

DEBBIE M GOODLET

**THE PROTECTION OF INDIGENOUS
PEOPLE'S
INTELLECTUAL PROPERTY**

LLM RESEARCH PAPER

INDIGENOUS PEOPLES AND THE LAW (LAWS 541)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1993

G652 GOODLET, D.M. The protection of indigenous peoples intellectual property.



e
AS741
VUW
A66
G652
1993



CONTENTS

ABSTRACT	3
I INTRODUCTION	4
II PROBLEMS OF DEFINITION.....	5
A <i>Definition of Taonga</i>	6
B <i>Definition of Intellectual Property</i>	6
C <i>Definition of Cultural Property</i>	6
III THE INTERNATIONAL REGIME'S RESPONSE TO THE PROTECTION OF INDIGENOUS PEOPLES INTELLECTUAL AND CULTURAL PROPERTY.....	9
A <i>The United Nations International Labour Organization Convention 107</i>	10
B <i>The United Nations Economic and Social Council's 1991 Working Paper</i>	12
C <i>The Sub-Commission on the Prevention of Discrimination and Protection of Minorities 1992 Report</i>	14
1 <i>The 1992 report's comments on the protection of folklore and craft</i>	15
2 <i>The 1992 report's comments on the protection of biodiversity and indigenous knowledge</i>	17
IV THE NEW ZEALAND POSITION ON THE RETURN AND RESTITUTION OF CULTURAL PROPERTY OF INDIGENOUS PEOPLES	19
A <i>The Antiquities Act 1975</i>	20
B <i>The Protection of Movable Cultural Heritage Bill</i>	20
C <i>The Resource Management Act 1991</i>	21
D <i>The Historic Places Act</i>	21

E The First International Conference on Cultural and Intellectual Property Rights of Indigenous People 22

V INTELLECTUAL PROPERTY PROTECTION IN NEW ZEALAND22

A Copyright: The Copyright Act 1962 22

 1 *Copyright protects the expression of ideas* 23

 2 *Copyright protects the individual owner* 24

B Trade Marks 26

C Plant Variety Rights Act 1987 27

D Fair Trading Act 1986 31

E Confidential Information (Trade Secrets) 31

 1 *The need for the information to be confidential* 34

 2 *The obligation of confidence* 34

 3 *An unauthorised use of the information* 35

F Summation of New Zealand Intellectual Property Law 35

VI CONCLUSION36

BIBLIOGRAPHY37

ABSTRACT

This paper will explore the area of indigenous peoples intellectual property rights. Firstly the paper will give a brief description of the fundamental problem of actually what property we are talking about, and the possible varying definitions for this topic.

The international regime is limited and inadequate in its protection of indigenous peoples intellectual property rights, but over the last few years consciousness of the complexity and urgency of the subject has been raised. The paper will look at the progress being made in the international forum to protect these rights.

Finally the paper will look at the national legislation and common law protection afforded to indigenous intellectual property in New Zealand. As individual areas of protection are discussed, suggestions as to the inadequacies for the protection of indigenous intellectual property will be raised.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,000 words.

I INTRODUCTION

Intellectual property of indigenous peoples, is the subject of legitimate concern. There are certain moral and ethical factors to be considered with regard to this subject. To respect an indigenous culture, respect for those symbols which are important to their beliefs is required. Due to lack of respect afforded to indigenous peoples traditional knowledge and creative abilities, there has accumulated a large unpaid debt. This debt is owed to indigenous people for their contributions to art, science, medicine and other areas of creative endeavour.

There is very little recognition of the contribution of indigenous people to the work of the present day artist or scientist. The stable diet we eat today is the consequence of indigenous knowledge and biodiversity. The indigenous people of the Americas revolutionised our diet by introducing us to potatoes, beans, corn, tomatoes, coca, and coffee. This revolution in peoples diets improved health and prolonged life. It is estimated that a quarter of all prescription drugs are derived from plants and that three quarters of these have been developed from information provided by indigenous peoples.¹ Other natural products developed from indigenous knowledge include organic pesticides, new varieties of crops, sweeteners and perfumes.

There are also pecuniary considerations of the intellectual property contributions made by indigenous people. Indigenous peoples living in biologically diverse regions of the world possess a knowledge of potentially high economic value. Indigenous people have a profound knowledge of flora and fauna. They have also developed socially and ecologically viable strategies of natural resource use and management. Indigenous people are thus becoming increasingly concerned about what they regard as the unauthorised use and abuse of their knowledge.

Protection and compensation for the present day contributions of indigenous people in a fair and effective manner is long over due, as this paper will show with the present international conventions and New Zealand legislation on the subject is inadequate. Respect for indigenous laws governing the situation in which sacred or

¹A Gray *Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples* International Working Group for Indigenous Affairs (IWGIA) Document 70 1991.

significant information can be disseminated has never been great. The exploitation of artistic creations is also subject to the same commercial exploitation as indigenous knowledge and biodiversity. The use of Polynesian designs and motifs on clothing is now common place without consultation with the community responsible for the design. As is the recreation of oral history in book, and through other medians. Often the tale is distorted in order to better comply with marketing requirements, with no regard to the cultural significance of the subject.

In 1992 artist Dick Frizzell's exhibition 'Tiki' in Auckland drew a storm of criticism. Frizzell borrowed the Maori symbol and used and abused it as he saw fit with no recognition to the Maori value placed on it. An example of the cultural insensitivity shown towards the tiki was Frizzell's cartoon like recreation of the Four Square man with a moko. Through taking and using a Maori cultural motif in this way the originators of the motif are discarded along with the cultural significance of the design. Degradation of images through inappropriate use or application, such as the classic instance of reproducing sacred or semi-sacred images on tea-towels, is an offence for which New Zealand law provides no remedy. The wholesale appropriation of Maori art can be seen in the wider context of cultural colonisation and dispossession. This abuse of Maori art has a two-fold effect; it deprives Maori people of a significant economic base; and, if trivialised, it can undermine the autonomy of unique Maori traditions. It is reflective of our legal order that the sacrilegious use of sacred objects and images is neither a civil nor criminal offence. The question is how can indigenous people protect their cultural property.

This paper will suggest that the requirements of New Zealand copyright law are essentially foreign to the concerns and perspectives of Maori law regarding the protection of intellectual property. Equitable principles according protection to confidential information may be sufficiently flexible to protect communal rights in sacred designs.

II PROBLEMS OF DEFINITION

One of the fundamental problems with the protection of indigenous peoples intellectual property is the definition of what is to be protected. This section will

briefly attempt to show the differences between three concepts of intellectual property.

A *Definition of Taonga*

Taonga was guaranteed by the Crown to remain in the possession of the Maori people, by article two of the Maori text of the Treaty of Waitangi. The second article of the Treaty of Waitangi guarantees Maori te tino rangatiratanga² of their lands, estates, forests, fisheries, and taonga katoa.³ The basic meaning of the Maori word taonga is valuable material possession, but taonga was also used to describe pieces of land, and social and cultural features such as carving dance and warfare.⁴ Therefore in strict accordance with language usage taonga includes all material and cultural possession.

