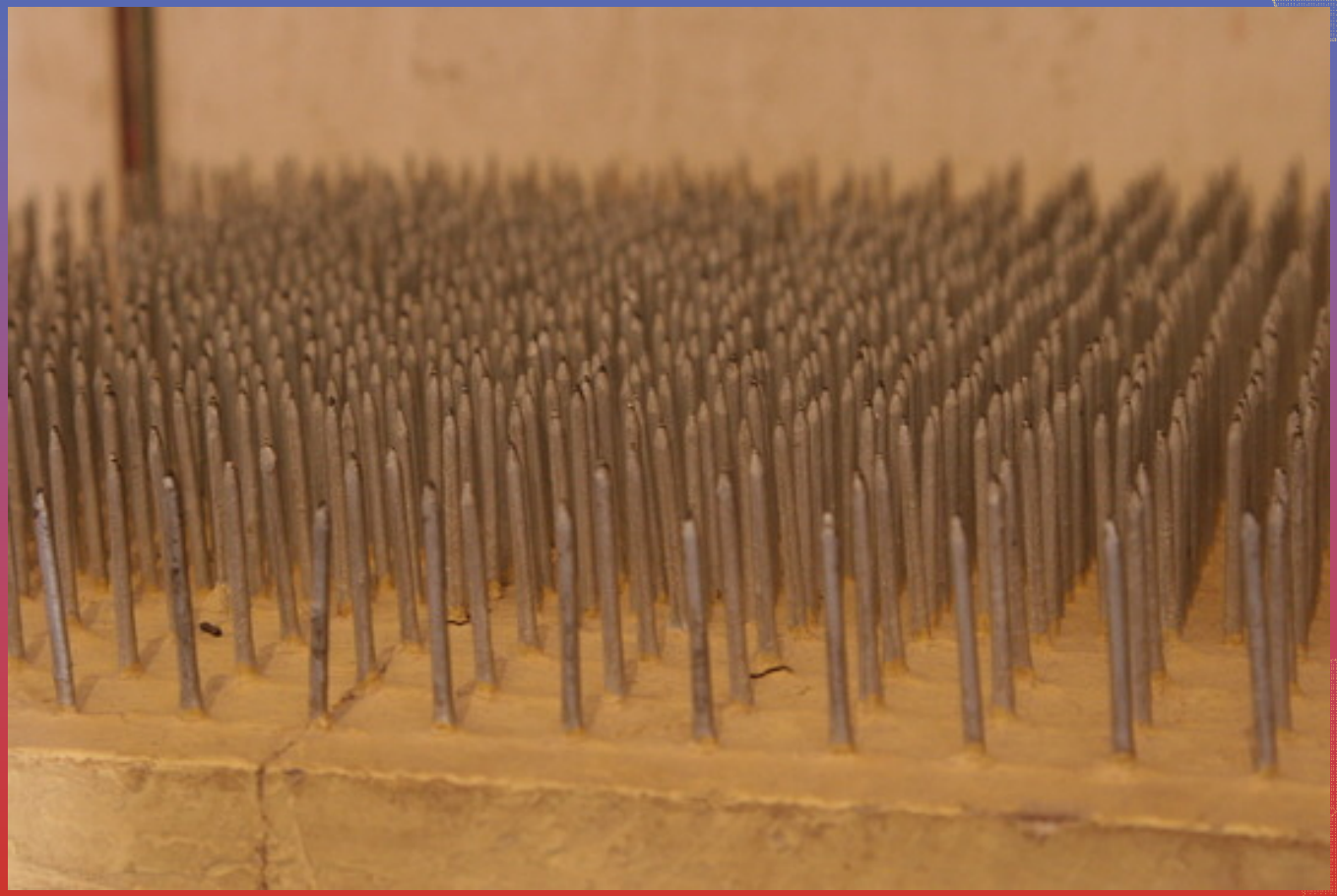
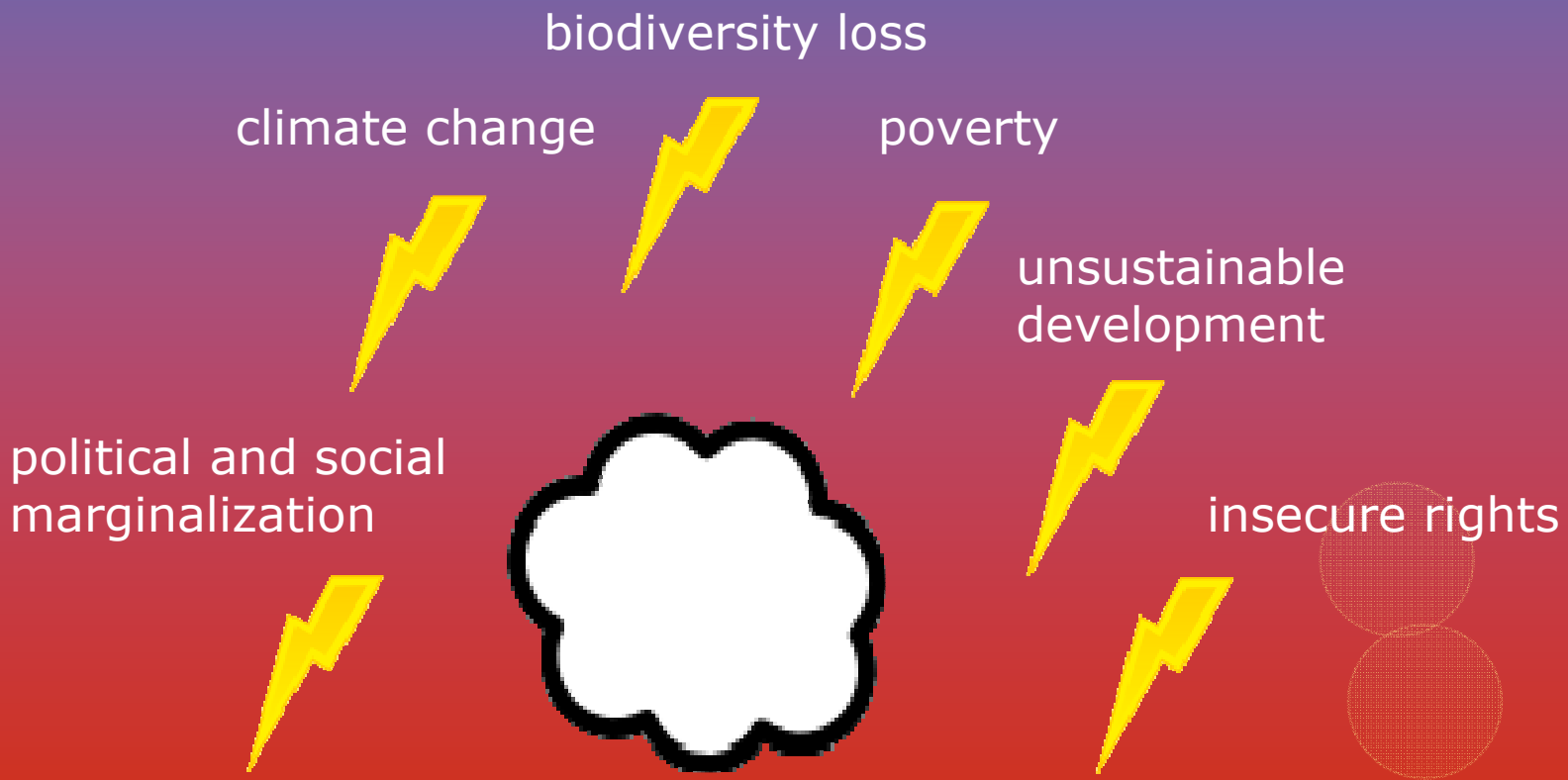
Or, when you’re a hammer . . .

