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**INTELLECTUAL PROPERTY PROTECTION FOR
TRADITIONAL MAORI WORKS**

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*Te Whare Wananga
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ABSTRACT

The purpose of this paper is to determine whether there is a need for additional legal protection for traditional Maori works and if so, what that protection should do. The paper examines the features of Maori culture that distinguish it from Western culture then considers current legal protection in the context of these distinguishing features for evidence that the protection is inadequate or inappropriate. It argues that current legal protection is inadequate. The paper then identifies the possible objectives of legal protection and analyses a range of models to determine how they meet these objectives. The models also provide the basis for a discussion of a range of issues that need to be considered when designing legal protection. The paper focuses particularly on the merits and problems of extending existing protection mechanisms or enacting sui generis legislation. It argues that copyright should not be extended to meet the objectives identified because those objectives are inconsistent with the objectives of copyright and that sui generis protection is feasible. The paper also considers the effects of dual protection under copyright and sui generis legislation and suggests a number of ways of resolving the inherent conflicts. In conclusion it identifies the features that will enable sui generis legislation to meet the identified objectives in a workable way.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 1300 words.

I INTRODUCTION

In 1984, Te Maori, an exhibition of Maori artifacts, opened at the Metropolitan Museum of Art in New York City. The exhibition toured Saint Louis, Chicago and San Francisco before coming home to New Zealand. It introduced Maori art to the mainstream art world. The outstanding reception it was given at each stage of the tour showed New Zealanders, for some perhaps for the first time, how valuable and valued Maori artifacts are. For Maori attending the exhibition, this was not just a display of history, these works were their tipuna or ancestors. They carried out dawn ceremonies to placate the ancestors and clear the area of harmful effects,¹ placed fresh leaves at their ancestors feet, and spoke openly to them.²

In Johannesburg, two years later, the pop musician Paul Simon recorded an album that synthesised Western and traditional South African music. "Graceland"³ sold over six million copies.⁴ The album spawned an international market for ethnic sounds.

In Australia, in 1995, a group of Aboriginal artists brought an action for infringement of copyright to prevent the unauthorised reproduction of their artworks.⁵ Their concern was not the economic loss the infringement would cause. Instead they were concerned about the shame and loss of tribal rights they would suffer because sacred designs had been used on carpet, which people would walk over. This event illustrates the downside of the relatively new market for "ethnic" material, especially ethnic music, art and designs. For the communities that created and maintain this material, the market represents an opportunity to improve the wealth of the community without abandoning traditional ways. At the same time, the market is likely to increase unauthorised uses that are culturally offensive or simply a rip-off.

Not surprisingly, events like those described have turned intellectual property rights for indigenous people into an important legal issue. In many quarters, commentators are suggesting that legal protection for traditional knowledge, and its manifestations, is desperately needed. In New Zealand, however, little work has been done to analyse the necessity for legal protection and what that protection should do.

¹ S M Mead "Te Maori: A Journey of Rediscovery for the Maori People" *Magnificent Te Maori: Te Maori Whakahirahira* (Heinemann, Auckland, 1986) 73, 75.

² S M Mead *Landmarks, Bridges and Visions: Aspects of Maori Culture* (Victoria University Press, Wellington, 1997) 184.

³ Warner Bros Records, 1986.

⁴ D Fricke "Paul Simon's Amazing Graceland Tour" *Rolling Stone*, New York, 2 July 1987.

⁵ *Milpururru & Ors v Indofurn Pty Ltd & Ors* (1995) AIPC 39.051

This paper is concerned with the protection of traditional forms of creative expressions including taonga whakairo or art; music and waiata or song; whakapapa or genealogy; whaikorero or the art of oration; ritual performances like the haka; ta moko or tattooing; weaving; and designs, motifs and symbols generally. It will examine the features of Maori culture that distinguish it from Western culture and consider current legal protection in the context of these distinguishing features for evidence that the protection is inadequate or inappropriate. It will identify the possible objectives of legal protection and analyse a range of models to determine how they meet these objectives. The paper will focus particularly on the merits and problems of extending existing protection mechanisms or enacting sui generis legislation.

II DEFINITIONAL ISSUES

Maoritanga, or Maori culture has a rich tradition of creative expressions. These include tangible products such as architecture, weaving, and carving; performances such as the haka; songs and music; and an extraordinary body of "oral literature". In Western culture, these forms of creative expression are protected primarily by copyright. Maoritanga does not recognise a concept equivalent to copyright. Nor does it employ the same classifications of property and knowledge as Western Culture. In Maori, creative expressions are collectively called taonga. Taonga, which translates approximately to "highly prized possessions" also includes other kinds of possessions, ranging from rivers to fishing rights to customs. Sometimes, the word is simply translated as possessions, giving it an even broader meaning. This raises a question about the validity of treating creative expressions separately from other taonga. To be effective, however, protection will need to address the different qualities and uses taonga have and the compatibility of the objectives and implementation of protection with other legislation, especially intellectual property law.

In the absence of a suitable Maori term, an English term must be found. WIPO⁶ and Unesco⁷ have adopted the terms "folklore and crafts" and "expressions of folklore" and given them specific definitions. "Folklore and crafts" includes various forms of oral literature, music, dance, artistic motifs and designs, crafts such as basketry, beading, quillwork, carving, weaving and painting.⁸ "Expressions of folklore" means

⁶ World Intellectual Property Organisation.

⁷ United Nations Economic and Social Council.

⁸ *Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General* (Unesco, E/CN.4/Sub.2/1992/30 6 July 1992) 2.

"productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community; in particular, verbal, musical and tangible expressions and expressions by action".⁹ Because these terms have international legal recognition and coincide with the subject of this paper, either appears to be an appropriate term to use.

Unfortunately, the term folklore has connotations of quaintness, rusticity and primitiveness, and it even implies low value. Similarly, common usage has given craft a lower status than art. These connotations belie the significance, contemporary relevance, and artistry of many antique and modern expressions of Maori culture.

Some commentators have used the term "cultural and intellectual property". Cultural property usually refers to the physical evidence of a culture's development, for example, works of art, artifacts, and archaeological sites.¹⁰ These things are not protected by intellectual property law. Instead they are commonly protected by heritage preservation laws designed to prevent their destruction, exportation, or defacement. Intellectual property creates and protects property rights in an original or novel expression of knowledge. The form of this expression may range from a method of manufacturing, to an artistic or literary work, or a trade mark. In this respect the term intellectual property is too broad for the scope of this paper. To speak of cultural and intellectual property also obscures the issue that Western law may not recognise intellectual property rights in some expressions of Maoritanga. This preempts the inquiry that needs to be undertaken.

Ordinary English, typically classifies expressions in the form of dance, art, music and literature as the fine arts. Calling Maori expressions "works of fine art" would place them on the same footing as similar Western expressions, without preempting the legal and cultural issues that need to be considered in determining what protection, if any, is appropriate. But once again, the term (and any similar terms)¹¹ is not ideal because it does not have any meaning in international law. Nor does it recognise that Maori dances, musical and oral compositions, and decorated objects have a variety of

⁹ *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (WIPO/Unesco, 1985)

¹⁰ *Intellectual Property Law Reform Bill: Maori Consultation Paper* (Ministry of Commerce, Wellington, 1994) 5.

¹¹ See for example *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander People* (Attorney General's Legal Practice, Canberra, 1994), which uses the term "arts and cultural expression".

purposes. As well as entertaining or beautifying, these expressions may record history, scientific knowledge, traditions, or laws; increase the mana of their owners or performers; and even embody the spirits of ancestors.¹² The incompleteness of the term may mislead people into viewing these expressions purely as aesthetic commodities, which would diminish their significance and possibly result in protection that fails to take into account the meaning and value they have for Maori. Christine Morris describes the issue in these terms:

[W]hen these cultural productions [that function as encoded law bearers] are reduced to the level of merely 'artistic' in the mainstream Australian psyche, they are understood to be only productions by the 'talented' for the consumption of the 'wealthy'. Such an understanding, by its very nature, reduces the authority of these productions, and thus the traditional laws associated with them.¹³

In this paper, the term "traditional Maori works" is used to identify artistic works, designs, songs, performances, and oral literature that are based on Maori tradition. The term "work" is chosen because it is used in the copyright law to cover a range of expressions including the forms of expression discussed here. As this paper will illustrate, in some cases the Copyright Act will not protect traditional Maori works, but this definition is intended to cover all works whether or not they are copyright. The term lacks recognition in international law and may need further refinement but it does at least avoid patronising connotations.

It is not envisaged that the definition given here for traditional Maori works would be adequate for use in legislation. In the case of a legal definition, the dilemma is how to determine whether something is a traditional Maori work. Consider a contemporary original painting by a Maori artist that is executed in a European art style and medium but has strong thematic and visual links with Maori culture. It does not belong exclusively to either tradition so arguably it should not be regarded as a traditional Maori work.

The line between traditional Maori works and other works could be drawn in different places. Tangible works could be required to use pre-European symbols or variations of them in the production of pre-European objects. The definition could be even

¹² This limitation is also true for Western works of fine art, which may serve the same range of purposes as Maori expressions.

¹³ C Morris "Indigenous Intellectual Property Rights: the Responsibilities of Maintaining the Oldest Continuous Culture in the World" (1997) 4 Indigenous Law Bull 9.

narrower by requiring the use of pre-European materials and techniques. Traditional performances may be identified by forms that are unique to Maoritanga. Songs and oral works may have to be created in Maori. In reality, this definition cannot anticipate the evolution of Maori culture. For example, when it was created the post-European Maori "folk art" created in the nineteenth century would not have been recognised as traditionally Maori. "Folk artists" used Western Christian and classical motifs alongside traditional motifs and adopted a distinctly Western folk style.¹⁴ Yet with hindsight, it is easy to say that this folk art is a traditional Maori work.