B *Definition of Intellectual Property*

Intellectual property law is that area of the law which encompasses legal rights associated with intellectual creative effort or commercial reputation and goodwill. The subject matter of intellectual property includes artistic and literary works, films, computer programmes, inventions, designs and marks used by trader for their goods or services. The basic reason for intellectual property law is that a person should own what they produce, that is what they create. Intellectual property is therefore the most basic form of property because a person uses nothing to produce it other than their mind.⁵ The law was established to deter others from copying or taking unfair advantage of the work or reputation of another and provides remedies should this happen. There are several different forms of rights or areas of law giving rise to rights under intellectual property which include; copyright, patents, law of confidence and design right.

C *Definition of Cultural Property*

²B Biggs "Humpty-Dumpty and the Treaty of Waitangi" in I Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 314

"The unqualified exercise of (their) chieftainship, highest chieftainship."

³"All (their) treasured possessions, cultural heritage." See n 2, 314.

⁴Above n 2, 308.

⁵DI Bainbridge *Intellectual Property* (1 ed, Pitman Publishing, London, 1992) 17.

The United Nations Economic and Social Council (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property⁶ adopted by the General Conference at its sixteenth session on 14 November 1970, defines cultural property "as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science."

Article One of the Convention lists the following categories of cultural property:

"(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

⁶UNESCO Standard-setting Instruments, IV.A.4, (Paris, 1986).

- (iii) original engravings, prints and lithographs;
- (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments."

New Zealand is not a signatory to this Convention.

The Convention Concerning the Protection of the World Cultural and Natural Heritage⁷ adopted by the General Conference of UNESCO in November 1972 defines cultural heritage, as works of man or the combined works of nature and of man, and areas including archeological sites which are of outstanding universal value from historical, aesthetic, ethnological or anthropological points of view.

While such definitions provide a guide for the purpose of the study they do not reflect the specific concerns of indigenous people nor do they necessarily provide comprehensive coverage of cultural property. Indigenous people themselves have indicated the importance of individual artistic works, artifacts and handicrafts; objects of religious significance; music, folklore and design; archaeology and human remains; sacred and historical sites.⁸ But even this list may not be comprehensive and further consultation with indigenous peoples would be necessary to ensure that their proper concerns are reflected in international or

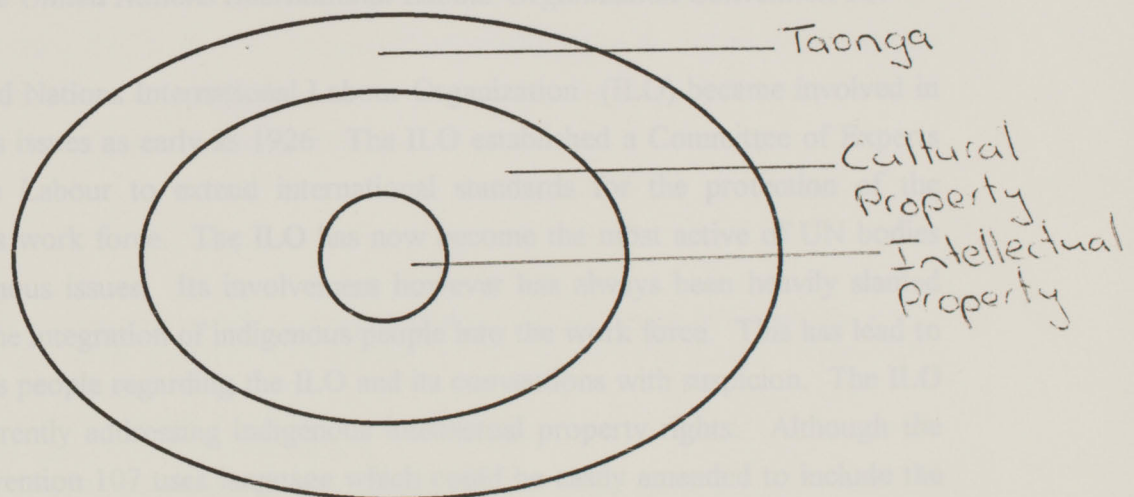
⁷Above n 6, IV.A.5.

⁸EI Daes Working paper on the Question of the Ownership and Control of the Cultural Property of Indigenous Peoples E/CN.4/Sub.2/1991/34, 4.

national legislation. Indeed concerns and priorities between indigenous populations would probably differ. Any definition of cultural property would have to take account of the specific needs and concerns of their cultures. Oral history may also be a part of indigenous cultural property. The UNESCO Convention refers to the oral history through "sound, photographic and cinematographic archives." Although "archives" suggests a public place where the material records are kept. This could be seen as a violation of religious and cultural belief to some indigenous people.

A notion of cultural property will need to include an understanding that the spiritual or cultural importance of the particular cultural object may override commercial or strictly property considerations. The last two definitions do not fully reflect the concern of indigenous people and are not sufficiently comprehensive.

These three types of property definitions can be seen in the sense of sets and subsets, below is a simple diagram showing the breadth of coverage.



III THE INTERNATIONAL REGIMES RESPONSE TO THE PROTECTION OF INDIGENOUS PEOPLES INTELLECTUAL AND CULTURAL PROPERTY

In its 1987 report, "Our Common Future," the World Commission on Environment and Development said indigenous communities "are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance [would be] a loss for the larger society, which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems. It is a terrible irony that as formal development reaches more deeply into rainforests, deserts, and other isolated environments, it tends to destroy the only cultures that have proved able to thrive in these environments."⁹

Currently no international convention discusses the question of intellectual property rights for indigenous people. Although many United Nations (UN) agencies and governmental and non-governmental organisations realize the significance of indigenous knowledge and intellectual property rights encompassed in science, agriculture, and drug development. Many international organisations are now exploring intellectual property rights for indigenous peoples.

A The United Nations International Labour Organization Convention 107

The United Nations International Labour Organization (ILO) became involved in indigenous issues as early as 1926. The ILO established a Committee of Experts on Native Labour to extend international standards for the protection of the indigenous work force. The ILO has now become the most active of UN bodies on indigenous issues. Its involvement however has always been heavily slanted towards the integration of indigenous people into the work force. This has led to indigenous people regarding the ILO and its conventions with suspicion. The ILO is not currently addressing indigenous intellectual property rights. Although the ILO Convention 107 uses language which could be easily amended to include the protection of indigenous intellectual property.

The Convention was adopted in 1957, a major goal of the Convention is the progressive integration¹⁰ of indigenous peoples into the life of the dominant culture

⁹The World's Indigenous People, World Bank Information Brief # L.02.4-93.

¹⁰ILO Convention 107, article 2(1):

of their respective countries. This type of integrationist language has been attacked as promoting the dilution and assimilation of minority cultures into the main stream dominant culture. Such language is contrary to cultural sovereignty and effectively destroys minority cultures. This language could easily be removed from the Convention, this would render the convention more effective.

