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JAMES T. HUDSON

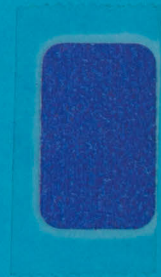
**MAORI KNOWLEDGE, THE TRIBUNAL & THE
COPYRIGHT ACT 1994**

**LLM RESEARCH PAPER
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*Te Whare Wananga
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WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,200 words.

ABSTRACT

This research paper discusses Maori perceptions of, and tikanga Maori relating to, knowledge. In particular, it discusses the utilisation of and provision of traditional Maori knowledge within the Waitangi Tribunal and its claims process. Copyright law and, specifically, the Copyright Act 1994 is analysed to assess the extent to which that Act provides for and protects traditional Maori knowledge within the Tribunal's claims process. The paper specifically reviews the provisions of the Act relating to the subsistence of copyright in a work and also those relating to commissions of inquiries. The general argument made throughout the paper is that the Copyright Act and the Tribunal's current practices fail to adequately provide and protect traditional Maori knowledge.

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I INTRODUCTION

Intellectual property issues concerning indigenous peoples are receiving increasing attention in various forum world wide. At a domestic level, intellectual property issues concerning Maori are also the subject of widespread debate, particularly in light of the proposed Intellectual Property Law Reform Bill and Wai 262, the Indigenous Flora & Fauna claim lodged with the Waitangi Tribunal ("the Tribunal"). It is submitted that while these issues themselves are not new to Maori, the opportunity to air and debate them is. Thus "Maori intellectual property debates occur in academic institutions, government departments, research institutions and, as mentioned the Tribunal.

This paper identifies some concerns of Maori in respect to New Zealand intellectual property laws and, in particular, copyright law. To illustrate these concerns, the processes relating to the Tribunal are examined in respect to the way in which they provide for the proper utilisation of Maori knowledge. The Tribunal is unique in that it is one of the few institutions in New Zealand that deals specifically with tikanga Maori and Treaty of Waitangi ("the Treaty") issues. It is also one of the few institutions where Maori are able to raise, debate and initiate the resolution of their Treaty grievances. Having inquired into Treaty claims for over 20 years, the Tribunal has (perhaps unintentionally) become one of the largest repositories in New Zealand of traditional Maori knowledge. An issue for Maori, therefore, relates to the way in which the Tribunal utilises and transmits this knowledge.

Chapter II of the paper provides *general* discussion of Maori perspectives of knowledge, and draws some conclusions about them. General principles are also drawn from the tikanga Maori developed by iwi to provide for the utilisation and transmission of their knowledge. Chapter III introduces intellectual property and copyright laws, and identifies some broad concerns that Maori share in respect both. Chapters IV and V provide an outline of the Tribunal, and the research which is undertaken for claims it inquires into. This paper deals specifically with claimant research that is based upon korero tuku iho, or oral literature, research commonly undertaken by claimants. And finally Chapters VI and VII discuss the applicability of certain provisions of the Copyright Act 1994 ("the Act") to the Tribunal and the copyright works it deals with.

II TIKANGA MAORI & KNOWLEDGE

It is recognised that there is a difference between *identifying* potential problems with the Tribunal and copyright law, and *formulating solutions* to them. In light of the limited amount of literature concerning tikanga Maori and copyright, this paper merely attempts the former, to provide a starting point for further discussion and possible policy formulation.

An assumption is made during the paper that the reader has at least a basic knowledge of tikanga and te reo Maori and explanations of terms used, and concepts referred to, during the paper are limited in this respect.

It is acknowledged that not all iwi share the same perceptions towards knowledge, nor does each apply the same tikanga associated with it. Each iwi is unique and has its own tikanga and kawa. Nevertheless, generalisations may be drawn that are useful for the purposes of this paper to provide a basis for later analysis.

A *Origins of Knowledge*

Maori recognise that knowledge is not solely sourced from human individuals, but rather has cosmogonic origins. The perception of the cosmogonic or spiritual origins are evident in Maori traditions. First and foremost, knowledge is sourced from Ranginui, the Sky Father, and Papatuanuku, the Earth Mother, and their numerous progeny. All tangibles and intangibles originate from these eponymous ancestors and are interrelated through whakapapa.