III THE NATURE OF TRADITIONAL MAORI WORKS

In order to assess the effectiveness of current law and the appropriateness of extending protection, it is important to understand the way Maori view traditional Maori works and the ways that their relationship with these works is not recognised by Western law.¹⁵

A *Sacredness of Knowledge and the Products of Knowledge*

According to a Maori legend, the god Rehua gave three putea wananga, or baskets of wisdom to Taneuiarangi, who then disseminated the contents amongst the Maori people. The three putea contained different kinds of knowledge: ritual knowledge, which was used for the creation of goodness and peace; occult knowledge, which could be used for evil and trouble-making; and secular knowledge, which is all the knowledge about the world, including the arts of carving, weaving, building, and entertainment.¹⁶

Other legends record that the arts and artistic inspiration came from particular gods or supernatural beings. According to one account, carving came from Tangaroa, the god of the sea, in another from te Hakuturi, a tribe of forest dwelling fairies.¹⁷ Weaving came from Hine te Iwaiawa, the goddess of the moon. Mataora brought ta moko, or tattooing, back from Rorohenga, the spirit-world. He also brought back a

¹⁴ See A Taylor *Maori Folk Art* (Century Hutchinson, Auckland, 1988).

¹⁵ The author is not an expert in Tikanga Maori and Maoritanga. Since little research has been published in this area, the descriptions in this section are drawn from a variety of sources and pieced together. As a result, the conclusions may be overly generalised or even inaccurate.

¹⁶ C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1991) 156-59; J Patterson, *Exploring Maori Values* (The Dunmore Press, Palmerston North, 1992) 163.

¹⁷ S M Mead "Ka Tupu Te Toi Whakairo ki Aotearoa: Becoming Maori Art" in S M Mead (ed) *Te Maori: Maori Art from the New Zealand Collections* (Heinemann, Auckland, 1984) 42-46.

cloak, called Te Rangi-haupapa, and a belt, called Te Ruruku-o-te-rangi. These items provided the pattern for traditional Maori garments.¹⁸

These accounts show that Maori traditionally believe that knowledge, and the products of knowledge have divine origins. Knowledge also has its own mauri or life force. Because of the divine origins and mauri of knowledge, the learning and use of it are tapu activities.¹⁹ Tapu is sometimes translated as sacredness, although the full meaning of the term is more complex. Something that is tapu is subject to restrictions on its use.²⁰ These restrictions ensure that any use respects the qualities that give rise to tapu.²¹ The creation of art is particularly tapu because art is understood to be the way that the gods speak to Maori.²²

Tapu dictates the rituals and rules that are traditionally observed during the creative process. For example, a high quality garment should not be woven in the open air or after sunset. A weft thread should not be left incomplete. Strangers should not be allowed to see the weaving process.²³ Rituals are observed at the beginning and end of the process to keep alive the relationship between ancestors, gods, and living people.²⁴

The materials used to create products also have spiritual qualities. They have their own mauri or life force²⁵ and they are also descended from the gods. For example, the timber used for carving and the harakeke (New Zealand flax) used for weaving, are descendants of Tane-mahuta, the god of the forest. Since the Maori people are descendants of Tane-mahuta too, the plants and trees are their kin. Their right to use these resources, despite the respect that kinship demands, is traced to an account of a battle between Tane-mahuta and his brother Tu-mata-uenga. Tu-mata-uenga won the battle and, since he was an ancestor of humans but not of plant life, his victory gave Maori authority to use the resources of the forest. Their common ancestry requires Maori to use these resources with respect and to create something that honours the ancestors.²⁶ This explains why such everyday objects as baskets and

¹⁸ E Best *The Maori as He Was* (A R Shearer, Government Printer, Wellington, 1924) 206.

¹⁹ Text at n 18, 208-09.

²⁰ J Patterson *Exploring Maori Values* (The Dunmore Press, Palmerston North, 1992) 164.

²¹ Ranginui Walker explains that there are three kinds of tapu: sacred, prohibited and unclean. See R Walker *Nga Tau Tohetohe: Years of Anger* (Penguin Books, Auckland, 1987) 136-7.

²² *Taonga Maori* (Australian Museum, Sydney, 1989) 45.

²³ See text at n 18, 222.

²⁴ See text at n 20, 21.

²⁵ See text at n 20, 18.

²⁶ See text at n 20, 18-19.

combs combine functionality with beauty; and why every object that Westerners recognise as art also has other functions.

The products of creative effort may also be tapu. If so, their tapu will be directly related to their mana. Like tapu, mana has nuances of meaning that make it difficult to translate. Mana is often loosely translated as prestige but, in some contexts, it refers to a metaphysical quality akin to sacred power.²⁷ The extent of mana and tapu varies from one thing to another. Sidney Mead says that something may derive its mana from the mana of its maker, or the status of its owners, past or present; its inherent qualities - its ihi, wehi and wana (power, awesomeness and authority); its size and the quality of the materials it is made of; or an association with death.²⁸ An object may also have mana because it represents an ancestor or the designs on it symbolise spiritual values and beliefs.²⁹

From a metaphysical viewpoint, tapu ensures that the relationship between the supernatural and the ordinary world is maintained. Any failure to respect tapu is believed to bring punishment from the gods.³⁰ Tapu plays a fundamental part in ensuring the preservation of tikanga Maori (customs) and taonga. But because tapu is metaphysical, it is not effective in preventing the culturally inappropriate use of resources by people who do not believe in it.

B The Relationship Between Maori and Things

Maori and Western people view their relationship with their resources in very different ways. As the story of Tane-mahuta and Tu-mata-uenga illustrates, Maori define their relationship with things on the basis of kinship ties. Because of these ties, Maori do not see themselves as having absolute dominion over their resources. Instead they are part of a two way relationship with a living entity. Any use must respect this relationship and protect the resource. This ensures that the resource will reciprocate by supporting Maori.

Maori culture generally values old things more highly than new things. This is because the older something is the closer it is to the ancestors whom Maori derive

²⁷ See text at n 16, 60-62.

²⁸ See text at n 1, 185-87.

²⁹ For example, a traditional spiral pattern symbolises the way Maori make decisions by consensus. See E Puketapu-Hetet *Maori Weaving* (Pitman, Auckland, 1989), caption to plate 12.

³⁰ See text at n 20, 86.

their identity from.³¹ This does not mean that Maori culture resists innovation. There are many examples to show the speed with which they have adopted new technologies and imported aspects of Pakeha knowledge.

Kinship, ascertained through whakapapa, also determines who can have a relationship with a specific resource.³² The social groupings recognised by Maori culture are whanau (extended family), hapu (sub tribe), and iwi (tribe). Certain branches of knowledge and ritual are family and tribal property and will not be passed to outsiders.³³ In fact, most resources are traditionally held in a form of communal ownership.³⁴ Personal possessions were traditionally limited to ornaments, clothing, weapons and other articles for personal daily use.³⁵ A group's relationship with resources is inter-generational. The rights of one generation are subject to the duty to protect the resources for the next generation. This duty is called kaitiakitanga. Membership on its own does not automatically create a right to use resources. Access is determined by tikanga or custom. Tikanga dictates for example that only men could participate in carving and carvers were usually chosen on the basis of their social rank and aptitude.³⁶

The relationship between Maori and resources is also based on spiritual beliefs. As discussed above, the tapu, mana and mauri of resources means that Maori must use them in a respectful way and according to established protocols. Traditional Maori works are not usually produced for economic purposes. Their traditional function is to enhance the mana of their owners.³⁷ The creators of artistic works were traditionally supported by their communities³⁸ and many Maori still consider it improper for serious artists to accept payment for their work.³⁹ Tangible traditional Maori works were given as gifts. However, the Maori concept of giving differs from the Western concept. Westerners regard gifts as unconditional but for Maori a gift brings an obligation of reciprocity or utu. The primary purpose of utu is to restore mana.⁴⁰ According to one

³¹ See text at n 1, 184.

³² *Maori and Trade Marks: a Discussion Paper* (Ministry of Commerce, Wellington, 1997) 16.

³³ B Kernot "Nga Tohunga Whakairo o Mua: Maori Artists of Time Before" in S M Mead (ed) *Te Maori: Maori Art from New Zealand Collections* (Heinemann, Auckland, 1984) 143.

³⁴ R Pere Ako: *Concepts and Learning in the Maori Tradition - Working Paper No. 17* (Department of Sociology, University of Waikato, Hamilton, 1982) 20, quoted in Patterson, see text at n 20, 96. Also see text at n 20, 31.

³⁵ T Barrow *An Illustrated Guide to Maori Art* (Reed Books, Auckland, 1984). 17.

³⁶ See text at n 35, 17.

³⁷ See text at n 35, 17.

³⁸ See text at n 29, 8.

³⁹ See text at n 20, 94.

⁴⁰ See text at n 20, 118.

Maori proverb, taonga may have the power to destroy those who receive them as gifts if there is a breach of reciprocity.⁴¹ Reciprocity also appears to require anyone who sells or trades a taonga to give the profit back to the original owner.⁴²

Knowledge appears not to be a tradeable commodity either. In order to preserve the mauri and tapu of knowledge, access to it often was, and still is, highly restricted. Some accounts say that candidates for learning in the whare wananga or traditional school were carefully selected by their elders⁴³ and Tohunga, or priests, would not disclose all of their knowledge to outsiders.⁴⁴ According to Maori custom, if the wrong person obtained treasured knowledge his or her mauri could be weakened, as could the tapu and mauri of the knowledge.⁴⁵

Westerners relate to resources through the concepts of property and ownership. The relationship between people and resources that property rights reflect is individualistic, dominating and essentially economic. In the strictest sense, Western law defines property as a bundle of rights guaranteed and protected by the State.⁴⁶ These rights include the right to possess, use, transfer, change, and even destroy a resource. The person who can claim legal ownership of a resource is entitled to hold the full bundle of rights to the exclusion of everyone else. Generally, the owner of property rights in a resource does not need to consider the interest others may have in that resource unless that interest is legal.⁴⁷ This approach is different from the Maori custom of holding resources collectively as guardians for future generations. Western property rights are also based on the notion that humans have absolute dominion over the world's resources, which is different from the relative dominion Maori have over nature as ancestors of Tu-mata-uenga.