Once this was done article 2(2) of the convention should be amended to include the legal protection of indigenous intellectual property rights. At the moment article 2(2)¹¹ only specifically requires measures to be taken to enable indigenous peoples to be equal in the face of the national law as other peoples and for the country to promote social, cultural, and economic development to raise their standard of living. Article 2(3) of the Convention states that "the primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative." This article could be specifically amended to refer to the development of economic independence through the exercise of intellectual property rights and subsequent compensation.¹² Just compensation in this instance would necessarily include that for the use of indigenous knowledge, compensation for this resource is required in the development of economic independence. Article 18¹³ advocates the protection of industries based upon indigenous knowledge although it does not go so far as to specifically give such knowledge a legal property right entitled to compensation.

Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

¹¹ILO Convention 107, article 2(2):

Such action shall include measures for-

- (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
- (b) promoting the social, economic, and cultural development of these populations and raising their standard of living.

¹²D Posey "Effecting International Change" (1991) Cultural Survival Quarterly 29.

¹³ILO Convention 107, article 18:

(1) Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.

(2) Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

Even if the ILO Convention 107 were amended to specifically give recognition and protection to indigenous intellectual property rights it has only been ratified by 27 countries.¹⁴

United Nation conventions have no real legal basis nor mechanisms for enforcement, although they do serve as a basis to argue legal and ethical positions the International Court of Justice, for example, could be a forum to attempt protection of indigenous people in intellectual property rights cases. The UN General Assembly or member states have to initiate any action. Given the current apathy toward indigenous issues and the vested interests of influential and international economic forces, such action is difficult to imagine.¹⁵

The ILO is not the only UN organisation concerned with indigenous issues. Within the General Assembly, the Third Committee deals with social and humanitarian issues and the Fourth Committee considers decolonisation issues.¹⁶ Both of these committees have the capacity to deal with intellectual property matters. However due to the existing inadequacies in international legislation and the political constraints of intergovernmental debates, little effort has been made regarding indigenous issues in the UN General Assembly.¹⁷

B The United Nations Economic and Social Council's 1991 Working Paper

In 1972, the UNESCO authorised the formation of a special sub-commission under the Commission on Human Rights. This sub-commission, on Prevention of Discrimination and Protection of Minorities, was established to conduct a broad study on the problem of discrimination against indigenous peoples.¹⁸ The subsequent report stated that the present international instruments were inadequate in their recognition and promotion of the rights of indigenous peoples. In 1982 UNESCO created a Working Group on Indigenous Populations, which is working to prepare a Declaration of Principles on Indigenous Rights.

¹⁴The United States is noticeably absent from the signatories of the Convention.

¹⁵Above n 12, 29.

¹⁶Above n 12, 30.

¹⁷S Aga Kahn and H Talal *Indigenous Peoples: A Global Quest for Justice* (Zed Books, London, 1987) 121.

¹⁸Above n 17, 121.

The Working Group on Indigenous Populations issued a paper in July 1991 on the question of the ownership and control of the cultural property of indigenous peoples.¹⁹ The purpose of the paper was to provide a tentative framework for further study. The paper observed that contemporary national law in general and relevant international conventions have been developed without particular reference to the legal practises and law of indigenous people. For example in a lot of indigenous societies cultural property is owned by the community as a whole and not by an individual. It may be the case that an individual or family is the holder or trustee of the cultural property, but the way that trustee uses the property is governed according to indigenous law. It is therefore important when drafting legislation to protect cultural property to look at the indigenous societies laws and customs which have already been set up to protect the property.

The 1991 working paper recognised two of the most difficult viewpoints to balance. These are, cultural patrimony and that of the common heritage of mankind. On the one side are the States which are being deprived of their culturally important objects and knowledge, these states wish to protect and regain these. On the other side are the States who hold large collections of culturally significant objects and who use for commercial advantage the indigenous knowledge, these States purport that the objects and knowledge are of a universal value and should be available to everyone for legitimate scientific research and education. The need for responsible conservation is also an argument used by the States backing the theory of a common heritage of mankind.

The 1991 working paper comments that the notion of cultural patrimony is being developed within the United Nations through such conventions as the 1972 UNESCO Convention.²⁰ This convention protects items pertaining to the cultural or natural heritage that are of outstanding universal value from the point of view of history, art, science or aesthetics.²¹ The 1972 Convention recognises the duty of the international community to cooperate in ensuring the conservation of the heritage, which is of a universal character. The UNESCO and the World

¹⁹Above n 8.

²⁰Above n 6, IV.A.5.

²¹Above n 8, 8.

Intellectual Property Organisation²² drafted model provisions for the protection of folklore in 1985.²³ These provisions tended towards the cultural patrimony view by recognising that the expression of folklore should be considered as an intellectual expression and therefore deserved to be protected in a manner similar to the protection provided for intellectual productions.

The 1991 working paper²⁴ considered very broadly the concept of ownership and control of cultural property. The paper's main points can be summarised as setting out the difficulty and importance of the definition given to the property to be afforded protection, and the need to consult with individual indigenous societies and to provide the protection they require. The general international trend towards the acceptance of cultural patrimony was also commented on in the paper. The conclusion and recommendation contained in the paper suggested further study of international and national instruments concerned with the protection and restitution of cultural property. The author of the 1991 working paper recommended that all interested parties be consulted and their views sought. It was recommended that in any further study on this subject emphasis be placed on the protection of human rights of indigenous people. Indigenous peoples have expressed the view that the restitution of cultural property, particularly the return of human remains, funeral objects, sacred and religious objects, is essential to the enjoyment of their human rights and fundamental freedoms. It was suggested by the 1991 working paper that the return and protection of cultural property is necessary to ensure indigenous people their right to their culture, by being able to practise it and to preserve their group identity.

C The Sub-Commission on the Prevention of Discrimination and Protection of Minorities 1992 Report

Following the presentation of the 1991 working paper the Sub-Commission on the Prevention of Discrimination and Protection of Minorities requested a further report on the extent to which indigenous peoples can utilize existing international

²²The World Intellectual Property Organisation, henceforth cited as WIPO, is responsible for the promotion of the protection of intellectual property throughout the world.

²³Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and other Prejudicial Actions, UNESCO/WIPO (Paris, 1985).

²⁴Above n 8.

standards and mechanisms for the protection of their intellectual property, drawing attention to any gaps or obstacles and to possible measures for addressing them.

This report was submitted to the Sub-Commission on 6 July 1992. The 1992 report recognised that the question of the protection of the intellectual property rights of indigenous people has been raised at successive sessions of the Working Group of Indigenous Peoples and that the draft declaration on the rights of indigenous people now contained a reference to intellectual property. The draft operative paragraph 19²⁵ states:

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, medicines and knowledge of the useful properties of fauna and flora.

The 1992 report expressed that the intellectual property of indigenous peoples could be divided into three groups: (i) folklore and crafts; (ii) biodiversity;²⁶ and (iii) indigenous knowledge.

1 The 1992 report's comments on the protection of folklore and crafts

The report mentioned that the only significant protection of folklore by a means of copyright through an international instrument was the revision of the Berne Copyright Convention in 1971.

Article 15(4) of the Berne Copyright Convention contains the following provision:

"(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."

²⁵See Draft Declaration on the Rights of Indigenous People, E/CN.4/Sub.2/1992/28.

²⁶Biodiversity refers to the varieties of living flora and fauna.

