

New Zealand: Māori Culture and Intellectual Property Law

December 2010



The Law Library of Congress, Global Legal Research Center
(202) 707-6462 (phone) • (866) 550-0442 (fax) • law@loc.gov • <http://www.law.gov>

LAW LIBRARY OF CONGRESS

NEW ZEALAND

MĀORI CULTURE AND INTELLECTUAL PROPERTY LAW

Executive Summary

The protection of the traditional cultural expressions of indigenous people from inappropriate use raises issues relating to the differences between standard intellectual property concepts and the “worldview” of such groups. In New Zealand, Māori claims regarding rights to “guardianship” of their cultural knowledge have been expressed in the context of the guarantees in the Treaty of Waitangi. Some recognition of these interests can be seen in amendments to intellectual property laws. However, there remain questions regarding the protection of expressions of culture that are considered in the public domain, and that are used commercially and non-commercially in both the domestic and international settings.

I. Introduction

Any discussion of Māori rights in the context of New Zealand law should begin with the Treaty of Waitangi. Signed in 1840 between representatives of the British Crown and 540 Māori chiefs, the Treaty is “the founding document of government in New Zealand.”¹ The Treaty’s preamble and three articles set out the principles upon which the British Crown was given the right to govern and develop British settlement in New Zealand, with Māori guaranteed full protection of their property rights as well as the rights and privileges of citizenship.²

Article 2 of the Treaty is of particular relevance in the context of intellectual property rights. There are some important differences in the wording of the English and Māori versions of this Article, both of which are considered to be official. The English version guaranteed Māori “full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”³ In comparison, the Māori version

¹ Rt. Hon. Kenneth Keith, *On The Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, in CABINET MANUAL 2008, available at <http://cabinetmanual.cabinetoffice.govt.nz/node/68>.

² The Treaty of Waitangi 1840, arts. 2 & 4 (English), available at <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text> and <http://www.waitangi-tribunal.govt.nz/treaty/english.asp>.

³ *Id.* art. 2.

guarantees “tino rangatiratanga” (full authority or chieftainship) over all “taonga”⁴ (treasures, which to Māori includes both the tangible and intangible, material and non-material⁵).

These and other differences in the two texts have been the source of much debate.⁶ As a consequence, it is now common to refer to the intention, spirit, or “principles” of the Treaty. The principles of the Treaty can be seen as having emerged from the reports of the Waitangi Tribunal⁷ and other sources and include “the principle of active protection, the tribal right to self-regulation, the right of redress for past breaches, and the duty to consult.”⁸ Such “principles of the Treaty of Waitangi,” and the need to take these into account in government decision-making processes and other activities, are referred to in several Acts of Parliament.⁹ Apart from these references, the Treaty itself has not been incorporated into New Zealand’s domestic law.

Given this context, this report discusses some of the issues and challenges in protecting cultural expressions and traditional knowledge in the law, and examines two examples of this in the context of the use of Māori cultural expressions. It also sets out the changes (or proposed changes) to New Zealand’s intellectual property legislation that seeks to enable Māori concerns and concepts to be taken into account through a consultative process. Further changes to the law

⁴ The Treaty of Waitangi 1840, art. 2 (Māori), available at <http://www.nzhistory.net.nz/politics/read-the-treaty/maori-text> and <http://www.waitangi-tribunal.govt.nz/treaty/maori.asp>.

⁵ See Waitangi Tribunal, WAI 262 Statement of Issues 6 (July 2006), available at <http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI%28doc2.314%29small.pdf> In some reports, the Tribunal has noted that taonga means “all things highly prized by Māori,” which includes tangibles such as fishing grounds, and intangibles such as the Māori language and life force of a river. See, e.g., REPORT OF THE WAITANGI TRIBUNAL ON THE MOTONUI–WAITARA CLAIM 50 (Waitangi Tribunal, 2nd ed. 1989), available at <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/6/2BC95342-6426-48EF-A9CE-38F3C9027330.pdf>.

⁶ See Differences Between the Texts, New Zealand History Online, <http://www.nzhistory.net.nz/politics/treaty/read-the-Treaty/differences-between-the-texts> (last visited Nov. 29, 2010).

⁷ The Waitangi Tribunal was established in 1975 to investigate alleged breaches of the Treaty by the Crown. See Treaty of Waitangi Act 1975, s 5 (setting out the functions of the Waitangi Tribunal), available at <http://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html>.