Western culture commodifies knowledge in a way unknown to Maori custom. For example, intellectual property law creates and protects economic rights in expressions of knowledge or ideas. This means traditional Maori knowledge and expressions of culture can be reduced to a tangible form and used or traded without knowledge of or

⁴¹ M Mauss *The Gift* (Cohen & West Limited, London, 1970) 8-11.

⁴² See text at n 41.

⁴³ See for example E Stirling and A Salmond *Eruera: the Teaching of a Maori Elder* (Oxford University Press, Auckland, 1985) 88.

⁴⁴ See text at n 33.

⁴⁵ M King "Some Maori Attitudes to Documents" 1978 and J Rangihau "Being Maori" 1977, quoted in Patterson, see text at n 20, 31.

⁴⁶ F Cohen "Dialogue on Private Property" (1954) 9 Rutgers LR 357, 374.

⁴⁷ H C Black *Black's Law Dictionary* (6 ed, West Publishing Co, St Paul, Minnesota, 1990) 1216.

respect for its cultural significance and the protocols traditionally attached to it. Western culture also values innovation far more than Maori culture does, especially in the field of intellectual property.

IV PROTECTION UNDER CURRENT LAW

Copyright is the primary source of protection for the fine arts. In New Zealand, the sources of copyright are the Copyright Act 1994 and the Designs Act 1953. In addition to copyright, there are three common law remedies that may give some protection to traditional Maori works. The common law remedies are breach of confidence, passing off, and blasphemy. The Antiquities Act 1975 and related Bills also give some protection to tangible traditional Maori works. This part of the paper will analyse the effectiveness and appropriateness of these sources of protection and also the protection available under international law.

A *The Copyright Act 1994*

The Copyright Act confers economic and moral rights on the owner of copyright in a work. The Act automatically grants copyright in a work that falls within the categories defined in the Act, provided it meets specific criteria. These categories include literary, dramatic, musical and artistic works.⁴⁸

1 *Exclusion of traditional Maori works*

While traditional Maori works appear to fall within these categories, some of the criteria may exclude them. These criteria are discussed below:

a) *Works must be recorded*

Copyright does not exist in a literary, dramatic or musical work unless and until the work is recorded.⁴⁹ Maori culture is an oral culture. The absence of a traditional written language, musical notation, and choreographic notation means that dances, songs, and speeches may not be recorded. Unless some kind of recording is made, these works have no protection.

Although the recording requirement is relatively easy to satisfy, there may be additional harms in forcing Maori to change their culture from an oral base to a written base. The oral tradition is a fundamental aspect of Maoritanga. It has

⁴⁸ Section 14(1).

⁴⁹ Section 15.

produced great orators with prodigious memories and been a reliable way to protect knowledge from passing in to the wrong hands. These benefits may be lost if knowledge is routinely reduced to written form.

b) *Originality*

Copyright exists only in original works.⁵⁰ Originality is concerned with whether a work originated from the author, rather than whether it is novel. The test for originality is easily satisfied - a work may be original if the author exercised sufficient skill, judgment and labour in creating it.⁵¹ But copyright does not exist in a work that is a copy of another work, nor does copyright exist in a work to the extent that it infringes the copyright in another work.⁵² The originality requirement may exclude a contemporary work that replicates or copies substantial parts of another traditional Maori work. However, this kind of repetition is an essential feature of traditional Maori works.

Even if these criteria were satisfied, the Copyright Act still would not provide a satisfactory level of protection for traditional Maori works for the reasons discussed below.

2 *Ownership*

Copyright can only be owned by an individual person or a body corporate.⁵³ The Copyright Act allows for joint authorship where the work is produced by collaborators,⁵⁴ but there is no provision for collective ownership based on other relationships. This means that the collective ownership of iwi, hapu or whanau according to Maori custom is not recognised.

3 *Recordings*

Copyright may exist separately in a recording of an item, whether or not the recorded item is copyright.⁵⁵ A recording may be made by sound, video, photograph or other reproductive medium. The copyright in a recording will belong to the person who

⁵⁰ Section 14(1).

⁵¹ R McArtney (ed) *Intellectual Property in New Zealand: Copyright and Design* (Butterworths, Wellington, 1997) C204.

⁵² Section 14(2).

⁵³ Section 18(1).

⁵⁴ Section 18(4).

⁵⁵ Section 15(3) leaves open the possibility that there may be a separate copyright in the recording of a copyright work.

made it or commissioned it. If copyright does exist in the recorded item, the owner of that copyright may be able to prevent the publication of the recording.⁵⁶ If there is no copyright in the recorded item, and the item is a performance, the performers could rely on the performers' rights set out in Part IX of the Copyright Act. In particular, where a recording is made of a performance other than for private use, the recorder must obtain the consent of the performers, whether or not the performance is copyright.⁵⁷ However, performance rights will not protect other forms of traditional Maori works that are not copyright works, especially where these works are held in museums and other public or private collections or are otherwise accessible to the public.

4 *Exclusive rights*

A copyright owner has the exclusive right to reproduce the work; to perform it in public; and to make an adaptation of it.⁵⁸ A copyright owner also has the exclusive right to authorise any other person to do these acts;⁵⁹ to grant any other person a license to deal with a copyright work;⁶⁰ or to transfer the copyright outright to another person.⁶¹ To give such broad exclusive rights to an individual may not be consistent with *kaitiakitanga*, the customary duty of guardianship.

An Australian case, *Yumbulul v Reserve Bank of Australia*,⁶² illustrates the risk of licensing. Yumbulul was an Aboriginal artist who had a right under Aboriginal customary law to make "morning star poles". According to Aboriginal custom, these poles have the power to take the spirits of the dead to the morning star, which will return them to their ancestral home. Despite its spiritual significance, a morning star pole can often be displayed in public or even sold as a craft because its symbolism is a carefully kept secret. Aboriginals view this exposure as an opportunity to encourage wider respect and understanding for their culture. However, they are less enthusiastic about mass reproduction, believing it can take the ability and right to produce and supervise the production of cultural material out of their hands. While Yumbulul had the right to reproduce the morning star pole, he also had an obligation to respect his clan's views on reproduction.

⁵⁶ Section 16(1)(b).

⁵⁷ Section 171.

⁵⁸ Section 16(1).

⁵⁹ Section 16(1)(i).

⁶⁰ Section 111.

⁶¹ Section 113.

⁶² (1991) 2 IPR 481.

Yumbulul licensed the copyright in a morning star pole to the Aboriginal Artists Agency Limited. That company gave a sub-license to the Reserve Bank, which reproduced the painting on an Australian ten dollar bill. His community was critical but could do nothing to stop the reproduction. Yumbulul tried unsuccessfully to argue that he had been misled into entering into the licensing agreement. The case shows the lack of legal power traditional communal owners have to prevent a member of their community from allowing uses that are culturally unacceptable. It also shows that through sub-licensing a creator may lose control over the uses a work is put to. In this respect, the case illustrates the naivety of the plaintiff and also warns that many creators may have misconceptions about copyright law.

5 *Copyright duration*

Generally, copyright endures for the life of the author plus fifty years.⁶³ After the copyright period expires a work passes into the public domain. If a work is recorded and there is copyright in the recording, the duration of copyright in the recording is fifty years from the day the recording was first shown to the public in an authorised screening.⁶⁴ These provision conflicts with the customary duty of guardianship because many older works, which are more valuable in Maori eyes, are unprotected and new works will only have protection for a limited period.

6 *Relief*

Where a person has infringed a copyright, the court may award damages, an injunction, or an account of profits.⁶⁵ The court may also make an order for delivery up of the infringing object,⁶⁶ or an order for disposal of the infringing object.⁶⁷ These remedies are appropriate for infringements in respect of traditional Maori works but the method of assessing damages is not. When assessing damages, the courts normally focus on the economic loss likely to flow from the impaired commercial potential of the copyright.⁶⁸ However, economic loss is not always the primary concern of indigenous people. For Maori, the economic loss may be considerably less than the perceived damage to the mana of the copied work, or even irrelevant.

⁶³ Section 22(1).

⁶⁴ Section 23.

⁶⁵ Section 120.

⁶⁶ Section 122.

⁶⁷ Section 134.

⁶⁸ See text at n 51 C883-6.

A recent Australian case, *Milpurruru*,⁶⁹ extended the kinds of harm that the court can consider. The plaintiffs in *Milpurruru* were aboriginal artists whose work had been copied, without authorisation, onto carpets. The court found that the plaintiffs' works, although based on traditional forms, were original so that copyright existed in them.

Although there was little economic damage, since the plaintiffs were unlikely to want to use their artwork in the carpet market, the court noted that damages may include compensation for personal suffering. Personal suffering may take the form of insulting behaviour⁷⁰ and humiliation⁷¹. The court said that this allowed it to take into account the distress experienced by the artists, the risk they faced of being held in contempt by their communities; and the possibility of their communities seeking retribution against them according to aboriginal law.⁷² The anger and distress suffered by those around the copyright owners was also relevant. Departing from the norm, the court awarded an aggregate amount to the plaintiffs as a group, rather than awarding damages individually. This was done at the plaintiffs' request so that they could divide the damages in a way that was culturally appropriate.⁷³ In reality, the court was forced to extend damages well beyond their usual scope because of the absence of alternative remedies.

While *Milpurruru* offers some hope to indigenous communities, it must be noted that the plaintiffs were able to satisfy the originality requirement of copyright. The court did not have to consider the position of the plaintiffs whose work replicated traditional designs to such an extent that they could not be original. Also, the court made the order for damages under a provision for additional damages for flagrant infringement.⁷⁴ This provision is the equivalent of s121 of the New Zealand Copyright Act. However, flagrancy ordinarily requires something more than intentional infringement so this extra requirement may not always be made out.⁷⁵

7 Moral rights

Once an author transfers the copyright in a work to another party, the only control the author continues to have over the work comes from moral rights provisions. These

⁶⁹ Text at n 5.