The Berne Copyright Convention is administered by the WIPO. It currently has over eighty member states including New Zealand, Australia and the United States.²⁷ The convention lays down minimum standards for copyright protection and provides for the reciprocity of protection between member states (or states of the Union). The revised article 15(4) enables member states to designate the ownership of an unpublished work where the author is unknown to a particular group. The practical implications of this article are perhaps minimal, it is unlikely that a large number of works which are unpublished and where the author is unknown.

The 1992 report also commented on the Paris Convention for the protection of Industrial Property, which provides protection for trademarks. The report suggested that motifs of indigenous people could be considered in this light. The Paris Convention contains a provision to prohibit unfair competition.²⁸ The article states:

"All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor" and "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

This article may be appropriate for the prevention of copies of certain indigenous artistic goods.

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, was mentioned in the 1992 report. The provision contained in this agreement is perhaps the most promising to protecting indigenous artistic works, but as of 1 January 1992 only 16 states were a party to the agreement.²⁹ The Agreement provides for the protection of the "geographical

²⁷Above n 5, 417.

²⁸Art 10 Paris Convention for the Protection of Industrial Property, Act of Stockholm, Stockholm 1967.

²⁹Intellectual Property of Indigenous Peoples: Concise report of the Secretary-General E/CN.4/Sub.2/1992/30, 5.

name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors."³⁰ This is the provision used to protect such products as champagne and port. This may be a viable means of protecting distinctive indigenous products, if a lot more states sign the agreement.

The 1992 report also briefly discusses the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions adopted by the WIPO in 1982. The provisions, if ever adopted as national law, aim at protecting folklore from "illicit exploitation and other prejudicial actions." The definition of folklore given in the provisions are "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community."

The 1992 report stated that international agreements on intellectual property appear largely inadequate to meet the concerns of the indigenous people for the protection of their folklore.

2 The 1992 report's comments of the protection of biodiversity and indigenous knowledge

In the intellectual property regime the protection of indigenous biodiversity and traditional knowledge is protected by patents. As in the case of folklore, biodiversity and traditional knowledge are not sufficiently protected by international conventions. Traditional knowledge is a communal knowledge which transcends generations. A principle of patentability is that the product or process is new. The process must also be described in a way which makes it capable of reproduction.

Certain international agreements may be relevant in the protection of indigenous knowledge. The International Convention for the Protection of the New Varieties

³⁰Art 2 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, concluded in 1958 and revised in 1967 and amended in 1979.

of Plants (1961) offers protection to the breeder of the new plant variety, or to the successor in title. The right conferred on the breeder for the new plant variety is granted for a limited period, usually not less than 15 years.

The Geneva Treaty on the International Recording of Scientific Discoveries, 1978, defines a scientific discovery as:

- "(i) the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification;
- (ii) 'discover' means the natural person who has made a scientific discovery himself, through observation, study, experimentation or reasoning and in a manner decisive for arriving at the recognition thereof; where, in the making of a scientific discovery, several natural persons have jointly fulfilled the said requirements, any reference to a discoverer shall be construed as a reference to all of them."

The 1992 report submitted that traditional knowledge that indigenous peoples have about the environment might be eligible as a scientific discovery under the Geneva Treaty and therefore recorded as such.

The question was raised by the 1992 report of whether indigenous knowledge about ecosystems could be considered as a proprietary asset, for example, in the form of know-how or as a trade secret. However the use of know-how as a protection would require the indigenous people to negotiate a satisfactory agreement on protection and remuneration, as know-how is a contractual protection.

Finally the 1992 report made reference to biodiversity and the protection of indigenous peoples knowledge and use of living things. The biotechnology market has been rapidly developing, through science trying to improve specific characteristics of plants and animals for commercial advantage. There is now interest in developed countries of the patentability of plants which have been developed through such means as genetic engineering and are characteristically distinct from the original plant. Researchers can now regenerate a whole plant from one of its cells or can fuse plants of different species together to create a new entity. Therefore it is possible that indigenous people can help researchers identify

commercially valuable plants on their territory. Then the researchers can isolate the plants special characteristics, patent the "new" plant and sell it. The indigenous people would in this case get not reward or compensation.

The 1992 report concluded by commenting on the complexity of the area of indigenous peoples intellectual property rights and how little research has been done in this area. The fact that international agreements do not specifically address the concerns of indigenous people in this area is a major concern. The report suggested that if the existing agreements do not protect the intellectual property rights of indigenous people satisfactorily that review and amendments may be merited. If this is still unsatisfactory then consideration should be given to developing specific protection for indigenous people.

IV THE NEW ZEALAND POSITION ON THE RETURN AND RESTITUTION OF CULTURAL PROPERTY OF INDIGENOUS PEOPLES

The return and restitution of Maori cultural property is being dealt with on an ad hoc basis. However the Government has assisted with the repatriation of Maori remains from abroad and from within its own establishments. Examples of this over the past five years include:

- A The repatriation from Britain of a Maori tattooed shrunken head taken there by a trophy hunter last century and offered for sale at Southebys. The Crown paid for its escort to New Zealand for burial.
- B The repatriation of the remains of Hohepa Umuroa from Tasmania. Umuroa was a prisoner who was wrongly incarcerated in a Tasmanian jail in the 1850's as a result of Governor Grey' order of deportation of five Maori, accused of rebellion. He died in captivity and was subsequently buried in Tasmania. The Crown paid for elders of the Whanganui river tribes to travel to Hobart, exhume, repatriate and then rebury Umuroa in Whanganui.
- C The minister of Maori Affairs (as trustee) agreed to the repatriation of skeletal remains from the Auckland Museum to Hokianga for reburial. These bones came into the possession of the Museum in 1902 when the

Crown ordered that six Wakatupapa (carved burial chests), which had been discovered in a cave, should be taken there for safe keeping.

- D The Crown allowed the exhumation and reburial of the remains of Maori prisoners who were executed in Mt Eden Prison last century. Their bodies had been buried under ignominious circumstances in the ground of the prison.

The Crown should be looking towards establishing agreements with institutions overseas to develop a process whereby repatriation can be facilitated as the opportunity arises. The National Museum is actively engaged in a process of negotiation with museums in Britain and in Europe in an attempt to ensure the return of museological holdings.

A *The Antiquities Act 1975*

This Act controls the export of important items of cultural property from New Zealand. The Act, however, has long been recognised as being in need of reform because it does not adequately protect cultural property in New Zealand nor does it take sufficient account of the principles of the Treaty of Waitangi. The Act fails to adequately describe the cultural property to which it applies and this adds to the difficulty of administering and enforcing the Act. Even though the Act has been around for eighteen years it is still it is not sufficiently well known to the public. A controversial part of the Antiquities Act provides that newly found Maori cultural property is prima facie Crown property.

The Act defines "antiquity" very broadly to include any chattel which relates to New Zealand and is of national, historical, scientific, artistic or literary importance and is more than 60 years old. "Antiquity" is also defined to include inter alia scientific type specimens, extinct native species and Maori artefacts in New Zealand before 1902.

B *The Protection of Movable Cultural Heritage Bill*

The Department of Internal Affairs has been engaged in a review of the Antiquities Act over the last few years and replacement legislation - the Protection of Movable Cultural Heritage Bill is in preparation.