⁸ See Principles of the Treaty, The Waitangi Tribunal, <http://www.waitangi-tribunal.govt.nz/treaty/principles.asp> (last visited Nov. 29, 2010). Particular “principles” of the Treaty were set out in the judgment of Lord Cooke of Thorndon (then President of the New Zealand Court of Appeal) in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. The judgment listed the principles as being: the acquisition of sovereignty in exchange for the protection of rangatiratanga, the establishment of a partnership, which imposes on the partners the duty to act reasonable and in good faith, the freedom of the Crown to govern, the Crown’s duty of active protection, the duty of the Crown to remedy past breaches, the maintenance of rangatiratanga by Maori over their resources and taonga, Maori to have the privileges of citizenship, and the duty to consult. Following this decision, in 1989, the Labour Government released a document entitled “Principles for Crown Action on the Treaty of Waitangi,” which listed and explained the principles of government, self-management, equality, reasonable cooperation, and redress. These principles, and those contained in Waitangi Tribunal reports and court decisions, are set out in Dr. Janine Hayward, *Appendix – The Principles of the Treaty of Waitangi*, in 2 ALAN WARD, NATIONAL OVERVIEW 493-94 (Waitangi Tribunal Rangahaua Whanui Series, 1997) available at <http://www.waitangi-tribunal.govt.nz/doclibrary/public/Appendix%2899%29.pdf>.

⁹ See, e.g., Resource Management Act 1991, s 8; Climate Change Response Act 2002, s 3A; New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008, s 6; Education Act 1989, s 181; State-Owned Enterprises Act 1986, s 9; Local Government Act 2002, s 4.

are also likely to be considered in New Zealand following the release of the Tribunal's report on WAI 262, a major inquiry into claims regarding Māori rights relating to indigenous flora and fauna and cultural intellectual property, and the obligations of the Crown with respect to those rights.¹⁰

II. Protecting Indigenous Cultural Expressions and Traditional Knowledge

Traditional cultural expressions, which include artwork, symbols, song, and dance, that “reflect and identify a community's history, cultural and social identity, and values,”¹¹ can result in economic benefits to indigenous peoples. However, “they are also and perhaps more importantly, instrumental to the preservation and continuation of indigenous cultures.”¹²

The challenges of protecting the cultural and intellectual property rights of indigenous peoples, including their ability to benefit commercially from cultural expressions and traditional knowledge and prevent exploitation or inappropriate use, have generated considerable discussion over the years. The issues relate to the appropriateness and usefulness of various Anglo-American legal concepts, including those found in copyright, trademark, and patent laws in a number of countries, to protect knowledge, designs, or other expressions that have been passed down over the generations and which are considered to be owned collectively by a group.¹³ Indigenous communities often have a holistic view of their traditional knowledge in terms of its connections with their history, environment, and artistic expressions.¹⁴ For instance, it is noted that:

It is the holistic nature of TK [traditional knowledge] which makes it singularly difficult to analyse coherently and accommodate within traditional Anglo-American intellectual property systems. Imprecision, a quality in statute law generally abhorred by lawyers, tends to characterize TK. Furthermore, from the intellectual property law (particularly the patent law) perspective, there are handicaps, such as the tendency toward communal

¹⁰ See generally, *Flora and Fauna (Wai 262 Inquiry)*, WAITANGI TRIBUNAL, <http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries2/florafauna/> (last visited Nov. 29, 2010).

¹¹ WORLD INTELLECTUAL PROPERTY ORGANISATION, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE 5, available at http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf.

¹² Mariaan deBeer, *Protecting Echoes of the Past: Intellectual Property and Expressions of Culture*, 12 CANTERLAWRW 94, 102 (2006), available at <http://www.nzlii.org/nz/journals/CanterLawRw/2006/4.html>.

¹³ See PAUL SUMPTER, INTELLECTUAL PROPERTY LAW: PRINCIPLES AND PRACTICE 254-255 (2006).

¹⁴ In New Zealand, reference to “mātauranga Māori” is used to describe the Maori body of knowledge in a broader, more holistic sense than perhaps the separate terms of “traditional knowledge” and “traditional cultural expressions.” See DR. CHARLES ROYAL, MĀTAURANGA MAORI AND MUSEUM PRACTICE (Ministry of Economic Development, 2004), available at http://www.med.govt.nz/templates/MultipageDocumentTOC_688.aspx; DAVID WILLIAMS, MĀTAURANGA MĀORI AND TAONGA. THE NATURE AND EXTENT OF TREATY RIGHTS HELD BY IWI AND HAPŪ IN INDIGENOUS FLORA AND FAUNA CULTURAL HERITAGE OBJECTS AND VALUED TRADITIONAL KNOWLEDGE (Waitangi Tribunal, 1997), available at <http://www.waitangitribunal.govt.nz/inquiries/genericinquiries2/florafauna/mtaurangamoriandtaonga.asp>; TE MANA TAUMARU MĀTAURANGA: INTELLECTUAL PROPERTY GUIDE FOR MĀORI ORGANISATIONS AND COMMUNITIES (Ministry of Economic Development, 2007), available at http://www.med.govt.nz/templates/MultipageDocumentTOC_28180.aspx.

ownership and the fact that TK is often already in the public domain, suggesting that it is available for use by one and all.¹⁵