II TIKANGA MAORI & KNOWLEDGE

Maori share unique perceptions of knowledge and utilise it according to these perceptions. This chapter discusses some of those perceptions and outlines examples of tikanga Maori developed and maintained by iwi to provide for them.

Tikanga Maori, for the purposes of this paper, refers to the "custom law" governing the Maori social order prior to the arrival of Pakeha during the nineteenth century. Tikanga Maori is influenced more by values as opposed to rights and is based upon, and provides for, the norms and values underpinning the Maori world-view. In general, it established general patterns of accepted behaviour within the social order and, it is submitted, it was flexible and pragmatic enough to evolve according to the changing times.

It is acknowledged that not all iwi share the same perceptions towards knowledge, nor does each apply the same tikanga associated with it. Each iwi is unique and has its own tikanga and kawa. Nevertheless, generalisations may be drawn that are useful for the purposes of this paper to provide a basis for later analysis.

A Origins of Knowledge

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A specific tradition concerning the origin of knowledge concerns Tane and his journey to the realm of Io (another recognised eponymous ancestor of Maori) to obtain the “three kete of knowledge”. A version of this tradition, as retold by Marsden, is outlined, in part, below:¹

“Maori traditions describe the journey of Tane (one of the children of Ranginui and Papatuanuku) whom ascended the heavens in search of the three kete (or baskets) of knowledge. Arriving at the penultimate heaven, Tane was sanctified by Rhea, the Priest God of exorcism and purification, and was allowed to enter the twelfth heaven, the realm of Io. There he received the three kete of knowledge together with two small stones; one white (named Te Hukatai - seafoam) and the other predominantly red (named Te Rehutai - seaspray). Descending to the seventh heaven, Tane was welcomed by his brothers who had completed the whare wananga. After the welcome, he had to undergo more purification rights to remove the intense tapu ingested from his association with the intense sacredness of Io. Having completed the purification rites, Tane entered the whare wananga named Wharekura and deposited the three Baskets of Knowledge named Tuauri, Aronui, and Tua-Atea above the taumata - the seat of authority where the seers and sages sat and then deposited the stones Hukatai and Rehutai, one on either side of the rear ridge pole.”

In light of, and as a consequence of, the origins of knowledge, Walker states that “[i]t is clear [that] from an analysis of the Maori world view... the acquisition of knowledge from the celestial realm and its transmission to humans from one generation to the next was a highly sacred matter.”² Knowledge is thus seen as a “taonga tuku iho” passed down through whakapapa providing an individual’s identity and well-being:³

“People were identified by their tribal and sub-tribal affiliations and their traditions.. people were greeted not as Maori but as Ngati Porou or Whakatohea or Nga Puhi or Ngati Raukawa, etc. Further, people were greeted or they identified themselves in respect of the taonga of their particular district or tribe... [P]epeha...not only

¹ This version is taken from Marsden, M. & Henare, T.A. *Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Maori*, paper prepared for the Ministry for the Environment, Wellington, 1992, at 4. It is recognised that several iwi have different versions of this tradition, for example, to some it was Tawhaki whom undertook the journey.

² Walker, R.J. *Cultural Sensitivity to the Sanctity of Wananga (Knowledge)*, *Archifacts*, vol 2, June 1986, at 74.

³ Royal, Te A. C. *Te Haurapa: An Introduction to Researching Tribal Histories and Traditions* (Bridget Williams Books Limited, Wellington 1992) at 13.

recognises the people of [a] district, but also the taonga from which they derive their mana. Tribal literature is rooted in mana.”

Tikanga Maori is developed and maintained to provide for the “sacredness” and the tapu nature of knowledge.

Maori further recognise that knowledge is inherent in every entity of the natural world. Every tangible has intangible qualities, such as a mauri, a wairua and a tapu, and matauranga - knowledge - is one such quality. Tikanga Maori recognises and provides for these intangible qualities in order to maintain and/or enhance the mana of an entity.

Knowledge is thus sourced from, and is contained in, the land and natural resources. For example, many Maori knowledgeable in the ways of mahi rongoa, and healing methods, perceive that their knowledge is “given” to them by the plants with which they associate. This knowledge binds them, and the people they treat, to the land, just as the exchange for gifts - whether of knowledge or of something other - bind people to one another.