the whole world can look like . . .



IPLCs are faced by many threats to their cultural survival



IPLCs have their own cultures, institutions, norms and customary laws

In other words, they have their own governance systems that may be different to national majorities

Although they are interested in development and economic development, they often strongly wish to not be assimilated and to retain their distinct cultural traditions

The right to self-governance and to recognition and respect for cultural distinctiveness has been affirmed

As a human right (UNDRIP, 2007)

As a treaty right (e.g. USA)

As a constitutional right

IP problems are "a storm brewed in other peoples' worlds"*

***like many of the threats that face them**

IPLCs are not major participants in the IP system

Compared with other problems, IP issues are rarely a priority

IPLCs are being asked to respond to opportunities and problems not of their making or request

This is not to deny IPLCs in some cases wish to participate in and benefit from the IP system; have the self-determined right to do so; and can derive benefits from participation

Participation in the IP system must be Equitable to IPLCs

IPLCs strongly wish to maintain their cultural identity, even when engaging the market or modernization

IPLCs strongly wish to have their cultural values recognized and respected, even when in extraterritorial situations (national and international)

The WIPO IGC over the last 10 years has generally concluded that the existing IP system inadequately protects TK, and that sui generis approaches are necessary

The IP system is oddly imbalanced in respect to pluralism

The drive in the international IP system has been to entrench a market logic in the harmonization of IP law

The social dimensions of IP are reawakening (e.g. the development agenda)

This does not change dominance of economic logic (see Drahos, 2010: The global governance of knowledge): totalizing and universalizing IP standards