⁷⁰ *Beloff v Pressdrum Ltd & Anor* [1973] 1 All ER 241, 268.

⁷¹ *Nichols Advanced Vehicle Systems Inc & Ors v Rees and Ors* [1979] RPC 127, 140.

⁷² Text at n Milpurruru, 39 080-83.

⁷³ Text at n 5, 39 077, 39 083.

⁷⁴ Section 115(4) of the Australian Copyright Act 1968.

⁷⁵ See D Miller "Collective Ownership of the Copyright in Spiritually-Sensitive Works: *Milpurruru v Indofurn Pty Ltd*" (1996) 6 AIPJ 185.

provisions are a new feature of the Copyright Act. There are two moral rights: the right to be identified as the author of a work⁷⁶ and right to object to derogatory treatment of the work.⁷⁷ They apply only to literary, dramatic, musical or artistic works.⁷⁸ In principle, moral rights are an appropriate form of protection for indigenous intellectual property because they recognise the value of protecting the integrity of the work and of acknowledging its source. In practice, the rights can only exist in a copyright work and, as it has been pointed out, copyright may not exist in traditional Maori works.

Even if a work is copyright, the moral rights provisions still fall short of providing suitable protection from culturally offensive acts. The Copyright Act provides that a treatment of a work will be derogatory if it amounts to a distortion or mutilation of the work; or if it is prejudicial to the author's honour or reputation.⁷⁹ It is not clear whether this provision could prevent culturally offensive uses. This depends on the scope of "honour and reputation". It could be limited to reputation as an author or it could encompass honour and reputation as a member of an ethnic group. Nor is it clear whether the treatment should be assessed on an objective or subjective basis. If it is objective, is the standard for assessing the treatment that of a reasonable Pakeha or a reasonable Maori? How this assessment is made will have a significant effect on the outcome.

The statutory definition of "treatment" also limits the scope of the right. A treatment must be an addition to, deletion from, alteration to, or adaptation of a work. This definition excludes situations where a work is included with offensive material or in an offensive context; for example, it may be offensive to reproduce a highly tapu carving on a teatowel or postcard. The definition also excludes situations where a work is performed in a derogatory way while remaining faithful to the text. It also excludes deliberate destruction of a work. Although destruction is generally prohibited by tort and criminal law, an author has no protection if a work is destroyed by its owner. It is also possible that, in special circumstances, simply recording a traditional Maori work or showing a recording of it may be culturally offensive but recording does not fall within the definition of treatment, either.

⁷⁶ Section 94.

⁷⁷ Section 98.

⁷⁸ Section 94(1)(a).

⁷⁹ Section 98(1)(b).

The moral rights provisions give rise to two other concerns. Firstly, an author can waive his or her moral rights. In an unequal bargaining situation, the author is likely to have to waive these rights or forgo the opportunity. Secondly, moral rights expire when the copyright expires.⁸⁰ Both provisions are inconsistent with the traditional Maori duties of guardianship discussed above.

B Designs Act 1953

The Designs Act overlaps with the Copyright Act to such an extent that it is little used. It also gives less protection than the Copyright Act. First, a design must be registered to obtain copyright, while the Copyright Act grants it automatically. Registration is costly. Secondly, to be registrable, a design must be novel, primarily aesthetic and applied to a manufactured article by an industrial process.⁸¹ These requirements are more difficult to satisfy than the Copyright Act requirements. Thirdly, the copyright is limited to the uses of the design in connection with specific articles listed in the register.⁸² Fourthly, the duration of protection is only fifteen years.⁸³ Finally, if the registered owner does not use the design, anyone can apply for a compulsory licence to use the design.⁸⁴

C Breach of Confidence

A breach of confidence action protects secret knowledge. The action has been used successfully in Australia to prevent the publication of photographs and descriptions of things and places that are secret-sacred to Aboriginal people.⁸⁵ The knowledge of these places and traditions are carefully guarded secrets that are normally only told to initiated members of a clan and passed in this manner to successive generations. However, the scope of this action is narrow: a plaintiff must show that the defendant has a contractual or equitable obligation to keep a secret.⁸⁶ An equitable obligation will arise where the information used without authority is of a confidential nature; was disclosed in circumstances explicitly or implicitly imposing a duty of confidentiality; and resulted in a detriment to the person who disclosed it.⁸⁷ These requirements are rarely likely to be made out.

⁸⁰ Section 106.

⁸¹ Section 2.

⁸² Section 5.

⁸³ Section 12.

⁸⁴ s14.

⁸⁵ *Foster v Mountford* (1976) 29 FLR 233; *Pitjantjatjara Council Inc v Lowe* Unreported, 26 March 1982, Vic Sup Ct, No 1796/82.

⁸⁶ A Brown and A Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) 641.

⁸⁷ *Coco v A H Clark (Engineers) Limited* [1969] RPC 41, 47.

Even when the requirements can be made out, the plaintiffs may be unable to show that they have sufficient standing to bring the action. Some authorities suggest that a plaintiff must show some form of legal connection, such as ownership, with the subject matter.⁸⁸ This creates a hurdle for Maori since New Zealand law does not recognise their ownership of traditional knowledge. The New Zealand courts could overcome this hurdle by adopting the approach taken by the Australian courts. The Australian courts have recognised that a representative body of an indigenous clan that claims custodial rights in cultural artifacts and significant archaeological sites can have sufficient interest to support standing, both in common law and statutory claims.⁸⁹

D *Passing Off*

Passing off protects the goodwill a trader has in his or her business by preventing other traders from copying the name, get-up or distinctive packaging of the trader's product.⁹⁰ At present its scope is too narrow to prevent the reproduction of authentic Maori works in an unauthentic way or with unauthentic materials unless the action is brought by a trader (or group of traders) who trades in certain authentic goods and can show that his or her good will has been damaged.

E *Blasphemy*

It is possible that the common law offence of blasphemy, although rarely used today, could be invoked to prohibit uses of traditional Maori works that are spiritually or culturally offensive. In *Bowman v Secular Society Ltd*, the House of Lords said that the offence is directed to the suppression of material that is considered dangerous to the civil order, rather than to the protection of "true religion".⁹¹ The alleged blasphemy must "deprave public morality generally,...shake the fabric of society,...and be a cause of civil strife".⁹² The court said that the words and acts that will have this effect will change as society changes.⁹³ Arguably, derogatory or debasing treatment

⁸⁸ See for example: *Fraser v Evans* [1969] 1 QB 349; 22 TLR 375; *Fellows & Son v Fisher* [1975] 2 All ER 829; *Infometrics Business Services Ltd v Broadcasting Corporation of NZ* Unreported, 7 September 1987, High Court, Wellington Registry, CP363/87.

⁸⁹ See text at n 75, 190-91.

⁹⁰ See text at 86, 137-45.

⁹¹ [1917] AC 406, 457.

⁹² See text at n 91, 466.

⁹³ See text at n 91, 466-67.

of tapu works could be a cause of civil strife. However, a recent English case, *Choudary v United Kingdom*,⁹⁴ restricted the application of blasphemy to Christianity.

The scope of common law blasphemy in New Zealand is less clear than it is in England⁹⁵ and *Choudary* is not binding on the New Zealand courts. Since New Zealand, unlike Britain, does not recognise an official religion, it is possible that in New Zealand the offence extends to all religions. If so, it could prohibit offensive uses of highly tapu taonga and many other aspects of Maori culture that have religious significance. For example, it may have provided a remedy for a group of Maori students who tried unsuccessfully to stop Auckland University students from performing a derogatory version of a haka during the 1970's.

In many cases, success may not be likely, since the threshold characteristics of a blasphemous publication are high. Older English cases required a "wilful intent to pervert, insult, and mislead by means of licentious or contumacious abuse of sacred subjects".⁹⁶ A recent case has said that blasphemy is a strict liability offence⁹⁷ but the courts still use such words as contemptuous, reviling, and scurrilous to define a blasphemous publication.⁹⁸ The New Zealand courts would also have to consider a freedom of speech argument under section 14 of the New Zealand Bill of Rights Act 1990. Recently, the Court of Appeal discussed freedom of speech in the related area of defamation. The Court said that "one race is entitled to comment adversely and even narrow mindedly on the practices of another save as prohibited by statute, e.g., the Human Rights Act 1993".⁹⁹ It is unlikely, therefore, that uses that are offensive simply because they are inconsistent with tradition would be held to be blasphemous.

F *Antiquities Act 1975 and Related Bills*

The Antiquities Act deals with traditional Maori works that fall within the statutory definition of "artifact" [sic]. An artifact may be a chattel, carving, object or thing which relates to the history, art, culture, traditions, or economy of Maori and which was made or modified in or brought to New Zealand by Maori prior to 1902.¹⁰⁰ It is the only form

⁹⁴ (1987) 71 ALR 41, 52.

⁹⁵ *R v Glover* [1922] GLR 185 is the only reported New Zealand case of a prosecution for the blasphemous libel.

⁹⁶ *R v Ramsay and Foote* (1883) 15 Cox 231; *R v Boulter* (1908) 72 JP 188; *Bowman v Secular Society Ltd* [1917] AC 406.

⁹⁷ *R v Lemon, Gay News Ltd* [1979] 1 All ER 989.

⁹⁸ Text at n 97; *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudary* [1991] 1 All ER 306.

⁹⁹ *Awa v Independant News Auckland Ltd* Unreported, 31 July 1997, Court of Appeal, CA 9/96.

¹⁰⁰ Section 2.

of protection for traditional Maori works that do not have copyright protection because of their age. The purpose of the Antiquities Act is to restrict the transfer and export of antiquities, including artifacts. It therefore only protects tangible objects and it does not recognise intellectual property in artifacts.