The perception that knowledge is rooted in the land is strongly maintained today. A participant at a hui in Kirikiriroa discussed knowledge and stated:⁴

“The knowledge of the ancestors is still their in the mauri, in the land, in the rocks and stones, in the birds - that's where our knowledge and our learning is.”

At a similar hui facilitated at Takapuwahia marae, in Porirua, a participant referred (albeit indirectly) to the inherent knowledge within resources of their rohe:⁵

“Iwi concerned about the export of sphagnum moss, paua, and tuatara, all of which are declining resources. The tuatara was of great concern because it represented so

⁴ Minutes of the New Zealand Conservation Authority's Consultation Hui concerning the draft discussion paper *Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, Hamilton, Kirikiriroa Marae, 23 November 1994.

⁵ Minutes of the New Zealand Conservation Authority's Consultation Hui concerning the draft discussion paper *Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, Wellington, Takapuwahia Marae, 25 November 1994.

much spirituality, heritage and knowledge. This should never be given away because it was giving away knowledge and wisdom.”

B Kaitiakitanga & Knowledge

Maori are the kaitiaki, or guardians of the land and resources within their rohe and, accordingly, the knowledge of the land and resources. Whakapapa provides for the relationship Maori share with the land and resources. Maori do not purport to own them. Rather, as kaitiaki, they are charged with ensuring that the land, resources and associated knowledge continues to exist for the benefit of generations past, present and in the future. There are at least two important aspects in respect of the kaitiakitanga they exercise.

Firstly, the responsibility of kaitiakitanga over the land, resources and knowledge is shared collectively. The principle of collectivity is a fundamental one underpinning Maori society. This principle also affects the way in which individuals relate and interact with one another, and the other entities of the natural world. An individual is therefore seen as part of a collective, whether it be the iwi, hapu or whanau and his or her interests and rights exist within the wider context of those of the collective.

Secondly, as land and resources vary according to the iwi rohe within which they are located, the knowledge inherent within each rohe also varies: the knowledge is geographically and culturally rooted to that particular rohe. Accordingly, the tikanga developed to provide for that knowledge is specific and unique to the rohe and respective iwi. Royal comments upon this and states:⁶

“Individual cultures cannot help but reflect individual environmental realities, for they all come forth from those areas and are shaped by them. This is reflected in waiata, karakia, purakau and pakiwaitara, to name a few items of tribal oral literature.”

⁶ Above n 6, at 13.

Pere also discusses the unique nature of tribal knowledge during an account of his involvement in oral history, or korero tuku iho research:⁷

“I've always believed that there's not really any such thing as Maori history, but tribal history... because when we talk about things Maori, it doesn't seem to define clearly what we really mean.... But the word 'tribal' certainly does. And each tribe will tell you that it has its own history; it has its own mana; it has its own name; it has its own turangawaewae; it has all those things that make up a specific tribal group.”

At this point, a distinction is drawn in respect to the knowledge currently available to Maori. There is the knowledge inherent within the land and resources that has not yet been transmitted to Maori. However, ensuring the well-being of the land and resources within the rohe, maintains the knowledge inherent within it. Maori are also kaitiaki of that knowledge which has been transmitted to them, their korero tuku iho, from previous generations. It is the latter type of knowledge, contained in korero tuku iho, or oral literature, that is the primary focus of this paper.

C Classes of Knowledge

Maori recognise different components and categories of knowledge. Regardless of its specific nature, knowledge of all kinds consists of two underlying components, namely, te kauwae runga (“upper-jaw”) and te kauwae raro (“lower-jaw”). Te kauwae runga refers to the celestial, philosophical and spiritual components of knowledge. While te kauwae raro, refers to terrestrial, technical components of knowledge. As the symbolism of the upper and lower jaw suggests, Maori are cognisant of both these components, even in contexts where one or the other is apparently of primary concern.⁸

Maori perceive knowledge in various categories. The terms describing the main categories are referred to in the tradition mentioned earlier of Tane and the three kete of knowledge.⁹ The

⁷ Pere, J. *Oral Tradition and Tribal History*, *Oral History in New Zealand*, 1990-1991, Vol 3, pp. 1-4, at 1.