In essence, “fundamentally contrasting worldviews form the basis of European and indigenous expectations of the international intellectual property system.”¹⁶ There are key differences in perspectives relating to the ownership of property, including intellectual property, and in defining the “value” of that property and the rewards that are or should be gained from its creation.¹⁷ As a result, the requirements for conventional intellectual property protection, such as individual or identifiable authorship, originality, and time limits for protection, often cannot be met by indigenous peoples.¹⁸

The Māori people have been “vocal and active within the international indigenous struggle for intellectual property rights and protections.”¹⁹ In fact, in the early 1990s, the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples was held in New Zealand and resulted in the Mataatua Declaration.²⁰ This declared that “Indigenous Peoples of the world have the right to self determination and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property.”²¹ It went on to make recommendations to indigenous peoples regarding the development of policies and practices relating to protecting their intellectual and cultural property, as well as recommendations to governments and agencies, including the statement that “existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.”²² It recommended that intellectual property rights regimes incorporate collective ownership and origin, coverage of historical as well as contemporary works, protection against debasement of culturally significant items, and “multi-generational coverage span.”²³

III. Use of Māori Cultural Expressions

The use of Māori cultural expressions has become increasingly popular in recent years, including on the part of overseas companies and people,²⁴ and in New Zealand aspects of Māori

¹⁵ SUMPTER, *supra* note 13, at 259.

¹⁶ deBeer, *supra* note 12, at 95.

¹⁷ *Id.* at 96.

¹⁸ *Id.* at 97.

¹⁹ *Id.* at 111. See also SUMPTER, *supra* note 13, at 257.

²⁰ The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples (1993), available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf.

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ Jessica Lai, *Maori Culture in the Modern World: Its Creation, Appropriation and Trade* 10 (University of Luzern, Switzerland, i-call Working Paper No. 02, 2010), available at http://www.unilu.ch/files/i-Call_Working_Paper02_Lai.pdf. Lai states that “[o]utside of New Zealand, there is currently something “cool” and “hot” about Māori designs and culture that have made them increasingly popular on the global market and in the

cultural heritage can be seen as becoming part of the broader New Zealand identity and culture.²⁵ In both the international and domestic context, issues include the use of Māori symbols or language in trademarks and inappropriate use of customary knowledge and expressions in products, advertising, and for other commercial purposes.²⁶ In general, Māori consider that they are unable to exercise control of the trade of their culture in any real or comprehensive sense under the traditional intellectual property framework, and that they are also not reaping the benefits of this trade, whether nationally or internationally.²⁷

The fact that certain knowledge or cultural expressions may be seen from a non-Māori or “Western” perspective as having entered the “public domain” is important in considering the type and level of protection that can be achieved. This concept is not necessarily recognized by Māori and other indigenous peoples for whom the cultural knowledge forms an integral part of their history and identity as both individuals and as a group.²⁸ The inappropriate use of Māori culture that does not recognize the meaning and protocols (*tikanga*) relevant to those expressions can therefore cause offense and anger.

Even if “ownership” of cultural knowledge or different cultural expressions may not be able to be (or wished to be) asserted in a legal sense according to the concepts of intellectual property law, Māori argue that their “guardianship” (*kaitiakitanga*) of such knowledge should be acknowledged, and there are frequently calls for prior consultation in order for the deeper meaning and significance of a cultural expression to be explained, understood, and respected.

Two of the most identifiable Māori cultural expressions that have been used by non-Māori in different contexts, both in New Zealand and overseas, are the Ka Mate haka (the war-dance used by the New Zealand national rugby team, the All Blacks, since 1905) and the koru pattern (unfolding fern frond).

A. The Ka Mate Haka

The Ka Mate haka “has become a symbol, not only of the All Blacks, but of New Zealand and all its people.”²⁹ It is performed formally and informally at sporting events and by New Zealanders overseas wishing to express their New Zealand identity, but it has also been used, satirically or otherwise, in foreign advertisements for Italian cars,³⁰ Scottish whisky, and

tourism industry in New Zealand.” See also *Maori Culture Taking Off Overseas*, THE DOMINION POST (Feb. 4, 2008), <http://www.stuff.co.nz/dominion-post/archive/national-news/252323>.

²⁵ Lai, *supra* note 24, at 30-31.

²⁶ deBeer, *supra* note 12, at 102-103.

²⁷ Lai, *supra* note 24, at 11.

²⁸ *Id.* at 25-26.

²⁹ *Id.* at 32.