This Bill will include a Cultural Heritage Control list which will list ten categories of objects for which export permission is required. The term "artefact" will be replaced with "taonga tuku iho" which has been passed from generation to generation. "Taonga tuku iho" will be defined as any object created or modified or recognised by Maori which:

- a is of cultural spiritual, historical, aesthetic and heritage significance and value to Maori and
- b (i) has been handed down a descent line of not less than two generations or
- (ii) is not less than fifty years old.

An awareness campaign should be undertaken to inform the public of the type of cultural property that is protected and of the importance of protecting New Zealand's movable cultural heritage for the benefit of all New Zealanders.

The new Bill will acknowledge that the ownership of newly found Maori cultural property is with the appropriate iwi and the iwi will decide the custody of the property found. Iwi will be assisted by an expert Maori group nominated by iwi and they will make up half the members of a Cultural Heritage Council. The Council will consider applications to export objects of significance to Maori and non Maori.

The new Bill will enable New Zealand to accede to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Trade in stolen cultural property is a major issue internationally and the Convention is a mechanism for international cooperation at government to government level in returning illegally exported cultural objects. The need to accede to this Convention was highlighted by the Ortiz case in which New Zealand unsuccessfully sought the return of illegally exported pataka panels through the English Courts. The Convention could have an important role to play in the repatriation of illegally exported manuscripts and archives.

C *The Resource Management Act 1991*

This Act recognises that the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga is a matter of national importance. The Act provides for the making of Heritage orders to protect any place of special significance to the tangata whenua for spiritual, cultural or historical reasons.

D *The Historic Places Act*

This Act provides that an application can be made to the Trust to have a traditional place declared to be a traditional site and, once such a declaration is made, the territorial authority must take into account the desirability of protecting or preserving the traditional site. A traditional site is defined as one that is important by reason of its historical significance of spiritual or emotional association with the Maori people or to any group or section thereof or its preservation.

E *The First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples*

This conference was held in Whakatane and on the marae of the region from 12-18 June 1993. It was hosted by the Mataatua iwi in the Bay of Plenty to coincide with the International Year of the World's Indigenous People. The Conference aimed to provide a forum for an exchange of knowledge and experience of indigenous peoples around the world, and ultimately to assist indigenous peoples to design appropriate mechanisms to safeguard and protect their intellectual and cultural property rights. The Conference was well attended and about eleven indigenous representatives travelled from overseas to attend.

The Conference resulted in the Mataatua Declaration, which contains recommendations to Governments on the protection of the intellectual and cultural property of indigenous peoples. The New Zealand Government will now give the Mataatua Declaration serious consideration.

V INTELLECTUAL PROPERTY PROTECTION IN NEW ZEALAND

The administration of intellectual property legislation in New Zealand is controlled mainly by the Ministry of Commerce. However the Department of Justice administers the Copyright Act 1962 and also monitors developments in the common law relating to passing off and confidential information. The Ministry of Consumer Affairs administers the Fair Trading Act 1986.

The protection given to intellectual property under New Zealand law may be summarised as follows:

A Copyright: The Copyright Act 1962

The Copyright Act 1962 provides that certain categories of works specified in the Act are protected by copyright and may not be copied without the consent of the copyright owner. Traditional forms of creative expression such as music, books, and painting may be protected by copyright, as well as new technologies such as computer programs. Copyright arises automatically when the copyright work is created. Registration of copyright works is not possible.

The owner of the copyright in a particular work has the exclusive right to do or authorise others to do certain acts in relation to that work. These acts are specified in the Copyright Act 1962 and vary according to the particular work in which copyright subsists.

The term of copyright protection is generally the life of the author plus 50 years, however the term can vary according to the particular work and whether the work has been published.

1 Copyright protects the expression of ideas

The traditional concern of copyright law to give protection to the form of expression of ideas, but not to the ideas themselves.³¹

Copyright law traditionally does not protect ideas in themselves. As stated in *University of London Press Ltd v University Tutorial Press Ltd*.³² This view is the

³¹Above n 5, 28.

product of the dichotomy of copyright law to strike a fair balance between the interests of society and those of individuals. In New Zealand law individuals have an interest in retaining exclusive control of the intellectual products of their labours. Society on the other hand has a direct interest in ensuring that the work should enter the broader realm of society and that ideas are free to all to use and work with.

This policy requirement is translated into s 7 of the Copyright Act 1962, which provides that for copyright to exist a work must be "original". This does not mean that the work has to be unique or even particularly meritorious.³³ The word "original" is more concerned with the way in which the work was created, that it originated from the author and was not copied. As stated in *University of London Press Ltd* "the originality which is required relates to the expression of thought."³⁴ The issue is whether Maori designs would qualify for protection under New Zealand law, when such designs would frequently be classified as the copying of ideas rather than the expression of ideas. Many works of Maori design may not satisfy the originality requirement of the Copyright Act for this reason.

The concern is whether and to what extent the freedom for all to use and re-work the idea in their own way would be infringed by the recognition of an exclusive legal right in Maori designs and the ideas behind them. It might be argued that such a right would be totally unjustified interference with freedom of artistic expression. Why should an artist be prevented from using say the tiki or koru (perhaps altered or interpreted in the artist's own way) in his or her own work? After all religious icons such as the cross or the Madonna and child have long been made the subject of interpretation in works of art.

Part of the answer to this objection lies in pointing out the differences of perspective between Maori law and New Zealand law. Sacred Maori designs are not ideas in the same sense as, say Cubism or Surrealism. Rather they are property in its most basic sense, the distinction between real and intellectual property having no significance in Maori customary law. It is thus a property right, not just a mere

³²See *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 602, 608.

³³Above 5, 36.

³⁴Above 32, 609.

idea, which is infringed when a sacred design is employed in an unauthorised way, an infringement as concrete as trespass in New Zealand law.

It should be noted that just as a trespasser is open to have a defence of consent, so too can the user of a design have a defence of consent. This would mean that the artist had the consent of Maori law to use the design in that way.

2 *Copyright protects the individual owner*

In New Zealand copyright law the author of a work is prima facie the owner of the copyright and the author is the person who has created the work. This establishes an individual ownership regime. The extent to which legal recognition should be given to communal, as against individual ownership is a major conflict between Maori law and New Zealand law. The notion of individual ownership is not consistent with tribal customs which emphasise communal ownership. The notion of tribal ownership of confidential ideas is common place in Maori customary law.

Problems in the practical operation of such a concept might arise in cases of conflict between the desires of the artist creating the physical work and the desires of the iwi with ownership of the design. In this situation the answer would presumably be to leave the Maori communities own dispute resolution mechanisms to solve the problem, with precedence being given to the desires of the collective owners if conflict remains unresolved.

A more difficult problem might be identifying the communities or iwi's with ownership under traditional law. One community might own a particular way in which a common design is used, another might own a different aspect of its use. A suggested approach might be to establish a record or register of title in which the characteristic interpretations of various communities of common designs are stored.³⁵

In any case such problems do not justify rejecting the idea of recognising collective ownership of Maori designs in a manner more consistent with Maori customary law

³⁵S Gray "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?" (1992) 66Law Inst J 47.

than the present approach. Such recognition would however require legislation, or alternatively the extension of an equitable remedy.