⁸ For further discussion on these components, see Benton, N & Benton, R. *The Unbroken Thread: Maori Learning and the National Qualifications Framework*, New Zealand Council for Educational Research, Wellington, 1995 at 2.

⁹ See discussion at page 3.

three kete, and accordingly the three principal categories into which matauranga Maori is organised, have been described as follows:

- Te Kete Aronui, (“aronui” translates as “that before us”) refers to religious, ceremonial and other advanced knowledge relevant to the enlightenment of man, and the preservation of his physical, spiritual, and psychological welfare. Marsden describes the knowledge within Te Kete Aronui as the knowledge of “the natural world around us as apprehended by the senses.”¹⁰
- Te Kete Tuauri, (“tuauri” translates as “beyond in the world of darkness”) refers to knowledge of benign ritual and the history and practices of human genealogy. Marsden describes knowledge within Te Kete Tuauri as “the real world behind the world of sense perception or the natural world” and that it concerns “the world where the cosmic processes originated and continue to operate as a complex series of rhythmical patterns of energy to uphold, sustain and replenish the energies and life of the natural world.”¹¹
- Te Kete Tuatea, (“tuatea” translates as “beyond space and time”) refers to knowledge of karakia, whether benign or malign in intent or effect, and knowledge of “the transcendent eternal world of the spirit [which] is ultimate reality.”¹²

From these three main kete of knowledge, are further, related categories of knowledge.¹³ As the source of the kete is tapu (that is the realm of Io) so too is the knowledge within them. Thus Maori perceive all knowledge to be tapu, albeit to varying degrees. An example of knowledge commonly perceived as tapu is that relating to whakapapa.¹⁴

¹⁰ Above n 1, at 10.

¹¹ Ibid.

¹² Ibid.

¹³ For further discussion on these other categories, see above n 8.

¹⁴ Whakapapa, in this sense, refers to the genealogy of all things, rather than the limited, ‘family tree’ type perception of it which is becoming increasingly popular. Whakapapa therefore refers to the whakapapa of different generations of people; the whakapapa of the people to the land and the resources; the whakapapa of knowledge and language (similar to astronomical charts and the ‘elements table’ of western science).

D *Classes of People*

The nature of the knowledge determines to whom, or the type of person to whom, it may be transmitted. In light of the tapu nature of knowledge, and the importance to the well-being of the iwi to preserve it, Maori have tikanga to control its dissemination, and ensure that it is utilised in an appropriate manner. Marsden comments upon the dissemination of knowledge, and states:¹⁵

“It was a basic tenet of Maoridom that the inner corpus of sacred knowledge was not to be shared with the tutua - the common herd, lest such knowledge be abused and misused. Such sacred knowledge was not lightly taught and was shared only with selected candidates who after a long apprenticeship and testing were deemed fit to hold such knowledge.”

E *Forum for Transmitting Knowledge*

A similar vein is followed by Rewiti Kohere, in his commentary on the proverb “Kaua te wareware e tu ki te marae,” which translates as “Let not a plebian stand on the marae.”¹⁶ Kohere explains that excessive democratisation in the area of knowledge is undesirable as knowledge obtained and applied by those without the requisite mana can be detrimental to the rest of the iwi or hapu.¹⁷

The whakapapa and mana of the individual are vital considerations when determining to whom knowledge ought to be transmitted. Thus, the more traditional repositories within iwi of the most tapu knowledge were the Rangatira, Ariki and, most commonly, the Tohunga. For example, while korero tuku iho associated with te kauwae raro knowledge may have been transmitted to anyone who wanted to learn, access to korero tuku iho associated with te kauwae runga knowledge was confined, for example, to members of the rangatira lineages.

An individual's mana and whakapapa is also a determining factor to identify whom may analyse or validate certain knowledge or the korero tuku iho in which it is recorded. Analysing korero tuku iho does not necessarily mean critiquing it. Rather, korero tuku iho is

¹⁵ Above n 1, at 4.

¹⁶ Kohere, R.T. *He konae aronui: Maori proverbs and sayings*. (1951) Wellington: A.H. & A.W. Reed, at 20, cited in above n 8, at 1.