The Antiquities Act gives the Crown a prima facie right of ownership in artifacts found in New Zealand after the commencement of the Act. To defeat the Crown's ownership, Maori must establish a prior proprietary right. This provision reflects the Western view that property can become unowned but the fact that something has been buried and lost for many years may not be enough to sever the kinship ties and duty of guardianship that Maori have in an artifact.

The Act authorises the Minister of Internal Affairs to acquire antiquities and to determine their custody.¹⁰¹ There is, however, no requirement on the Minister to consult with Maori to establish the tikanga and the wishes of Maori in relation to an artifact. The underlying intention of the Act appears to be to preserve New Zealand's cultural heritage rather than to preserve Maori ownership and control of Maori cultural heritage. It is debateable how appropriate it is for the Government to assume that Maori cultural heritage belongs to the nation and to act unilaterally in taking control of it.

The Act provides that the Crown can obtain a photograph or cast of an antiquity before it is removed from New Zealand. The copyright in these reproductions is owned by the Crown. The Act does not prohibit or control the manufacturing or sale of a replica of any artifact beyond requiring that it be permanently identified as a replica. There is nothing to stop culturally offensive uses of the replica.

Two Bills have been produced in an attempt to improve the protection of artifacts. The first of these, the Protection of Moveable Cultural Heritage Bill, proposed to replace the automatic Crown ownership provisions of the Antiquities Act with a provision for iwi ownership. This is a positive step towards recognising Maori rights in relation to their artifacts. The Bill also proposed to create a five member Maori board to determine who the iwi owners of an artifact are and to settle opposing claims between iwi.

The Bill was never introduced to the House.

¹⁰¹ Section 4.

The Taonga Maori Protection Bill was introduced to the House of Parliament as a private member's bill in 1996. The TMP Bill proposes to establish a register of taonga held offshore and a charitable trust to facilitate the return of taonga and to assist with the administration of the Register. The TMP Bill has gone to a select committee for review and the committee's report is currently being considered.

Although neither Bill creates any intellectual property rights in Maori artifacts, the form of administrative bodies proposed by each Bill could be adopted to administer an intellectual property scheme. In particular, having an agency that could identify owners of intellectual property would facilitate a scheme involving authorisation or royalties.

G *International Law Protection*

New Zealand's international law obligations do not require the government to protect traditional Maori works that fall outside of ordinary intellectual property mechanisms. A relevant provision has been included in the Draft Declaration on the Rights of Indigenous People. It says that indigenous peoples are entitled to the legal recognition of and the full ownership, control and protection of their cultural and intellectual property. The Draft Declaration also says that states will develop an additional cultural and intellectual property rights regime incorporating collective as well as individual rights. The Draft Declaration has been in the drafting process for about 14 years. It is expected that it take several more years to complete the process. When the Draft Declaration is finally adopted it will not be legally binding on United Nations Members. It will however, carry great moral force.

An attempt to extend the Berne Convention to protect folklore was made in 1967. As a result, Article 15.4 of the Stockholm (1967) version and the Paris (1971) version of the Convention contains the following provisions:

- (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 or her rights in the countries of the Union.

- (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate the declaration to all other countries of the Union.

As a mechanism for protecting traditional expressions of culture, the provisions of the Berne Convention are inadequate. Article 15.4 does not impose an obligation to create a protection scheme. It does not even specifically refer to folklore, cultural property, or indigenous peoples. Not surprisingly, no Article 15 notification has been made to the Director General. Furthermore, in 1985, WIPO admitted that copyright was not necessarily the best way to protect folklore because of its focus on individual originality.¹⁰²

V FOUNDATIONS FOR PROTECTING TRADITIONAL MAORI WORKS

Having established that current law does not adequately protect all traditional Maori works, we should consider what justifications there are for altering the law. In the case of traditional Maori works, there are both legal and moral justifications for protection.

A *Treaty of Waitangi*

The basis of a right to legal protection for traditional Maori works can be found in the Treaty of Waitangi. The Crown's obligations in respect of property are founded on Article two. The English version of article two says:

Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the 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...¹⁰³

According to the official English translation, the official Maori version of article two says:

¹⁰² See text at n 9, 5.

¹⁰³ Treaty of Waitangi Act 1975, First Schedule.

The Queen of England agrees to protect the Chiefs, the Subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.¹⁰⁴

The Treaty of Waitangi Act requires the Waitangi Tribunal, which hears treaty claims, to have regard to both versions.¹⁰⁵ So far the Tribunal has not had to determine whether Maori should or do have intellectual property rights beyond those granted by the current law.¹⁰⁶ However, the Tribunal has recognised that intangible things may be taonga. In the Te Reo Maori Report,¹⁰⁷ the Tribunal acknowledged that the Maori language is a taonga and therefore the Crown is under an active duty to protect it. In another ground breaking report, the Tribunal said that radio frequencies are taonga.¹⁰⁸ This shows that taonga can even include things that were not known to Maori when the Treaty was signed. It must also be borne in mind that the New Zealand government has indicated that chieftainship or te tino rangatiratanga generally will take precedence in matters concerning the material and cultural resources and taonga that Maori have retained. Since there is ample evidence that Maori view their knowledge and customs as taonga,¹⁰⁹ they are arguably entitled to recognition of their relationship with this taonga and the government may have a duty to actively protect it.

B Moral Justifications

Aside for the treaty claim that Maori may have, there are social and moral justifications for protecting traditional Maori works. In an age of rapid globalisation, where American hamburgers and cable television epitomise an increasing homogenisation of

¹⁰⁴ Translation by Professor Sir Hugh Kawharu, reproduced in *Principles for Crown Action on the Treaty of Waitangi* (Department of Justice, Wellington, 1989) 6. The official Maori version set out in the First Schedule of the Treaty of Waitangi Act 1975 says: *Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.*

¹⁰⁵ Section 5(2).

¹⁰⁶ The Tribunal is investigating a claim that includes intellectual property issues. The claim, Wai 262, asserts that te tino rangatiratanga o Te Maori incorporates the right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna; and that this right has been denied by the Crown. The claim is essentially a claim for recognition of te tino rangatiratanga or sovereign control of the exploitation of indigenous flora and fauna, rather than for recognition of customary intellectual property rights. An amended claim is to be lodged in September 1997. It is likely to extend the claim to cover traditional Maori symbols, designs and performances. The hearings of evidence begin in September 1997 and will continue into 1998. The Crown is expected to oppose the claim vigorously.

¹⁰⁷ Waitangi Tribunal *Te Reo Maori Report - Wai 11* (Department of Justice, Wellington, 1986).

¹⁰⁸ Waitangi Tribunal *Radio Frequencies Report - Wai 150* (Brooker & Friend Ltd, Wellington, 1990).

¹⁰⁹ See text at n 107, 20.

cultures, unique cultures such as Maoritanga are endangered. While legislation cannot ultimately protect culture from redundancy, it can embody some of the values of that culture. In doing so, it can contribute something to the survival of those values. Legislation that enhances the Maori people's economic rights in traditional Maori works may also aid the preservation of the culture by providing incentive to continue to produce these works.

Legislation could give Maori greater control over the use of traditional Maori works. This, together with recognition of the special relationship Maori have with their traditional works may be a way of repairing some of the damage to Maoritanga caused by missionaries and bureaucrats who tried to suppress aspects of Maori culture such as language. Prohibiting offensive uses may even have a positive effect on race relations by reducing the incidence of offensive uses and by indicating that the general public respects Maori customs and values.

VI ESTABLISHING WHAT MAORI SEEK FROM LEGAL PROTECTION

Any prescription for protection should reflect the objectives Maori collectively wish to achieve through legal protection. To determine these there must be consultation between Maori representatives. Consultation needs to take account of tikanga Maori and the views of contemporary Maori creators. It should also be an ongoing part of the development of suitable protection for traditional Maori works.

In the absence of such consultation, this paper has to rely on the work done by Te Puni Kokiri and the signatories of the Mataatua Declaration. A Discussion Paper published by Te Puni Kokiri identifies three threats to traditional Maori knowledge. These threats are expropriation, inappropriate use and over-protection.¹¹⁰ By expropriation, Te Puni Kokiri means the alienation of ownership and control of traditional knowledge. Te Puni Kokiri suggests, as a hypothetical illustration, that Maori could be prevented from using a traditional symbol because someone else has registered a modification of the symbol as a trademark. If a mark became sufficiently well known this may be possible but Te Puni Kokiri does not give any factual examples of this kind of appropriation, and it is difficult to assess how realistic this risk is. In most instances, intellectual property law should not facilitate the appropriation of Maori knowledge. For example, copyright protects the way knowledge is expressed,

¹¹⁰ *Nga Taonga Tuku Iho No Nga Tupuna: Maori Genetic, Cultural and Intellectual Property Rights* (Discussion Paper, Te Puni Kokiri, Wellington, 1994).

provided that expression is original. It can only prevent Maori from making particular uses of the original expression. Maori are still free to use the underlying knowledge and to express it in different ways.

The spiritual qualities Maori see in traditional Maori works explain why inappropriate use is such an issue. Even if it is unintentional, inappropriate use is offensive and, in Maori eyes, damaging to the mana of a work. To other New Zealanders, a prohibition on offensive uses may seem inequitable when their rights in their cultural heritage are not recognised. However, the basis for prohibiting offensive uses lies in the difference between Maori and Western culture. It seems unjust to insist that Maori surrender their values and adopt Western values.

There are also precedents in New Zealand law for affording special protection to traditional Maori works. The common law of blasphemy gives special protection to religion and the relationship Maori have with traditional Maori works has religious qualities. The derogatory treatment provisions of the Copyright Act protect the sensibilities of authors. The amendments to the Trade Marks Act 1953, proposed by the Ministry of Commerce, would require applicants for trade mark registration to provide clear evidence of the origin of a trade mark using a Maori word, symbol, sound or smell and to show that the relevant iwi, hapu, or whanau had given permission for the use of the trade mark. The use would also have to be culturally appropriate.¹¹¹ Finally, the Flags, Emblems, and Names Protection Act 1981 protects cultural icons such as the New Zealand flag, the word ANZAC, and the names and uniforms of the Girl Guides Association.