The extent to which recognition should be given to the Maori community's interest in the design even after publication or selling of the copyright is also an important point. The idea that an iwi should retain a perpetual or inalienable interest in a design is in some ways akin to the European or civil law concept of 'moral rights'. Moral rights stress the author's rights to control³⁶ and be identified with the work regardless of the ownership of the economic rights. In New Zealand the common law or legislative recognition of these rights is limited.

In the Copyright Act 1962 s 9 and s 62 suggest the protection of the moral rights of the author. Express recognition of moral rights would protect the rights of individual Maori artists but it would not protect communal Maori rights in a design where the individual owner was prepared to authorise the proposed use of the design. This approach does not further the view that Maori designs are a proprietary interest, since as stated above moral rights exist independently from economic or proprietary rights. Legislative recognition of moral rights would need to be extensive to provide adequate protection of collective rights. It is suggested that legislative recognition of moral rights which allow for collective ownership would be an effective way to protect Maori design.

The right to depict a design does not mean that the artist may be permitted to reproduce the design. The right to reproduce the design would depend on permission being granted by the iwi owners of the rights of design. Applying copyright principles to the problem, it may be said that the tribal owners of design have an equitable interest in the copyright in such designs insofar as they, and not the legal owner of the copyright per se, have the right to permit or refuse the reproduction of the designs. The courts do recognise that an action for an interlocutory injunction to restrain and infringement of copyright can be brought by an equitable owner of copyright in their name.³⁷ Nevertheless, it is the case that a permanent injunction cannot be granted to an equitable owner without joining the

³⁶Control in this instance means that the author has the right to object to derogatory treatment of the work, or to protect the integrity of the work.

³⁷See *Ward Lock & Company v Long* [1906] 2 Ch 550.

legal owner of the copyright.³⁸ Having regard to the fundamental dichotomy between Maori collective ownership right and interests and the Western model of individual ownership, one possible way of combining these interests together would be for iwi owners to be joined with the copyright owner in copyright infringement proceedings. Again the difficulty of identifying the iwi owners arises and again it is suggested that this can be resolved through Maori conflict resolution mechanisms. It also follows that the licensing or assignment of copyright concerning Maori art should have the equitable owners joint in the proceedings.

B Trade Marks

Trade marks are marks which are used to identify the goods or services of one trader and to distinguish them from the goods or services of another. They may consist of such things as words, logos, names, letters and numerals.

A trade mark will be registrable if it satisfies the criteria for registration specified in the Trade Marks Act 1953. Trade marks are registered in relation to those goods. A trade mark registration may be renewed indefinitely.

There is growing interest in Australia for the adoption of a certification mark to protect original aboriginal art against the damage caused by imitations.³⁹ These imitations can not be prevented under copyright because of the limited term of a copyright or because the imitation is original in its own right. The interest stems from the need of a means of ensuring public awareness of the authenticity of original Aboriginal art, and distinguishing such art from imitations. Canada has recently established trade mark recognition for its indigenous people and their art and creative works.

In New Zealand the Trade Marks Act 1953 provides for registration in the Trade Marks Register. Certification of trade marks is obtained by goods possessing certain characteristics from those which do not and the use of which is permitted by representative organisations, such as trade associations, rather than by individual traders. The distinguishing characteristics may include geographic, origin, quality of material used and mode of manufacture. Registration of a trade mark confers on

³⁸See *Performing Rights Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1.

³⁹C Golvan and A Wollner "Certification Mark to Protect Art" (1991) Aust IP Rev 104.

the proprietor of the registered mark the right to exclusively license the use of the mark in relation to the goods represented by it. In the event of an unauthorised use of the mark the proprietor can seek redress through the Trade Marks Act 1953.

The adoption of a trade mark for indigenous art would protect the integrity of the indigenous art market and discourage imitation. The effectiveness of the mark would depend upon the marketing of the mark and controlling and the use of it. The public must know what special characteristics they are getting when they purchase goods with the mark, and these standards must be monitored and upheld. Public confidence in the mark is essential.

C Plant Variety Rights Act 1987

Any person who develops a new variety of plant (with the exception of algae, bacteria and fungi) may be eligible for the grant of a plant variety right.

The purpose of granting plant variety rights is to encourage plant breeding in New Zealand and to provide an incentive for overseas breeders to release their new improved plant varieties in this country.

Plant varieties may only be granted in respect of varieties which are new, distinct, homogenous, and stable. A plant variety right may be obtained for varieties which are either introduced from abroad or of indigenous New Zealand origin.

The holder of the plant variety right has the exclusive right for sale and to sell reproductive material of the variety and in the case of vegetatively propagated fruit and ornamental varieties, the additional exclusive rights to propagate the protected variety for the commercial production of flowers, fruit or other products of the variety.

A plant variety right remains valid for up to 20 years in the case of non-woody plants, or 23 years in the case of a woody plant.

During the term that a plant variety right is in force, the plant variety right holder may license others to produce for sale and to sell reproductive material of the protected variety, charge a royalty on all sales of reproductive material, and bring civil actions against persons infringing his or her right.

The Plant Varieties Act 1987 does not affect the rights of Maori or any other person to use native flora in traditional ways.

Under the Plant Variety Rights Act the Crown has created exclusive property rights called Plant Variety Rights to exploit and develop native plants. The Crown has sold these Plant Variety Rights to commercial firms, mainly foreign based multinationals. Several varieties of New Zealand's native plants are owned by foreign companies, mainly being French or Japanese firms. These include the Koromiko (used by Maori for medicinal properties) varieties of kumara, and Puawananga (clematis).⁴⁰

In 1992 Moana Jackson in a speech, to the Campaign for Peoples Sovereignty in Otautahi, gave the example of a young Maori who returned to his papakainga in Northland and set up a small factory making scent from Pohutukawa flowers. The aim being to utilise a natural resources and to provide income and jobs for his people. The venture was stopped by a french perfume company who had brought the rights to the particular variety of Pohutukawa that the factory was using. The company demanded that the venture cease or the company would take legal action.⁴¹

There is currently a claim before the Waitangi Tribunal on the issue of ownership of native plants and animals. The claim is specifically concerned with:

"the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use of and transmission of the knowledge of New Zealand indigenous flora and fauna and the genetic resource contained therein."⁴²

The statement of claim is framed to assert the ultimate authority of tino rangatiratanga as reaffirmed by the Treaty of Waitangi text, and thus it seeks a recognition of the sovereign right of Maori to make resource decisions. This is

⁴⁰See "Law of the jungle - and the seeds of Rangatiratanga" *Treaty Times* (AFIA, Otautahi, 1993) Issue 15, 12.

⁴¹Above n 40.

⁴²Waitangi Tribunal Statement of Claim *Flora and Fauna Claim - Wai 262* (Department of Justice, Wellington, 1991).

consistent with the continuing Maori analysis of the Treaty but is contrary to contemporary political and legal views.⁴³ At the moment most Tribunal claims are being framed within the Court and Crown defined 'principles' of the Treaty. The claim for plant variety rights is very important and the consequences of the claim's rejection will impact seriously on Maori economic development.