¹⁷ Ibid.

considered in light of, for example, the mana of the individual transmitting it and the setting in which it is being transmitted. Pere discusses this point in reference to his own experiences researching korero tuku iho and states:¹⁸

“We reconcile differences and versions and variations with other tribal groups by respecting what they have - we're all connected in some way where we have a version of oral history that's connected with some current event or some historical event - and they accept ours... we've listened to their stories, and matched them up with ours. And we've appreciated... each tribe has its own, so we haven't gone in and said that they're wrong. We've accepted what they've said, and accepted their stories and their information.”

E Forum for Transmitting Knowledge

Traditionally, the type of knowledge, including the formal categories of knowledge outlined above, dictated the institution or forum within which it was utilised and transmitted. While knowledge was constantly disseminated in every day forum, some certain, tapu knowledge was only transmitted in controlled forum in which particular tikanga was practiced. The formal transmission of te kauwae runga knowledge traditionally occurred within special institutions, for instance, whare wananga.

Whare wananga were the premier institution for formal education and were commonly devoted to transmitting te kauwae runga knowledge. There were also other institutions for instruction in the arts, crafts and various economic pursuits. These institutions were devoted to matters connected mainly to te kauwae raro. For example, there were *whare pu-rakau* (martial arts and weaponry), *whare pora* or *whare tactic* (weaving), and *whare mata* or *whare takaha* which functioned both as a school for instruction in matters related to bird-snaring, fishing and other food gathering pursuits.

Two points are made in respect of these institutions. Firstly, even although many of the terms used to describe the institutions include the word “whare” instruction did not always occur in set buildings. Rather the term whare wananga, refers more to an institution and its activities,

¹⁸ Above n 7, at 2.

irrespective of the physical setting. For example, some iwi, such as Ngai Tahu, had permanent houses in which instruction took place. While others, such as some hapu within Tuhoe, commonly facilitated learning outdoors, in the environment most suitable to the instruction at hand.

Secondly, the names for these institutions vary greatly from rohe to rohe, with the same terms often being used for quite different institutions among various iwi. For example, the highest forum of learning was called the *whare wananga* in Taranaki, the *whare kura* by Ngai Tahu, the *whare maire* by Tuhoe and the *whare takiura*, by hapu within Tuhoe. However, despite the terminological differences in organisational detail, the pattern of higher education seems to have been similar in most regions.

Nowadays, the *marae* remains as the most prominent forum where oratory occurs and *korero tuku iho* is transmitted. *Marae* are the main venue for *hui* and, more recently, an important venue for *kohanga reo*, *kura kaupapa* and *wananga*. The establishment of contemporary *whare wananga*¹⁹ also provide suitable venues for the transmission of *korero tuku iho*. Other less traditional forum (such as meeting halls, class rooms and offices) are 'prepared' with *karakia* or similar ceremony to establish the *tapu* and to ensure knowledge may be transmitted safely.

F Maori Pedagogy & Knowledge

1 Oral transmission

Prior to contact with Pakeha, and thus the written word, Maori transmitted knowledge orally in accordance with oral traditions such as *whaikorero*, *hui*, *wananga* and *karakia*. As mentioned earlier, knowledge was recorded and encoded within *korero tuku iho*, such as *waiata*, *haka*, *whakatauki* and *purakau*. The prominence of oratory in Maori society is testimony to the importance Maori place on the oral transmission of knowledge.

¹⁹ *Whare wananga* are distinguished from "universities" in that the two are administered according to different philosophies of learning and teaching.

Pere discusses the importance of oratory as follows:²⁰

“...oratory has a vital part to play in Maori institutional life. It has been, yesterday, today and tomorrow, will always be a vital essence in things Maori. The transmission of whakapapa has always been through the language, through the oral language, which is passing down from one repository to another of tribal history. So that without the language, everything else becomes unimportant. The language and oratory are the lifeline that keep all things tribal together... [i]ts like the tahuu of a meeting house - the backbone of the tipuna.”

2 Ceremony & karakia

Ceremony and karakia at critical stages of learning and were, and continue to be, important and necessary procedures during the transmission of knowledge. There were karakia to whakawatea the forum within which the knowledge was to be transmitted. There were special karakia in preparation of the learning session, to prepare the learner's mind to receive the knowledge, and to ensure that the knowledge was retained. For example, two generic names of karakia from the Tuhoe rohe are *moremore puwha* and *pou*. The former were karakia used when transmitting knowledge of weaving and carving, and over warriors preparing for battle, to make the mind alert and receptive. The latter is the generic name of karakia recited to fix knowledge and enable it to be recalled when required.