Te Puni Kokiri acknowledges the risk that protection could inhibit the use of traditional Maori knowledge. This would prevent Maori from obtaining economic benefits from their knowledge and may have a detrimental impact on its relevance to future generations. Therefore protection needs to be carefully tailored to prevent offensive uses while allowing non-Maori to have sufficient access to traditional Maori works and knowledge to sustain a market.

The Mataatua Declaration, a statement of principles for indigenous intellectual property rights, also gives some idea of what the objectives of protection are likely to be. The Mataatua Declaration is the product of an international conference on the

¹¹¹ See text at n 32, 19.

cultural and intellectual property rights of indigenous people, hosted by iwi from the Mataatua rohe (Bay of Plenty District) in 1993. The Declaration has been signed by the Maori Congress, individual iwi members of the Congress, and the indigenous representatives of approximately 60 countries.¹¹² The Mataatua Declaration recommends the following actions for governments, states, and national and international agencies:

1. Recognition that indigenous peoples are the guardians of their knowledge, and as such must be the ones to define it and have the right to protect and control dissemination of it.
2. Recognition that indigenous peoples also have the right to create new knowledge based on cultural traditions.
3. Note that existing protection mechanisms are insufficient for the protection of indigenous peoples cultural and intellectual property rights.
4. Accept that the cultural and intellectual property rights of indigenous peoples are vested with those who created them.
5. Develop, in full cooperation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:
 - collective (as well as individual) ownership and origin;
 - retroactive coverage of historical works as well as contemporary works;
 - protection against debasement of culturally significant items;
 - a cooperative rather than competitive framework;
 - first beneficiaries of the exploitation of knowledge to be the direct descendants of the traditional guardians of that knowledge; and
 - multi-generational coverage span.

These objectives are beyond the scope of intellectual property rights as they are traditionally defined, although intellectual property law may be sufficiently flexible to accommodate them. Much more discussion is needed to clarify the meaning and

¹¹² A Mead *Indigenous Rights to Land and Biological Resources: the Convention on Biological Diversity* (Paper presented at the Conference on Biodiversity: Impacts on Government, Business and the Economy, Auckland, August 4-5 1994) 6, reproduced in RUME Monograph No 23, Research Unit for Maori Education, University of Auckland.

possible implementation of the objectives but the provisions of the Mataatua Declaration, together with Te Puni Kokiri's work, at least provide a starting point for analysing the appropriateness of the solutions that will be discussed in the following section.

VII ANALYSIS OF MODEL SOLUTIONS

A number of countries and international agencies have developed their own legislation for protecting traditional works. This part of the paper will describe a range of models and analyse them in terms of the objectives identified in part VI. It will also discuss some of the issues they raise and how features could be adapted to suit Maori needs.

A *Preservation / Customs Control Model*

This kind of model typically controls the sale or export of artifacts by various mechanisms including customs controls, limiting rights of transfer, and the maintenance of a register. This is the approach adopted in the Antiquities Act, the Protection of Moveable Cultural Property Bill, and the Taonga Maori Protection Bill. This kind of legislation may also restrict access to sites of great cultural significance; create offences for the destruction, damage or defacement of important cultural property; and establish procedures for the collection and storage of cultural material.¹¹³

While a preservation and customs control approach is very important to stop the loss of traditional Maori works, it does not recognise the relationship Maori have with traditional Maori works. Nor does it create economic rights or prevent offensive uses. It therefore does not meet the objectives identified above.

B *Public Domain Model*

In most countries, traditional works are in the public domain. Some countries extract a royalty for the use for these works. This is referred to as the "domaine public payant" approach. In Senegal, for example, the right to perform or exploit traditional works is controlled by a national bureau. Users must pay a royalty to the bureau and perform traditional works consistently with moral rights. Works derived from traditional works may be protected by copyright.¹¹⁴

¹¹³ *Report of the Working Party on Aboriginal Folklore* (Department of Home Affairs and Environment, Canberra, 1981) 18.

¹¹⁴ See text at n 113, 19.

In Mexico, traditional works that are not protected by copyright are also in the public domain. Works derived from these traditional works must be registered with a national authority and a royalty based on the income generated by the derived works must be paid. The money generated through royalties is used by the national government to promote institutions that are beneficial to authors.

The domain public payant approach may appeal to some New Zealanders who are used to regarding heritage as in the public domain and who may consider Maori culture a part of their heritage. It may also appeal to New Zealanders who fear that legalising Maori ownership will make it more difficult for non Maori to have access to and make use of traditional Maori works. However, the concept of a public domain is less likely to appeal to Maori who will appreciate that it takes ownership and control of their culture out of their hands. Also, if the government is allowed to use or determine the use of royalties, Maori would be denied the chance to obtain economic benefit from their traditional works. These effects are counter to the objectives expressed in the Mataatua Declaration.

The domain public payant approach is also inconsistent with the Treaty of Waitangi. The Treaty expressly promises that Maori shall retain possession and chieftainship of their taonga. However, this approach denies Maori possession and chieftainship of taonga in the form of traditional Maori works that are not copyright. Two features of these schemes may, however, be useful. These are the creation of moral rights in traditional works and of a bureau to collect and distribute royalties.

C *State Copyright Model*

Copyright in traditional works can be vested in the State.¹¹⁵ This approach was taken by the Bolivian government, which has a statutory duty to guard, promote and safeguard Bolivia's "artistic patrimony". The State obtains the copyright in folk music if the author cannot be identified or died 30 or more years ago. Users of these works must pay a royalty to the State, which uses this revenue to promote folk music. The State also has the power to stop unauthorised publications or recordings of these works.¹¹⁶

¹¹⁵ The Copyright Act already grants a Crown Copyright in works made by a Crown employee or contractor, see s26.

¹¹⁶ See text at n 113, 19.

As for the public domain model, vesting in the Crown the ownership of copyright in traditional Maori works is likely to be a breach of the Treaty of Waitangi. It would be the intellectual property equivalent of the land thefts and appropriations perpetrated at times by New Zealand governments. The Bolivian scheme also lacks a mechanism for returning the economic benefits of their knowledge back to indigenous communities. Nor does it feature any moral rights to prevent offensive uses. In fact the utility of the Bolivian scheme is hard to discern. It seems to be nothing more than a way of generating revenue to promote folk music. Yet, if anything requiring royalty may discourage the use of folk music. When deciding whether fees or royalties should be collected this should be weighed against the value of allowing free access to traditional Maori works.

D Extension of Copyright

Copyright and other existing legal mechanisms may be extended to protect the traditional owners of cultural material. In Brazil, for example, indigenous communities, societies or organisations have the right to apply for a patent for the indigenous knowledge they possess. Where indigenous knowledge cannot be patented, the legislation provides that all the intellectual production of indigenous communities, societies or organisations shall be protected. Intellectual production is defined as "all useful knowledge, in particular the pharmaceutical products and natural essences, known by the Indians and which will be used for research and industrial or commercial use". Indigenous communities are also entitled to authors' rights over their intellectual production and collective spiritual creations, in particular their music, fables and folk tales.¹¹⁷

The discussion of New Zealand's Copyright Act in part IV identified a number of provisions of the Act that made it unsuitable to protect traditional Maori works. These provisions could be amended but any amendments to the Copyright Act must take into account New Zealand's international law obligations, in particular the Berne Convention for the Protection of Literary and Artistic Works.¹¹⁸

The Berne Convention sets a minimum standard for protection,¹¹⁹ which means that New Zealand could amend the provisions of the Copyright Act without breaching its

¹¹⁷ PL 2057/91

¹¹⁸ New Zealand is a signatory of the 1914 version of the Berne Convention and also of the GATT Agreement on Trade-Related Aspects of Intellectual Property (GATT-TRIPS). GATT-TRIPS requires New Zealand to comply with Articles 1-21 of the 1971 version of the Berne Convention.

international obligations provided the amendments exceeded the minimum standard. Therefore the Copyright Act could recognise communal ownership according to Maori custom, as well as individual ownership. The scope of derogatory treatment in the moral rights provisions could be extended to include a culturally offensive treatment. The duration of copyright could also be extended. Currently, the New Zealand Act incorporates the minimum durations set by Article 7 of the Convention but subparagraph 6 provides that the countries bound by the Convention may grant a term of protection in excess of those provided by Article 7. Arguably, this allows the term of protection to be perpetual or at least of such a long duration that it is effectively perpetual. The requirement that certain works must have a material form to obtain copyright protection may also be changed. Article 2.2 of the Convention leaves it to member states to decide whether or not to prescribe that works in general, or any specified categories of works, will not be protected unless they have been fixed in some form.

The practical effects of some amendments need to be considered carefully. In practice, it may be difficult to identify the owners of a copyright in a traditional Maori work. This is because few traditional Maori works have a written provenance that the public can access. It may be possible to gather evidence showing that a traditional Maori work belongs to a particular whanau, hapu or iwi but the cost and time required to do this is likely to discourage the use of traditional Maori works. The need to obtain consent for a proposed use from all the members of the group would also discourage use and it would require customary owners or guardians to spend considerable time and resources to be in a position to give consent. In terms of Te Puni Kokiri's Discussion Paper, to require authorisation from every owner would be over protective. It would be better to establish a central agency to handle requests and receive royalties.

Another concern is whether it is philosophically appropriate to extend copyright. The primary objective of copyright is to encourage authors to be productive and innovative.¹²⁰ This is why there is a limit on the duration of copyright. While the actual term of duration may be somewhat arbitrary, unlimited duration would arguably

¹¹⁹ S Ricketson *The Law of Intellectual Property* (The Law Book Company Ltd, Sydney, 1984) 372.