³⁰ See *Italians Drive Ahead with Car Mate Haka*, NEW ZEALAND HERALD (July 4, 2006), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10389619. See generally Susy Frankel & Megan Richardson, *Cultural Property and ‘the Public Domain’: Case Studies from New Zealand and Australia*, in TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION 280-83 (Christoph Antons ed., 2009).

for a British employment website.³¹ Māori people, and particularly the Ngāti Toa tribe of the warrior chief Te Rauparaha, who authored the haka in 1821, have taken offense and expressed their anger at the inappropriate use of the words and actions, which have been performed outside of and against *tikanga* and without consultation, particularly in instances of overseas commercial use.³² This has been communicated to the companies involved directly and there have been discussions in the media, but the outcomes have been mainly some bad publicity and possibly a raising of the awareness of Māori culture and concerns among a broader audience.³³

An attempt was made to trademark the lyrics of the Ka Mate haka, but this was rejected for various reasons.³⁴ More recently, in February 2009 the Government, as part of negotiations for financial, property, and cultural redress for breaches of the Treaty of Waitangi, stated in a formal offer letter to Ngāti Toa that the legislation implementing the final settlement will recognize the significance of the haka to the tribe.³⁵ In particular, the offer expresses the expectation of the tribe that “the primary objective of this redress is to prevent the misappropriation and culturally inappropriate use or performance of the haka ‘Ka Mate’.”³⁶

The exact approach to the issue is still being negotiated, and the wording of any legislative provisions that give affect to it are sure to be the subject of widespread public interest. However, it has become clear over the years that Ngāti Toa’s aim is not to prevent use of the haka by the public or the All Blacks (who have the tribe’s permission to use it) from using it, but to prevent inappropriate use, particularly in a commercial setting. A spokesman has previously stated: “For all New Zealanders who wish to participate and use the haka – not a problem. But

³¹ Mark Sweeney, ‘Haka’ War Dance Ad for Jobs Site Cleared of Being Offensive to Maoris, THE GUARDIAN (July 29, 2009), <http://www.guardian.co.uk/media/2009/jul/29/haka-ad-cleared-asa-stv>; Watch an STV Jobs Ad Attacked for Spoofing the Haka, THE GUARDIAN (July 29, 2009), <http://www.guardian.co.uk/media/video/2009/jul/28/stv-jobs-ad-haka>.

³² See, e.g. *Hollywood Hijacks Haka*, STUFF.CO.NZ (Nov. 3, 2008), <http://www.stuff.co.nz/entertainment/701595>. See also Lai, *supra* note 24, at 38, stating that “[w]hen Māori culture is appropriated outside of New Zealand, there are different implications. It is not potentially a sign of Māori culture forming part of the general New Zealand identity or done out of pride or affiliation for the country’s history and Indigenous people. In almost all cases, such appropriation is done for commercial reasons, outside of Tikanga Māori and is offensive to the Māori.”

³³ Lai, *supra* note 24, at 38.

³⁴ *Id.* at 32; Frankel & Richardson, *supra* note 30, at 283. See also Jonathan Milne, *Iwi Threatens to Place Trademark on All Black Haka*, HERALD ON SUNDAY (May 22, 2005), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10126807; Patrick Crewdson, *Iwi Claim to All Black Haka Turned Down*, HERALD ON SUNDAY (July 2, 2006), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10389347.

³⁵ Ngāti Toa Rangatira Letter of Agreement, Attachment 2: Cultural Redress 18 (New Zealand Government, Feb. 11, 2009), available at <http://www.nz01.2day.terabyte.co.nz/ots/DocumentLibrary%5CNgatiToaofferletter.pdf>. See also Martin Kay & Katherine Newton, *Haka Seals Ka Mate Deal*, THE DOMINION POST (Feb. 11, 2009), <http://www.stuff.co.nz/national/1397833>; Ellen Connolly, *Maori Win Battle to Control All Blacks’ Haka Ritual*, THE GUARDIAN (Feb. 12, 2009), <http://www.guardian.co.uk/world/2009/feb/12/new-zealand-haka-maoris>.

³⁶ Letter of Agreement, *supra* note 35, at 19.

when it comes to commercial activity we feel strongly that we need to be sitting down at the table.”³⁷

The final settlement will not confer full ownership rights and will not result in the tribe being able to claim royalties or the right to an outright veto of the use of the haka.³⁸ The Government is concerned that a balance is struck between the “rights and interests of Ngāti Toa, users, and the broader public” and considers that the special protection for the haka “should be complementary to, and not replace or prejudice the acquisition of, any applicable conventional intellectual property protection and derivatives thereof.”³⁹ The outcome is therefore likely to involve consultation requirements in some form, although it is unclear to what extent this might have an impact on overseas companies wishing to use depictions of the haka.