Ceremony and karakia are just as important today for the same reasons. A hui participant at Motatau refers to the way in which a Kuia from her iwi involves karakia when teaching mahi kakahu and cloak making:²¹

“As a weaver of kakahu she has had kiwi and kukupa feathers... She karakias the feathers, and shows people what she's doing so they'll understand.... The spiritual side is important; she teaches the younger women learning weaving from her about the spiritual dimensions of the feathers and the work. We must go back to the marae, to the kuia and kaumatua, to the old people who have the responsibility to teach

²⁰ Above n 7, at 1.

²¹ Minutes of the New Zealand Conservation Authority's Consultation Hui concerning the draft discussion paper *Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, Motatau, Motatau Marae, 25 November 1994.

these things. All the people who work with kakahu, kete and tukutuku must hui with our whanau to learn these important things.”

The main principle is that in order for learning to be effective, certain tikanga must be followed to prepare the learner mentally, physically, and spiritually, and to ensure that the “pieces of knowledge” will eventually be viewed as a whole.

3 “Tools” for transmitting knowledge

In the absence of a written record, Maori relied upon tools or mechanisms, both tangible and intangible, to transmit and recollect information. To accurately remember large quantities of information, Maori developed sophisticated memory management techniques within their specific philosophical framework, and according to their unique world-view. Further, important use was made of metaphor and personification, and explanations and knowledge was often encoded in narrative form. For this reason, the various meanings within these mechanisms are only obtainable within the cultural context or setting within which they were constructed.

Whakapapa is an example of such a mechanism. Although the term is commonly used today to refer to human genealogy, whakapapa properly refers to, and provides for, the relationships and connections of all phenomena within the natural world. With an understanding of the nature and dynamics of whakapapa, Maori were able to utilise it as a tool to encode and transmit matakā Maori. Williams comments upon this point and states:²²

“Maori had an extensive whakapapa of all flora and fauna, thereby codifying the natural world in a fashion similar to modern biological classification systems...There is then a very clear parallel between taxonomy and the whakapapa system used by matakā Maori. In particular, taxonomy practiced by Maori was a taxonomy which related life forms and phenomenon back to their place in the ecology.”

²² Williams, D.V. *Matakā Maori and Taonga* (January 1997) a report prepared for the Waitangi Tribunal for Wai 262, the Indigenous Flora and Fauna claim, at 15.

Natural entities are often personified within the whakapapa codification. An example of this is a whakapapa describing the different forms of stone and their groupings:²³

“Papa-matua-te-Kore (Papa, the parentless) mated with Rangi-a-Tamaku and had a first born Putoto, whose sister was Parawhenuamea (personified form of water). Putoto took his own sister to wife and she bore Rakahore, who mated with Hineuku (the Clay Maiden), who bore Tuamatua (all kinds of stones found on the sea coasts), from whom came gravel and stone. The younger brother of Tuamatua was Whatuaho (greywacke, chert, etc), next came Papakura (origin of volcanic stone, kauwhanga, whatukura), then Taurira-karapa (greenstone)...”

Further, the names included within whakapapa contain and relay information. A name not only distinguishes one person or object from another, but also conveys relevant information relating to it.

Personification is also utilised for transmitting morals, values and ethics. An example is the personification of the harakeke, or flax plant, as a whanau. Children are taught from an early age to view the clusters of flax leaves as a whanau (family) and at the centre of each is the rito (youngest leaf) which is likened to a tamaiti (child). Enclosing and protecting this are the parents and other members of the extended whanau. People who have learnt about harakeke in this way know that the rito must not be damaged or left without protection of its parents or else the continued growth will be at risk. The analogy with family, the tikanga associated with flax use, also serves to cement the cultural and spiritual relationship of Maori with harakeke. It is apparent from this discussion that any use of flax outside this cultural context may be seen to impinge on, and degrade the relationship of, Maori with harakeke.”²⁴

Purakau, or myths, are also prominent mechanisms. Often dismissed as “the superstitious and quaint imaginings of primitive, pre-literate societies”, purakau contain and convey not only knowledge, but also values, morals and ethics. Some myths are often constructed as mnemonics, or memory pegs, that enable the receiver of the knowledge to remember

²³ Ibid, at 16.