¹²⁰ *Intellectual Property Law Reform Bill: Maori Consultation Paper* (Ministry of Commerce, Wellington, 1994) 6.

discourage production and therefore negate the primary objective.¹²¹ The originality requirement of Copyright is also necessary to encourage innovation and prevent people from obtaining copyright in direct copies of other people's work. It should not be altered to accommodate traditional Maori works. Also, some Maori commentators have criticised the Western tendency to commodify knowledge.¹²² Since this is another fundamental purpose of intellectual property law, it would be inappropriate to use it to protect the spiritual qualities of traditional Maori works.

E Tunis Model

The Tunis Model Copyright Law for Developing Countries was developed by WIPO and Unesco in 1976 as a guide for domestic copyright legislation. It includes intellectual property rights provisions for the products of folklore.

The Tunis Model uses the term "creation of folklore", instead of "work". It defines "creations of folklore" as "the products of the indigenous communities of a nation that express characteristic elements of the communities' traditional culture and civilisation, through forms that have evolved from generation to generation".¹²³ The forms of creation that are protected include folk tales, poetry, songs, dance, music, plays and works of art in various media.

The Tunis Model creates economic and moral rights that apply specifically to creations of folklore as a form of intellectual property. Unlike existing copyright, the duration of the rights is unlimited and they are exercised by a competent national authority, not by an individual owner. The national government of the country adopting the Tunis Model would appoint the members of this authority.

The Tunis Model also creates a *domaine public payant* scheme. The scheme requires prospective users of a creation of folklore to obtain permission from the national authority if they intend to make money from their use. They would also pay to the national authority a percentage of the income received from the use or adaptation of a creation of folklore. The national government enacting the Tunis Model would set the percentage of the royalty. The royalties would be distributed to

¹²¹ See S Frankel "Duration of Copyright: Life of the Author plus Fifty or Seventy Years?" 1997 NZIP 216.

¹²² See text at n 112, 6.

¹²³ Section 1.

promote institutions for the benefit of authors and performers and to protect and disseminate national folklore.

Unlike some of the *domaine public payant* schemes described above, the Tunis Model enables the national authority to enforce the creators' moral as well as economic rights. However, the moral rights provision is very similar to the New Zealand derogatory treatment provision. It has already been suggested that the scope of this provision is too narrow to protect traditional Maori works.

It is worth noting that the Tunis Committee of Experts considered that the problems involved in the protection of folklore were essentially concerned with definition, identification, conservation and preservation of folklore. It said that the legal control of the use of folklore was mainly relevant to promoting folklore as a means of asserting national identity.¹²⁴ This view is quite different from the concerns expressed in the Mataatua Declaration. It shows that the work of Unesco and WIPO has not taken into account the goals of indigenous communities who have become a minority group through colonisation. For these groups, as the Mataatua Declaration makes clear, conservation of culture is only one of a number of concerns (and it is not one that is well served by legislation). Other concerns are the desire for self-governance, economic development, and protection of the integrity of the culture.

F Model Provisions for National Laws on the Protection of Expressions of Folklore

In 1985, WIPO and Unesco released the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. With this model, WIPO and Unesco have tried to remedy some of the weaknesses of the Tunis Model. They have also adopted a quasi-copyright approach with the intention of creating the possibility of reciprocal treatment on an international level.¹²⁵ As yet, no agreement for the reciprocal treatment of protected folklore or traditional works exists. This may be the most significant weakness of a *sui generis* solution but it is one that cannot be rectified by domestic law.

The Model Provisions define "expressions of folklore" as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by

¹²⁴ See text at n 113, 23.

¹²⁵ See text at n 113 p 25.

a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular (but not exclusively) verbal expressions, musical expressions, expressions by action and tangible expressions".¹²⁶ None of these categories is exhaustive. Verbal expressions may include folk tales, folk poetry and riddles.¹²⁷ Musical expressions may include folk songs and instrumental music.¹²⁸ Expressions by action may include dance, plays, and artistic forms or rituals.¹²⁹ Tangible expressions may include productions of "folk art" such as drawings, paintings, carvings, woodwork, jewellery, textiles, costumes, musical instruments, and architectural forms.¹³⁰ Unlike copyright law, the Model Provisions do not require verbal, musical and action expressions to be reduced to a material form and there is no time limit on the duration of protection. The Model Provisions also avoid the difficulties of determining who has ownership of expressions of folklore by using the term "community concerned" rather than owner. It is up to the enacting country to determine ownership.

The Model Provisions create a licensing scheme. In general, where use of an expression of folklore is made with gainful intent and outside its traditional or customary context, the user must first obtain authorisation from a "competent authority". The provisions envisage that the competent authority will be defined by the enacting government or community concerned, depending on which option is more appropriate for the enacting country.¹³¹ The competent authority may impose a fee for use of expressions of folklore and such fees are to be used for the purpose of promoting or safeguarding national folklore or culture.¹³² This use of fees may not be compatible with Maori interests. Instead, it may be better to distribute fees or royalties to the customary owners or guardians of a work, as determined by whakapapa or genealogy, and other evidence. Since distributing fees or royalties among many beneficiaries would be expensive and logistically difficult if not impossible, it would be

¹²⁶ Section 2. The use of the terms "expression of folklore" and "productions" is intended to emphasise that the provisions are sui generis, rather than an extension of copyright. The definition makes it clear that the Model Provisions apply only to artistic heritage, not cultural heritage as a whole. Other important aspects of culture, such as traditional beliefs, scientific views (including traditional cosmogony), the substance of legends, merely practical traditions, and significant sights are not protected. See *Commentary on the Model Provisions* (Unesco/WIPO/Folk/CGE/II/4) 5-6.

¹²⁷ Section 2(i).

¹²⁸ Section 2(ii).

¹²⁹ Section 2(iii).

¹³⁰ Section 2(iv).

¹³¹ Section 3.

¹³² Section 10.

preferable to pay them to an iwi trust or other legal iwi or hapu entity. The entity could then distribute the money in a culturally appropriate way.

The Model Provisions do not require authorisation if the expression of folklore is used by people working within their traditional context, even if they have a gainful intent. Although the Model Provisions do not specify what "traditional context" means, they appear to require a member of the community concerned to seek authorisation if he or she is working outside the traditional context with gainful intent. In this respect the provisions could be seen as fossilising culture and preventing members of that culture from using their cultural property. Because of this risk, the Model Provisions say that no authority is required if an expression of folklore is used as the basis for creating an original work.¹³³ This provision would also allow people outside of the community concerned to incorporate folklore motifs and knowledge in their creative works. The provision appears to contradict the authorisation requirements of the Model Provisions. What is meant will depend on the definition of use. If it includes using an expression of folklore as the basis for an original work then there is a conflict. It is more likely that use is intended to mean use without sufficient modification to make an original work.

Exception from the authorisation requirement is also provided where an expression of folklore is used for educational purposes; by way of illustration in an original work, provided the use is fair; and where the use is incidentally part of a sound or visual recording.¹³⁴ The educational purposes exception is broader in scope than the fair use equivalent in New Zealand's Copyright Act. It applies to any educational use whether or not the use is intended to generate revenue; for example, a text book. This encourages the research and publication of educational materials. At the same time, since these materials are protected by copyright, the author's rights are limited to the way in which the knowledge is expressed. This means that Maori could continue to use the knowledge embodied in the materials.

Irrespective of whether authorisation is required, if an identifiable expression of folklore is used in a printed publication or a communication to the public, its source must generally be indicated by mentioning the community or geographic place of origin.¹³⁵ It is an offence not to do so.¹³⁶ It is also an offence to use an expression

¹³³ Section 4.

¹³⁴ Section 4.

¹³⁵ Section 5.

without authority if authority is required; to deceive others as to the source of a work; and to use a work in public in a manner that wilfully distorts it in a way prejudicial to the interests of the community concerned.¹³⁷ The Model Provisions leave it to the enacting government to determine what the penalties or remedies for such offences will be.¹³⁸ Civil remedies may also apply and may include compensation for any harm to the reputation of the community concerned resulting from distortion of an expression of folklore.¹³⁹

The Model Provisions specifically do not limit or prejudice any other protection applicable to expressions of folklore. They envisage, for example, that something may be the subject of a copyright and protected by the Model Provisions.

G Australian Model

The 1981 Report of the Australian Working Party on the Protection of Aboriginal Folklore recommended sui generis legislation for the protection of Aboriginal folklore. The Australian Model defines Aboriginal folklore as the traditions, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature.¹⁴⁰ The proposed scheme would be limited to items of folklore that are not copyright.¹⁴¹ It would create offences for non-traditional uses of sacred-secret material and uses that were destructive, mutilating or debasing.¹⁴² It would not create a property right in Aboriginal folklore. This is because Aboriginal custom does not recognise the Western concept of ownership. The Working Party also concluded that a property right would include the right to control the production of folklore. This would raise unresolvable issues about the extent that Aboriginal people should be able to isolate their culture from Australian culture generally. They also concluded that a property right would require the capacity to vindicate it in court. This is not feasible since the Australian rules of evidence are not amenable to establishing rights dependant on oral tradition. Also litigation is foreign to Aboriginal culture, which relies on dispute mediation.¹⁴³

¹³⁶ Sections 6(1).

¹³⁷ Section 6.

¹³⁸ Sections 6 and 7.

¹³⁹ Section 8; see also text at n 126, Commentary on the Model Provisions, 28.

¹⁴⁰ See text at n 113 49.

¹⁴¹ See text at n 113, 37.

¹⁴² See text at n 113, 51-2.

¹⁴³ See text at n Report, 36.

The proposed scheme would exempt Aboriginals living under customary law. Aboriginals living outside of customary law and other users would have a right to proceed immediately with the use of an item of folklore if they were satisfied that the use were lawful. If an intending user were uncertain whether the use was legal he or she could seek a clearance from the Commissioner. Since the scheme does not require authorisation, clearance is an assurance that the use is legal rather than an authorisation.