The Letter of Agreement between the government and Ngati Toa also refers to the WAI 262 inquiry, stating that “[t]he Crown will work with Ngāti Toa in designing an approach to address the issues and concerns relating to the use of the Ka Mate haka that is consistent with the Crown’s response to WAI 262 and the policy objectives and future outcomes of the Government’s Traditional Knowledge Work Programme.”⁴⁰

B. Koru

The koru pattern is another example of a Māori cultural expression becoming “infused” into everyday New Zealand, with the association with Māori deliberately maintained by those that use it.⁴¹ Traditionally used in carvings, jewelry, tattoos, and other artwork, the pattern is now widely used in souvenir products and the artwork of both Māori and non-Māori New Zealanders, in product labels, and in major corporate brands (including the national airline). The limits of the intellectual property regime are also evident in this example: koru designs feature greatly in expressions of a New Zealand identity and the fact that the patterns are based on natural forms and ideas adds further weight to the argument that they are in the public domain.⁴² Furthermore, a particular koru pattern that is of significance to a tribe would not be protected by copyright and could not be registered as a trademark if it is not used in trade.⁴³

While many businesses do seek to explain the meaning of the design, there are concerns about the level of understanding being superficial and some of the products being “kitschy,” rather than the design being used with a true appreciation and observance of *tikanga*.⁴⁴ As with the haka and other cultural expressions, the concept of guardianship has been raised by some

³⁷ Patrick Crewdson, *supra* note 34.

³⁸ Letter of Agreement, *supra* note 35, at 19.

³⁹ *Id.*

⁴⁰ *Id.* at 19.

⁴¹ Frankel & Richardson, *supra* note 30, at 285-86.

⁴² *Id.* at 286.

⁴³ *Id.*

⁴⁴ See Lai, *supra* note 24, at 30.

Māori, who argue that Māori have the role of protecting flora and fauna, and the cultural knowledge associated with it, from misuse, on behalf of past and future generations.⁴⁵

C. Non-Legislative Initiatives

One initiative that has sought to ensure that Māori benefit from their own use of koru and other traditional designs in jewelry and other artwork is the Toi Iho Māori Made Mark, a registered trademark for use by Māori artists.⁴⁶ The authentication mark was launched by the Government in 2002 and was originally funded through Creative New Zealand (Arts Council of New Zealand).⁴⁷ On launching the mark, the Minister for Arts, Culture and Heritage stated:

Māori art is unique to Aotearoa [New Zealand]. As a nation, we need to preserve and promote our unique Māori artistic expression, not only because it is precious to us, but also because it gives us a point of difference on the global market. There is a burgeoning interest in Māori art both in New Zealand and internationally. Assurances of authenticity and quality have been lacking in the tourism industry for many years. The mark provides this to New Zealanders and visitors from overseas.⁴⁸

Following various reviews of the initiative, however, it was announced in 2009 that Creative New Zealand would no longer invest in managing and promoting the Toi Iho mark.⁴⁹ In announcing the decision, Creative New Zealand said that:

For many Māori artists, the quality of their work speaks for itself and this is reflected in a growth of opportunities for consumers to buy Māori art from specialist Māori art and general galleries, the Internet and Māori arts markets. Creative New Zealand has conducted several reviews of toi iho™ since its inception and a consistent theme was that while the ideas underpinning the brand have considerable merit, it has failed to deliver on its promise in terms of increasing sales of Māori art by licensed artists and stockists (retailers).⁵⁰

⁴⁵ Frankel & Richardson, *supra* note 30, at 286.

⁴⁶ See *About Us*, TOI IHO MAORI MADE, <http://www.toiiho.com/Aboutus/tabid/249/Default.aspx> (last visited Nov. 30, 2010).

⁴⁷ See Speech, Hon. Judith Tizard, Launch of the toi iho Maori Made Mark (Feb. 8, 2002), *available at* <http://www.beehive.govt.nz/node/13013>.

⁴⁸ Press Release, Hon. Judith Tizard, Toi Iho Maori Made Mark Will Bring Cultural and Economic Benefits to New Zealand (Feb. 8, 2002), <http://www.beehive.govt.nz/node/12988>.

⁴⁹ Press Release, Creative New Zealand, Creative New Zealand Statement on Toi Iho (Oct. 21, 2009), http://www.creativenz.govt.nz/who_we_are/news/articletype/articleview/articleid/334/categoryid/4/creative-new-zealand-statement-on-toi-iho and http://www.creativenz.govt.nz/funding/toi_iho%E2%84%A2_Māori_made_mark (including frequently asked questions). See also Toi Iho website, <http://www.toiiho.com/>.

⁵⁰ *Id.*

In February 2010, Creative New Zealand sought expressions of interest from entities who might wish to take ownership of the Toi Iho mark.⁵¹ It has been reported that a foundation made up of Māori artists has been established to ensure that the trademarks continue.⁵²

Separate from the Toi Iho initiative, as part of the broader work program on intellectual property law and the protection of indigenous rights relating to cultural and traditional knowledge,⁵³ in 2007 the Ministry of Economic Development published detailed guidance on protecting Māori cultural or artistic expressions through the use of intellectual property laws.⁵⁴ This document states that:

While there are limits to the protection IP rights can provide for mātauranga Māori,⁵⁵ a number of existing forms of IP rights can give some protection. Some IP rights, such as copyright, are available to protect contemporary expressions or adaptations of mātauranga Māori (not the underlying mātauranga Māori or traditional knowledge). Other IP rights, such as trade marks, can be used to certify the authenticity of Māori products, and the action of “passing off” can be used to fight false claims of indigenous authenticity.⁵⁶