The claim states that the acts of the Crown in relation to native flora and fauna are a denial of tino rangatiratanga and are contrary to the Treaty of Waitangi. A break down of the formal statement of claim shows that the complaint falls into four categories:⁴⁴

1 *The Right to Development.*

Maori are excluded, under the terms of the Plant Variety Rights Act 1987, from any proprietary interest in indigenous flora for which plant variety rights have been granted. This includes the denial of developing or researching any of these species. The species excluded from Maori control or development include various varieties of kumara, which Japanese interest have effective control of through the Act. Numbers of these kumara species which were sent overseas are now extinct in New Zealand. Also due to a joint intergovernmental research programme between New Zealand and France scores of native plant species of 27 genera (botanic families) are currently the subject of genetic, climatic and plant breeding research in France. This vast number of plants comes under the Plant Variety Rights Act regime.

2 *The Right to Conserve, Preserve and Protect Species.*

The claim asserts that the Crown has replaced the protection and control of species with inadequate Crown polices. Such species as the Kereru (native wood pigeon) and the Tuatara have been and are subject to Crown management and protection strategies which have been determined without consulting Maori. These Crown strategies include the creation of reserves and restricted access areas, as a result Maori have suffered exclusion and alienation to these species.

⁴³Above n 40.

⁴⁴Above n 42, 8.

3 *The Right to the Use and Dispersal of the Species.*

The claimants are objecting to Crown controlled trade, both national and international in native flora and fauna. The koromiko has been sold both within and outside New Zealand, and it is now under commercial evaluation in Europe. The Tuatara and Kereru, and other protected, rare or endangered species are often gifted by the Crown to overseas institutions.

4 *The Right to Cultural/Spiritual Concepts.*

Crown policies towards protected flora and fauna and the problems of access to restricted areas and reserves has lead to a denial of the cultural and spiritual values attached to these species. This denial has lead to the alienation of the Maori people from culturally important flora and fauna.

The outcome of this claim at the Waitangi Tribunal will play major part in future developments of the protection of taonga.

D *Fair Trading Act 1986*

Section 9 of the Fair Trading Act 1986 allows people to sue traders who engage in conduct which is misleading or deceptive, or likely to mislead or deceive. This provision may be used in a number of situations, including where a trader engages in misleading or deceptive conduct (such as misleading advertising) in relation to its own intellectual property, or the intellectual property of others. This may be of benefit to indigenous people with regards to traders falsifying the originality of works, for example if a trader is misrepresenting the way in which the good was made or by whom.

Section 16 of the Fair Trading Act 1986 prohibits the forging of trade marks. This section would provide a remedy if a Maori trade mark was established to authenticate Maori works.

E *Confidential Information (Trade Secrets)*

A great number of people possess confidential information which is very valuable to them and/or to their businesses (including trade secrets). If a person suffers loss

because someone who had confidential information made unauthorised use of that information, the person who suffered loss may be able to bring an action for "breach of confidence". Three elements are required for a successful breach of confidence action firstly the information must have had the necessary quality of confidence about it. Secondly it must have been given to the person who disclosed. Finally there must have been an unauthorised use of that information to the detriment of the party communicating it.

The first Australian case which explicitly granted a right of protection for Aboriginal secrets was *Foster v Mountford*.⁴⁵ In this case an injunction was granted restraining the author and publisher from publishing, in the Northern Territory, a book which contained secrets of significance to the Pitjantjatjara people. It was found that the author had received information 35 years earlier in circumstances importing an obligation of confidence.⁴⁶ The injunction was granted partly on the basis that "monetary damages cannot alleviate any wrong to the plaintiffs that may be established and, perhaps, there can be no greater threat to any than a threat to one's family and social structure."⁴⁷ There is nothing legally novel about the case. The decision relied upon the well established principle in *Fraser v Evans*⁴⁸ by Lord Justice Denning that "no person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so."⁴⁹ It was clear in *Foster v Mountford* that the information was confidential and that the defendant had understood this at the time of communication.

The information had never previously been published.⁵⁰ Therefore the court did not have to consider what the situation would have been had some form of publication of the information, authorised by the plaintiffs, occurred prior to its communication to the defendant. Nor did the court consider whether the right was based on a breach of faith, on contract, or in property. Two early English

⁴⁵See *Foster and Others v Mountford and Rigby Ltd* [1976] 14 ALR 71 (Supreme Court of the Northern Territory).

⁴⁶Above n 45, 72-73.

⁴⁷Above n 45, 75.

⁴⁸See *Fraser v Evans* [1969] 1 All ER, 8.

⁴⁹Above n 48, 11.

⁵⁰Using the definition of "published" in Anglo-Australian law.

cases decided before the passing of the English Copyright Act 1911 appear to give some guidance on this question.

In *Abernathy v Hutchinson*⁵¹ an injunction was granted to restrain a student from publishing details of lectures, delivered orally by a distinguished surgeon to a group of medical students, in a periodical. The Lord Chancellor clearly considered that the case could be viewed either as a question of trust, or a question of property, or finally an implied contract.⁵² The Lord Chancellor questioned whether language and sentiments not put into writing could give rise to a property right, and he decided to give no opinion but states that it is a very important question.⁵³ Although in the end the court decides that a proprietary interest can exist. The question of whether there was an implied contract was rejected by the court because there were insufficient grounds to establish an implied contract between the plaintiff and the defendant. The case is therefore persuasive that a proprietary interest can exist even though the lectures were never committed to writing, and that the proprietary interest was retained even though publication (in a limited sense, with the students recording the lecture) had occurred.

The other English case on this point is *Prince Albert v Strange*.⁵⁴ This case provides further support for the proposition that a proprietary interest exists in original material independent of copyright. In this case an injunction was granted to restrain the defendant from publishing copies of private etchings exchanged between Queen Victoria and Prince Albert. The etchings had never been published and it was considered by the court that the etchings had been obtained improperly. The court clearly based its decision on property rights. The court stated that "the exclusive right of the author in unpublished compositions, which depends entirely on the common law right of property."⁵⁵ It is arguable that the court may have intended to restrict this recognition of a proprietary interest to unpublished works. The court based the property right on the proposition that every author has the right to determine whether or not they will publish, therefore they have the right of first publication. The court found that whoever deprived the

⁵¹See *Abernathy v Hutchinson* (1824) 47 ER 1313.

⁵²See n 38, 1315-1316.

⁵³See n 38, 1317.

⁵⁴See *Prince Albert v Strange* [1849] 47 ER 1302.

⁵⁵See n 41, 1310.

author of the right of first publication was guilty of a wrong against a proprietary right. It is submitted that the two cases of *Prince Albert* and *Abernathy* recognise a proprietary right independent from copyright, and there is evidence that this right can still exist, at least in some circumstances, after publication.

Once the English Copyright Act was enacted in 1911, this right became actionable only in equity. The fact that this right is now in equity means that if it does apply after publication it is not inconsistent with the Copyright legislation (in England or New Zealand). The action has now become known as an action for breach of confidence, this term can be somewhat misleading when considering the history of the action. The elements of this action have become refined in later cases. In the case of *Coco v A N Clark (Engineers) Ltd*⁵⁶ these elements were specified and have received judicial and academic acceptance.⁵⁷ If we consider the three elements set out in *Coco* we can determine whether there is anything in their way which they have been judicially interpreted which is inconsistent with the contention that a breach of confidence action may still apply after publication.