Lack of recognition and respect for IPLC governance and cultural values

- Public domain
- Freedom of Expression
- Fair use/exemptions
- Limited duration of protection
- Spiritual values and beliefs about harm
- Lack of substantive law of IPLC IP (unlike most other sectors of law)
- Lack of direct participation of IPLCs in developing IP law in regards to their knowledge and resources/heritage

TK databases in the IP system must be understood broadly

Policy requires trade-off analysis, and measures to ensure there are no or limited unintended consequences, spillover effects, or crowding out effects

IPLCs should be involved in ensuring that they identify the impacts and the policy goals

Measures should be evaluated across the entire IP life cycle (research, application, patent review, patent publishing, patent expiration) as well as broader cultural issues

Patent Life Cycle

Research
FPIC & MAT
Declarations
Certificates

Review
Prior art
Patentability
Subject Matter
Legal Acquisition

Publication
Public availability
In camera review

Exhaustion
Public domain
Severability

Goals

- Defeating bad patents
- Stopping inappropriate research from starting
- Benefit sharing
- Protecting TK by the patent system
- Protecting TK from the patent system
- Protecting IPLCs from unintended policy consequences

Some IPLC and others' views of "protection of TK"

Protection against:

- Extinction
- Any use outside original context/community
- Any inappropriate use
- Any commercial use
- Inappropriate commercial use
- Use without permission
- Use without acknowledgement
- Use without benefit sharing

Potential barriers, trade-offs and conflicts

Conflicts between defensive and positive measures (e.g. defensive disclosure vs. rights to control access and use)

Benefits of sharing vs. risk of exploitation

Safeguarding compiled TK over time/in perpetuity

- Security
- Policy sliding/policy shifting

TKDL

Impressive system, deserving of notice and praise

But Alternative models exist, also worthy of support (e.g. IPLC databases, distributed database models such as those proposed by Tulalip and being developed by South Africa

National level approach to compiling non-localized TK dependent on type and history of TK being compiled

In many cases TK is oral and not codified, versus in written texts reaching back 1000 years.

TKDL

In many countries, and in instruments such as UNDRIP, IPLCs are recognized as the holders of TK, and have rights to FPIC for database compilation

There is a spectrum of TK – generally all TK is considered spiritual by IPLCs, but there are different degrees of confidentiality, cultural restriction and secretness

Cultural beliefs and norms dictate some of it cannot be compiled without spiritual pollution, transgression or harm

TKDL

TKDL seems designed as defensive protection for one aspect of the IP-cultural nexus – to prevent or defeat the granting of bad patents – which it may do very well

Defensive protection is occurring in a vaccum in which positive protections are not well developed. ALL the aspects of protection and IPLC involvement must occur to ensure that use of a database does not compromise other rights.

Infrastructure/IP Ecosystems Approach

Policy should be implemented within an ecosystem

Handwaving towards "other rights" for the protection of TK cannot be used to move forward when there are gaps in protection; TK cannot be protected by illusion

Care must be taken to distinguish paper protections to real protection on the ground

"Governability" of types of TK

Policy Slides/Policy Shifts/Crowding Out

- Seductive Arguments
  - Commons
  - Good of Humanity
  - Sharing
- Policy/Protection in Perpetuity
- Regret and pulling back
- Crowding out/majoritarian effects (market preferences vs altruism)
- Standardization effects
- Transaction costs as a friend
  - Cheap talk

Burden Shifting

IPLCs are being asked to compile TK into a technology that may be foreign, and takes time and resources

Promoting compilation by others fails to protect the right to FPIC, and may reinforce existing concepts such as the existence of a public domain in TK

Although claims are now being made that TK databases will not be used as a registry for protection, but they may over time create a bias towards protection of databased knowledge

Burdens on potential users to demonstrate right to use vs on IPLCs to demonstrate ownership

Ways Forward

Acknowledge problem the TKDL is trying to solve

Acknowledge we will need multiple approaches that reflect regional differences, the aspirations of IPLCs, and differences in types of TK and values attached them

Involve IPLCs at all steps of evaluating the use of TK databases. Respect and incorporate their concerns.

Support alternative approaches (e.g. South African)

Thought Piece

Soon, it's estimated there will be 1 trillion Internet-connected devices in the world. Every day, 15 petabytes (1015 or 1,000,000,000,000,000) of new information is generated - eight times more than the information in all the libraries in the United States. This year the amount of digital information generated is expected to reach 988 exabytes (1018 or 1,000,000,000,000,000,000). This is equivalent to the amount of information if books were stacked from the Sun to Pluto and back.

Data . . . We Have a Problem

November 4, 2010

By Doug Balog

http://www.cioupdate.com/insights/article.php/3911571/Data--We-Have-a-Problem.htm

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