IV. Amendments to New Zealand’s Intellectual Property Legislation

While New Zealand’s intellectual property laws were originally based on the laws of the United Kingdom, more recent amendments reflect an increased recognition of Māori concerns.⁵⁷ Reform processes commenced in the 1990s, including a 1994 Māori consultation paper and meetings on an Intellectual Property Law Reform Bill that referred to possible recommendations to the government for changes to the trademark and patent legislation.⁵⁸ These reforms progressed as separate bills, and further changes may arise as a result of the findings of the Waitangi Tribunal in the WAI 262 claim, which are expected to be released soon.

⁵¹ Press Release, Creative New Zealand, Expressions of Interest in Toi Ihu Sought (Feb. 25, 2010), http://www.creativenz.govt.nz/who_we_are/news/articletype/articleview/articleid/453/categoryid/18/expressions-of-interest-in-toi-iho-sought.

⁵² *Toi Iho in Maori Control (finally!)*, TANGATAWHENUA.COM (May 22, 2010), <http://news.tangatawhenua.com/archives/5166>. See also Lai, *supra* note 24, at 25.

⁵³ See *The Intellectual Property and Traditional Knowledge Work Programme*, MINISTRY OF ECONOMIC DEVELOPMENT, http://www.med.govt.nz/templates/ContentTopicSummary_1938.aspx (last visited Nov. 30, 2010).

⁵⁴ TE MANA TAUMARU MĀTAURANGA: INTELLECTUAL PROPERTY GUIDE FOR MĀORI ORGANISATIONS AND COMMUNITIES (Ministry of Economic Development, 2007), available at <http://www.med.govt.nz/upload/48608/ip-guide-maori.pdf>.

⁵⁵ “Mātauranga Māori” refers to “knowledge specific to Māori communities and is the most significant body of traditional knowledge in Aotearoa-New Zealand.” *Id.* at 3. See also note 14, *supra*.

⁵⁶ TE MANA TAUMARU MĀTAURANGA, *supra* note 54, at 6.

⁵⁷ See SUMPTER, *supra* note 13, at 254-59. See also *Copyright Laws to Protect Māori Heritage*, BBC NEWS (Aug. 10, 2001), <http://news.bbc.co.uk/2/hi/business/1482203.stm>.

⁵⁸ INTELLECTUAL PROPERTY LAW REFORM BILL: MAORI CONSULTATION PAPER (Ministry of Commerce, Nov. 1994).

A. Trade Marks Act 2002

Following on from the 1994 consultation paper, the Ministry of Commerce established a Māori Trade Marks Focus Group which released a discussion paper in 1997 on proposals relating to Māori that would be contained within a new trademarks bill.⁵⁹ A bill was eventually introduced in 2001 and was enacted in 2002. One of the stated purposes of the Trade Marks Act 2002 is to “address Māori concerns relating to the registration of trade marks that contain a Māori sign, including imagery and text.”⁶⁰

The Act contains provisions that resulted from the recommendations of the Māori Trade Marks Focus Group. Section 17 of the Act sets out absolute grounds for the Commissioner of Trade Marks to refuse to register a trademark or part of a trademark, including where its use or registration would “in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.”⁶¹ The Act also requires the appointment of an advisory committee⁶² “to advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.”⁶³

The previous trademark legislation prohibited the registration of trademarks containing “scandalous matter,”⁶⁴ and cultural issues may have been taken into account under that provision despite not being spelled out in the legislation. The establishment of an advisory committee also means that such issues can be considered in a proactive manner as there is no requirement for a complaint to be received regarding a particular trademark.⁶⁵ There is also nothing in the legislation that requires a particular level of offensiveness, or proof of that offensiveness, or that requires the Commissioner to follow the recommendations of the Committee. At least one commentator has raised concerns with these aspects of the law, stating that “offence is a value laden concept open to a variety of interpretations and a determination of whether a mark is likely to offend is more open to subjective judgment than the provisions which were replaced.”⁶⁶

⁵⁹ See Maori Trade Marks Advisory Committee, Background Information, Ministry of Economic Development, http://www.med.govt.nz/templates/Page_1291.aspx (last visited Nov. 30, 2010).

⁶⁰ Trade Marks Act 2002, s 3(a), available at <http://www.legislation.govt.nz/act/public/2002/0049/latest/DLM164240.html>.

⁶¹ Trade Marks Act 2002, s 17(1)(c).

⁶² Trade Marks Act 2002, s 177 (stating that “the Commissioner must appoint an advisory committee”).

⁶³ Trade Marks Act 2002, s 178 (Functions of Advisory Committee).

⁶⁴ Trade Marks Act 1953, s 16.