1 The need for the information to be confidential

The fact that the product is in the public domain does not mean that the information ceases to be confidential.⁵⁸ This point has received its greatest recognition in the case of trade secrets. The ability of the public to inspect or even purchase the final product does not mean that the trade secret which was used to manufacture the product should be divulged. This doctrine can be extended to indigenous design. Merely because an object or design has entered the public domain does not mean that the 'trade secrets' or sacred information surrounding the art work lose their quality of confidentiality. Part of this continuing confidentiality can be seen to lie in the restriction placed upon indigenous design owners or trustees, who determine the designs further dissemination. The design continues to retain its confidentiality while the secrets are known to only those indigenous peoples which their law dictates. The secrets are disseminated and therefore enter into the public domain only when under the indigenous law someone who is not

⁵⁶See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

⁵⁷S Gray "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?" (1992) 66 Law Inst J 46.

⁵⁸Above n 57, 50.

authorised to see it or not authorised to have the information. The reason why the practice of indigenous law is important to determine whether there is a breach of confidence is a clear analogy to law dealing with trade secrets. In the case of trade secrets the law relies on the usage and practises of the particular trade.⁵⁹

2 *The obligation of confidence*

It is clear from various cases that the recipient of information need not know that the information is confidential, in order for the circumstance to impart an obligation of confidence.⁶⁰ Thus it would not be necessary for a clothing manufacturer to know that it was breaching Maori customary law in printing shirts with Maori designs on them. All that is necessary is that a "reasonable man" would be satisfied.⁶¹ A third party may also be liable if they receive information and seek to disclose it. Therefore a defendant cannot claim that they had no direct communication with the Maori community, whose customary law is responsible for the design.

3 *An unauthorised use of the information*

This simply means a use of the information which is not authorised under Maori law. A detriment is also necessary to establish, this would be done with reference to the effects on the Maori community concerned.

F *Summation Of New Zealand Intellectual Property Law*

New Zealand intellectual property law has been inadequate in the protection of indigenous intellectual property for a variety of reasons, including the narrowness of the definition of intellectual property and the focus on individual ownership. It is suggested that the main reason for this inadequacy lies in the different concepts of "intellectual property" under New Zealand law and under Maori law. It is argued that a recognition of Maori interests in real property at common law should logically lead to a recognition of Maori proprietary interest in sacred designs, beyond that already accorded by copyright law.

⁵⁹Above n 57, 51.

⁶⁰Above n 56.

⁶¹Above n 56.

The most appropriate basis for recognition of Maori interests in taonga lies in a property right. This is because the concept in New Zealand law of proprietary interest accords more closely than any other legal category with the Maori conception of taonga. It has been suggested that the basis for such a recognition already exists in the equitable action for what is called breach of confidence, although it was submitted that the true basis for this equitable action is proprietary. The action could be extended to cover the Australian copyright cases of *Bulun Bulun*⁶² and *Yumbulu*⁶³, and could also cover other conceivable cases involving the unauthorised use of indigenous knowledge. This action possesses greater scope than any other legal remedy for taking into account the Maori law in making the decision. It gives far greater recognition than any other legal remedy to the legal system in place in New Zealand prior to the coming of English law.

VI CONCLUSION

Intellectual property law has provided an ineffective means of protecting the oral history, artistic works and knowledge of indigenous peoples. By their nature these things evolve collectively and over time, making it difficult to fix their authorship or the moment of creation. Protection of intellectual property normally fixes a short duration on the type of protection afforded. This is never a long enough period to afford effective protection to a culture's heritage.

A greater understanding of the concerns of indigenous peoples on the issue is needed before determining the specific legal remedies which might be appropriate. Particularity important is having due regard to the law of the Maori and other indigenous peoples who successfully protected their taonga own, cultural and intellectual property for hundreds and thousands of years. Before a new legal framework is devised indigenous people must be consulted as to what particular property they want to protect and what mechanisms are to be developed for the purpose.

⁶²See *Johnny Bulun Bulun v Nejlam Pty Ltd* [1989] EIPR 346.

⁶³See *Yumbulu v Aboriginal Artists Agency Ltd and Another* [1991] 21 IPR 481.

BIBLIOGRAPHY

- E ARMITAGE The Changing Face of Intellectual Property (1987) 9Eur Intell Prop Rev 191.
- D BAINBRIDGE Intellectual Property (1992) Pitman Press London.
- C BROWN Protecting Plant Varieties: Development In New Zealand (1988) 18 Vic U Well L Rev 83.
- G BROWN The Law Of Intellectual Property In New Zealand (1989) Butterworths Wellington.
- C GOLVAN Aboriginal Art and Copyright: The case for Johnny Bulun Bulun (1989) 11 Eur Intell Prop Rev 346.
- C GOLVAN Issues in the Licensing and Assignment of Literary Rights In Australia (1988) 62 Aust L J 363.
- C GOLVAN Aboriginal Art and the Protection of Indigenous Cultural Rights (1992) Aboriginal Law Bulletin Vol 2 No 56.
- A GRAY Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples (1991) IWGIA Doc 70.
- S GRAY Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands? (1992) 66 Law Inst J 46
- V JOHNSON A Whiter Shade of Paleolithic: Aboriginal Art and Appropriation (1988) Aboriginal Law Bulletin No 34.
- S AGA KAHN and H TALAL Indigenous Peoples: A Global Quest for Justice (1987) Zed Books London.
- K MADDOCK Copyright and Traditional Designs - An Aboriginal Dilemma (1988) Aboriginal Law Bulletin Vol 2 No 34.

W MARIKA Copyright in Aboriginal Art (1976) Aboriginal News DAA Feb.

D POSEY indigenous Knowledge and Development: An Ideological Bridge to the Future (1983) Ciencia e Cultura 35 (7).

K PURI Copyright Protection of Folklore: A New Zealand Perspective (1988) Copyright Bulletin 22 (3).

K PURI "*Copyright Protection For Australian Aborigines in the Light of Mabo*" Mabo: A Judicial Revolution (eds MA Stephenson and S Ratnapala University of Queensland Press 1993).

MC SUCHMAN Invention and Ritual: Notes on the interrelation of Magic and Intellectual Property in Preliterate Societies (1989) 89 Colim L Rev 1264.

		VICTORIA UNIVERSITY OF WELLINGTON	
A Fine According to Library Regulations is charged on Overdue Books.		LIBRARY	
LAW LIBRARY		WI	893922
WSS 601388	PLEASE RETURN BY	- 6 JAN 1997	
PLEASE RETURN BY	TO W.U. INTERLOANS		
31 MAR 1995	TO W.U. INTERLOANS		
TO W.U. INTERLOANS	TO W.U. INTERLOANS		

		VICTORIA UNIVERSITY OF WELLINGTON	
A Fine According to Library Regulations is charged on Overdue Books.		LIBRARY	
DU 1364987			
5 DEC 2003		RETURN BY	
Please return to			
TO WATERLOO INTERLOANS			

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00410424 4

r
Folder
Go

Goodlet, D. M
The protection
of indigenous
people's
intellectual
property