Users who used items of folklore for commercial purposes would be required to pay a fee to the traditional owners. The proposals envisaged the creation of a system for clearing uses and negotiating and collecting fees; and a Commissioner for Aboriginal Folklore to administer the system. In some cases, the Working Party envisaged that several clans would have a claim for a share of a fee and the Commissioner could ensure that fees were distributed fairly. The number of claims would not be taken into account in negotiating the fee.¹⁴⁴

The Australian Model accommodates two special features of Aboriginal culture, their sacred-secret material and the fact that many Aboriginals live under customary law on reservations. These provisions will not be appropriate for Maori.

The nearest equivalent to secret-sacred works in Maori culture appears to be highly tapu works. Since many of these works are in public locations or libraries, it would be difficult to regard them as secret. It is also likely that most New Zealanders do not know which works are highly tapu so it would be impractical to prohibit non-customary uses of highly tapu works in the way that the Australian Model prohibits uses of sacred-secret works. It may be useful to create a schedule to the protective legislation that lists traditional Maori works that are so highly tapu, any unauthorised use would be offensive. The legislation could then prohibit unauthorised use of these works.

Exempting Maori living under customary law would not be feasible in New Zealand since there are no Maori reservations. Instead, a New Zealand solution could exempt all Maori or all Maori who can establish a customary relationship with an iwi or even with the traditional Maori work in question. This raises the difficult question of the rights of Maori who do not know their whakapapa or do not wish to identify themselves

¹⁴⁴ Text at n 113, 36.

with their iwi. There is no easy answer to this problem, as the recent litigation over the rights of urban Maori to a share of a Treaty settlement involving fishing quota shows.¹⁴⁵ It is important to find a solution before creating legal rights so that Maori resources are not consumed in inter-Maori battles.

Other features of the Australian Model are useful. The Model protects Aboriginal works without granting a property right. Two of the reasons given for this would be applicable in New Zealand. First, like Aboriginal culture, Maori culture does not recognise property rights or ownership in the Western legal sense. In some respects, ownership is an anathema. Secondly, creating property rights in culture raises an issue about the rights of the rest of New Zealand society to use traditional Maori works as part of their heritage. It also sets an undesirable precedent. After all, Maori are heavy users of Western culture and knowledge and globally, every country benefits from the achievements of the people of other countries - this would be altered drastically if each country claimed perpetual property rights in those achievements by saying that they were cultural property. The part of the third reason that concerns evidence, does not apply in New Zealand. The Waitangi Tribunal already relies on evidence that is based on mental recollection of unrecorded whakapapa and customs to determine Treaty claims. It is, however, true that Maori traditionally resolve disputes through mediation rather than litigation, so mediation processes should be a feature of protective legislation.

The Australian model facilitates the use of traditional materials by dispensing with authorisation. This feature avoids the dangers of over-protection identified by Te Puni Kokiri. At the same time, it provides a mechanism for returning part of the proceeds of commercial uses to the Aboriginal people and prohibits destructive, mutilating or debasing uses. Unlike the Model Provisions which require wilfulness, the report does not say what the mens rea for these offences would be. Given that few New Zealanders would know what uses were offensive, it would be unreasonable to make it an absolute offence. At the same time offensive uses should be stopped. One way of resolving this would be for the Maori concerned or a central agency to notify a user that his or her use was offensive and require rectification within a statutory time period. The user could have the right to query the validity of the notice and to negotiate a solution with the owners or customary guardians. If the use continued

¹⁴⁵ See *Treaty Tribes Coalition and Ors v Urban Maori Authorities* [1997] 1 NZLR 513.

beyond the statutory period it would clearly be intentional and could action could be taken by the Commissioner.

The Australian Model has not been implemented. Although some reports have been produced subsequently, none of these added much to the conclusions of the Working Party.¹⁴⁶ The most recent report suggested an authentication mark for traditional Aboriginal products.¹⁴⁷ This mark is intended to give Aboriginals a way of resisting the economic and cultural harm done to them by producers of cheap, mass-produced, unauthentic copycat products. It could also be included in a New Zealand solution.

VIII DUAL PROTECTION

It was noted above that the Model Provisions allow for dual protection under the Model Provisions and Copyright Law. If sui generis legislation were enacted to protect traditional Maori works, dual protection would raise significant problems. Under Copyright law, the individual owner of the copyright has the exclusive right to authorise uses of the work. This would be incompatible with the authorisation provisions of the Model. In practice, there may be a conflict between the kinds of use the authorising authority considers to be acceptable and the kinds of use the individual copyright owner considers to be acceptable. It would be necessary to determine which provision prevailed. One way of overcoming this would be to adopt the Australian Model approach of dispensing with authorisation for use of traditional Maori works. It would be necessary to amend the Copyright Act so that users of copyright in a traditional Maori work would be required to comply with the provisions of the sui generis legislation.

Another problem with dual protection is that the copyright owner can assign her or his rights and thereby transfer control or ownership outside of the community. This right needs to be reconciled with the purpose and provisions of sui generis legislation. The moral rights provisions of the Copyright Act show that this can be done. It may be that once a copyright work is alienated, the customary guardians can no longer claim a royalty for its use under the sui generis legislation but can continue to prevent offensive uses of the work.

¹⁴⁶ K Puri *Preservation and Conservation of Expressions of Folklore: the Experience of the Pacific Region* (paper presented to the Unesco-WIPO World Forum on the Protection of Folklore, Phuket, 8-10 April, 1997) 22-3.

¹⁴⁷ *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Straight Islande People* (Attorney General's Legal Practice, Canberra, 1994).

Rather than allowing dual protection, sui generis legislation could provide that contemporary works that fall within the definition of a traditional Maori work are denied copyright protection altogether. However, contemporary Maori may not wish to have their creations subjected to collective control and should not, be denied the rights they currently enjoy and benefit from as New Zealanders.

These conflicts could be avoided altogether by adopting the Australian Model approach. The Australian Model only applies to works that cannot be copyright. This would include works that failed the originality or materiality requirements or were too old to be protected by copyright. This solution would allow contemporary Maori creators to obtain the benefit of copyright law without being placed in a position of conflict. Original works would be protected by copyright for the duration of the copyright but once the copyright expired, if the works fall within the definition of traditional Maori works, they could be protected by the sui generis legislation. Either dual protection that avoids conflicts or the Australian model would be feasible. The additional advantages of the Australian Model are that it is simpler and it could avoid the problem of Maori folk art. In this case, the folk art would have copyright protection, and by the time the protection expired it may be easier to see whether it should be classified as traditional Maori work.

VIII CONCLUSIONS: FEATURES OF AN OPTIMAL SOLUTION

The discussions of copyright in sections IV and VI identified a number of reasons why extending copyright to protect traditional Maori works would not be appropriate. It would be possible however, to create sui generis legislation. The best examples of sui generis legislation considered in this paper were the Model Provisions and the Australian Model. Whilst neither model is perfectly suitable for New Zealand, features of both models provide a sound starting point. Some of the best features of these models together with the suggestions for improvements on them are set out below.

Sui generis legislation should:

1. define traditional Maori works in a way that resolves the definitional issues raised in this paper.
2. Define who has rights in relation to traditional Maori works (If the rights are determined by whakapapa, that would mean that Maori who are disconnected from their iwi and hapu ties would be unable to obtain any benefits from the legislation. They may also have to pay a royalty for any commercial uses they make of traditional Maori works and would not benefit from the royalties collected.

If these Maori are not included in the definition, then the definition of a traditional Maori work should not apply to any original products that they make).

3. Recognise kaitiakitanga or Maori guardianship of traditional Maori works (but avoid creating property rights).
4. Provide that rights created by this legislation are held in perpetuity.
5. Create a single authority, such as a commission, to administer the Act.
6. Prohibit uses that resulted in the mutilation, destruction or debasement of a traditional Maori work.
7. Create a schedule for tapu works and provide that tapu works listed in the schedule cannot be used without authorisation from the iwis concerned.
8. Allow users the automatic right to use traditional Maori works, other than those listed in the schedule, provided they are satisfied that the use does not mutilate, destroy or debase the work.
9. Enable users to obtain clearance from the central authority that their proposed use is not debasing.
10. Require users to identify the source of a traditional Maori work, if the source is ascertainable.
11. Require Maori to give notice to a user, through the central authority, that his or her use is offensive. Allow a period for rectification to pass before legal action can be taken.
12. Allow traditional Maori works to be used as the basis for original works.
13. Require users intending to make commercial uses to give notice to a central administration body and pay royalties for commercial uses, with exceptions for incidental uses in commercial products (It may be desirable to require authors of original works substantially derived from a traditional work to pay the royalty as well. In this case they are really paying for the use of the idea underlying the expression. This is contrary to the principle of copyright that the expression rather than the idea gets protection. In practice however, the line between idea and expression is often blurred. It is suggested that the underlying idea could be protected by sui generis legislation to the extent that the idea is identifiably Maori. For example, the idea of a hei tiki might be protected, but the idea of carving a figure in pounamu (New Zealand greenstone) would not be).
14. Create an administration scheme to:
 - a) determine who are the customary guardians;
 - b) act as an intermediary between users seeking authorisation for use of works listed in the schedule;

- c) clear uses;
 - d) collect royalties or settlements and to distribute them; and
 - e) resolve disputes between users and guardian or between guardians from different iwi or hapu.
14. Provide that royalties should be distributed to iwi trusts or in some other reasonable and efficient way.
 15. Make mediation between customary guardians and users the first step to resolving conflicts and remedying infringements.
 16. Create an authentication mark for traditional Maori works
 17. Provide suitable remedies, taking into account the non-commercial harms of infringements.
 18. Determine whether traditional Maori works can have dual protection under the copyright act and the sui generis legislation.

Although this paper has suggested solutions for many issues raised in it, Maori and other New Zealanders need to dedicate time and resources to develop proposals. These proposals should reflect Maori customs and needs and create a cooperative relationship between Maori and other New Zealanders. A hasty grab at intellectual property rights as they float past in the ether of ideas is not a solution.

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