⁶⁵ Provision is also made for complaints to be made, including by a “culturally aggrieved” person, which can result in the Commissioner or a court declaring the registration of a trademark to be invalid. Trade Marks Act 2002, s 73.

⁶⁶ Owen J. Morgan, *The New Zealand Trade Marks Act – No Place for Offence 2* (Intellectual Property Research Institute of Australia, Occasional Paper No. 2/03, 2003), available at <http://www.ipria.org/publications/occasional%20papers/Occasional%20Paper%202.03.pdf>.

The Māori Trade Marks Advisory Committee meets quarterly and reviews applications referred to it by the Commissioner of Trade Marks. In 2003, 333 trademark applications were referred to the Committee, and of these they considered that eight were likely to be offensive or required more information.⁶⁷ This did not mean that they were necessarily declined; instead the applicants appear to have been asked to rework and resubmit their applications.⁶⁸ There has not been any litigation regarding the application of the provisions, and it is noted that:

It will be difficult to measure the success of the provisions until a particularly controversial mark comes before the Commissioner of Trade Marks. The willingness of the Commissioner to ignore the recommendations of the Committee will then be tested. It is unlikely that this will occur often given the option for an applicant to amend their application in order to meet the requirements of the Act.⁶⁹

The Committee has also issued guidance on the use of Māori symbols in trademarks, including particular reference to the use of the koru pattern. A general guideline states that the use of a koru in a trademark application is not offensive for a wide range of goods and services.⁷⁰ In this context, it has been stated that the threshold of “offensiveness” under the Trade Marks Act 2002 is much higher than that of “appropriateness,” and that the “cultural origins of designs and designers are not part of the assessment process.”⁷¹ Therefore, one view is that, even under the amendments, the range of Māori concerns about the use of particular cultural expressions may not be fully accommodated by the ability to object on offensiveness alone.⁷²

B. Patents Bill

Following a review, consultation, and decision-making process that commenced in the 1990s, including a 1999 discussion document entitled Māori and the Patenting of Life Form Inventions,⁷³ a Patents Bill was introduced in 2008 and is currently before the New Zealand Parliament awaiting the final stages of debate.⁷⁴ If passed, this bill will repeal and replace the

⁶⁷ deBeer, *supra* note 12, at 110.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Trade Marks Practice Guidelines: Pitau (Koru), Intellectual Property Office of New Zealand (IPONZ), <http://www.iponz.govt.nz/cms/trade-marks/practice-guidelines-index/practice-guidelines/16-maori-advisory-committee-maori-trade-marks/6-annexure/6-3-pitau-koru>.

⁷¹ Frankel & Richardson, *supra* note 30, at 287 (quoting Practice Guideline Amendment 2006/11, IPONZ Newsletter, Dec. 2006).

⁷² *Id.*

⁷³ MĀORI AND THE PATENTING OF LIFE FORM INVENTIONS (Ministry of Commerce, 1999), available at http://www.med.govt.nz/templates/MultipageDocumentTOC_1237.aspx
<http://www.med.govt.nz/upload/3649/patentsreview.pdf>.

⁷⁴ The Patents Bill was reported on by the Commerce Committee on March 30, 2010. See Patents Bill, New Zealand Parliament, http://www.parliament.nz/en-NZ/PB/Legislation/Bills/a/f/2/00DBHOH_BILL8651_1-Patents-Bill.htm.

existing 1953 legislation.⁷⁵ Clause 14 of the bill provides for a morality exclusion and allows the Commissioner to seek advice from a Māori advisory committee.⁷⁶ Therefore, similar to the trademark legislation, the bill provides for the establishment of a Māori Advisory Committee to advise the Commissioner of Patents on whether an invention is “derived from Māori traditional knowledge or from indigenous plants or animals” and, if so, “whether the commercial exploitation of the invention is likely to be contrary to Māori values.”⁷⁷

The parliamentary committee that considered the bill received submissions and advice regarding Māori interests, including a number of references to the WAI 262 inquiry. It noted that further amendments may be made to the legislation as part of the government response to the Tribunal’s report on this inquiry.⁷⁸

C. WAI 262 Inquiry

The WAI 262 claim was lodged in 1991 by a number of different Māori groups. It combines a wide range of elements, “including traditional practices of Māori, spiritual values, and other aspects which are perhaps more recognizable as cultural features rather than intellectual property.”⁷⁹ The claimants essentially argue that their rights to control, manage, and utilize indigenous flora and fauna, and the genetic resources they contain, arise from Article 2 of the Treaty of Waitangi. They assert that the Crown had an active duty to protect these interests and that the Crown has breached the Treaty by denying Māori proprietary interests in indigenous flora and fauna, including through some intellectual property laws and agreements.⁸⁰ The intellectual property aspects of the claim have never been addressed by the Tribunal before.

The claims and inquiry include issues relating to the protection of cultural expressions. For example, the Statement of Issues refers to “taonga works,” which include a long list of examples of “artistic and literary works,” including the “mauri” (spirit) of those works, “where the work reflects in some way the culture and/or identity of the kaitiaki [guardian] of the work and includes the knowledge, skills, cultural or spiritual values upon which the work is based.”⁸¹

The claimants contend that their cultural knowledge and expressions are taonga, and that the guarantees in the Treaty included the rights of guardianship, custody, collection,

⁷⁵ Patents Act 1953, available at <http://www.legislation.govt.nz/act/public/1953/0064/latest/DLM280031.html>.

⁷⁶ Patents Bill, As Reported From the Commerce Committee, cl 14, available at http://www.parliament.nz/NR/rdonlyres/B6E4F834-C47A-426A-86B8-F573ED4F5E04/133805/DBSCH_SCR_4679_PatentsBill_2352_7434_3.pdf.

⁷⁷ *Id.* cl 14(3).

⁷⁸ *Id.*, Commentary, at 3.

⁷⁹ SUMPTER, *supra* note 13, at 257.

⁸⁰ *See* Statement of Issues, *supra* note 5, at 4 and 6-12.

⁸¹ *Id.* at 6.

revitalization, and transmission of such knowledge and expressions.⁸² The issues being considered by the Tribunal therefore include:

- Must the Crown protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?
 - If so, in what circumstances does New Zealand law and policy provide such protection?
- Must the Crown provide for the regulation, control, use and development by kaitiaki of their taonga works?
 - If so, in what circumstances does New Zealand law and policy ensure this activity?
- Must the Crown ensure the preservation of intellectual property aspects of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?
 - If so, in what circumstances, does New Zealand law and policy provide for such preservation and transmission?⁸³

The Statement of Issues goes on to list a number of questions relating to specific intellectual property laws and concepts, including whether they are inconsistent with the Treaty and, if so, whether they can be made consistent through particular amendments.⁸⁴

The Tribunal has recently released a chapter relating to the Māori language aspects of the claim⁸⁵ and the remaining recommendations are also expected to be released in 2010. The Tribunal's recommendations are not binding on the government, but are likely to have a considerable impact on discussions regarding the need for any further amendments to the intellectual property regime, the development of other legislative changes, or non-legislative initiatives relating to the protection of Māori cultural knowledge and expressions.

V. Concluding Remarks

The amendments to New Zealand's intellectual property laws, in terms of requirements for considering Māori concerns about the use of their cultural knowledge in trademarks and patents, are unique. Furthermore, traditional intellectual property concepts, including copyright and trademarks, can be beneficial to Māori in protecting and benefiting from their own contemporary cultural expressions. However, concerns remain about the level of control that Māori have over the use of their traditional cultural expressions by others, particularly in a commercial setting. The concept of "guardianship" and requirements for prior consultation and

⁸² *Id.* at 6-12.

⁸³ *Id.* at 14.

⁸⁴ *Id.* at 14-21.

⁸⁵ TE REO MĀORI (Waitangi Tribunal Report No. 262, pre-publication version, Oct. 2010), available at <http://www.waitangitribunal.govt.nz/scripts/reports/reports/262/056831F7-3388-45B5-B553-A37B8084D018.pdf>. This chapter was released early so that it would be available to the current Ministerial review panel considering the Māori language sector and strategy. *Indigenous Flora and Fauna and Cultural Intellectual Property: Report Summary*, WAITANGI TRIBUNAL, <http://www.waitangitribunal.govt.nz/reports/summary.asp?reportid={BF981901-5B55-441C-A93E-8E84B67B76E9}> (last visited Nov. 30, 2010).

for use that conforms with Māori protocols are difficult to include in an intellectual property legal regime. This is particularly the case with expressions that are seen by non-Māori as being in the public domain or that have become infused within the broader culture and identity of the country.

The detailed examination of these issues by the Waitangi Tribunal offers the opportunity for increased clarity and understanding regarding Māori rights and interests in protecting their culture from inappropriate use. In responding to the Tribunal's final recommendations, it appears that the New Zealand government will seek to achieve a balance between these and the interests of the public, meeting any obligations arising from international instruments, as well as the need to maintain the coherency and benefits of the existing intellectual property regime. Any changes to the framework in New Zealand with respect to traditional cultural expressions could have an impact on how overseas companies approach the use of Māori culture, although the lack of agreed international rules or standards at this stage⁸⁶ may mean that Maori will need to continue to use other mechanisms to enhance the understanding and protection of their culture.

Kelly Buchanan
Foreign Law Specialist

⁸⁶ The World Intellectual Property Organisation's Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore is continuing to work towards an agreement on an international legal instrument on traditional cultural expressions. Press Release, World Intellectual Property Office, Experts Break New Ground in Traditional Cultural Expression Talks (July 23, 2010), http://www.wipo.int/pressroom/en/articles/2010/article_0026.html.