²⁴ Gibbs, N. *Genetically Modified Organisms and Maori Cultural and Ethical Issues*, Ministry for the Environment, Wellington, 1996, at 34.

historical facts and events. Again, having been constructed, and culturally and geographically rooted, within a specific setting, or world-view, the relevance and validity of myth is often only revealed when interpreted within a particular setting.

Myths were also utilised as "oral maps", whereby the journeys of demigods or phenomena (such as mountains), when retold, can describe an area of land, features within that area, or a travel route. An example of the use of myths as an oral map are those relating to the tupuna, Tohe, of the Te Taitokerau region. Muriwhenua oral traditions describe the journey of Tohe from Kapowairua, near Te Rerenga Wairua (Cape Reinga), to Ahipara (near Kaitaia), and his various actions and encounters along the way. By analysing the myth an oral map unfolds describing the names of settlements, rivers and land marks in the Muriwhenua region.²⁵

4 *Maintaining the integrity of transmission*

In addition to memorising the content of the whakapapa, Maori ensure that the manner in which it is transmitted accords with tikanga. Traditionally, tohunga equally emphasised the correct intonation and pronunciation whenever an individual recited whakapapa. Carter discusses the need to recite whakapapa according to tikanga and states:²⁶

"...in the event of a relative dying without issue, it became necessary for any claimant wishing to succeed the deceased to prove his relationship by whakapapa and traditional means. In his recital, listened to by assessors who were men of proven ability in the field of traditional recitation, attention was given not to the substance of the whakapapa but to the intonation of the recital. If given correctly and in accordance with customary usage (that is, if the modulation of the voice at various stages followed the correct pattern), then it would be accepted that there was substance and purity in the speaker's claim."

²⁵ For example, part of the myth refers to Tohe traversing a the stream atop a giant mullet, and he subsequently named that stream Waikanae, or Mullet Waters. It is this stream from which the Muriwhenua people traditionally gathered mullet (and it remains a customary fishing site for them).

²⁶ Carter, M. *The Preservation of Maori Oral Tradition*, *Oral History in New Zealand*, 1990-1991, Vol 3, pp. 5-6, at 5.

Pere also refers to the importance of ritual during the transmission of knowledge:²⁷

“Many of our repositories know the responsibilities and the repercussions that are associated with the ritual of transmission. So they have to be as accurate and as direct as is required, as has already been set by our tipuna of the past... So that the importance of tradition, of discipline, of ritual, and treating the material with the utmost responsibility and care.”

G Commentary

In summary, tikanga Maori associated with knowledge is based upon some general, yet fundamental, principles. Knowledge is not viewed in isolation but as part of the whakapapa or network of relations binding all entities, tangible and intangible, within the natural world. Knowledge, or at least certain kinds, is perceived as tapu. Its utilisation and transmission occurs within a societal framework of collectively rights and interests. And the tikanga followed within each framework is specific to different iwi and/or hapu.

²⁷ Ministry of Commerce *Intellectual Property Law Reform Bill: Maori Consultation Paper*, Business Policy Division, Ministry of Commerce, Wellington 1994, at 2.

²⁸ Cornish, W. R. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell, London, 1996, at 3.

²⁹ *Grain Processing Corp v Commissioner of Patents* (1985) 155 ALJR 1009 (1985) 1010, cited in Hammond, G. *The Law of Intellectual Property*, Oxford: Oxford Law Journal vol. 29, no. 1, pp. 93-125, at 97.

III INTELLECTUAL PROPERTY & COPYRIGHT

A Intellectual Property

The *Concise Oxford Dictionary* (9th ed) defines "intellectual property" as "non-tangible property that is the result of creativity, such as patents, copyright, etc." Intellectual property "rights" have been defined as "the rights that people have over their intellectual creations (that is, the creation of their minds).²⁸ Thus intellectual property rights can exist over inventions, trade marks, designs, stories, songs etc. Rights in respect to intellectual property are prescribed by statute and, in general, are concerned with marking out, by means of legal definition, types of conduct which may not be pursued without the consent of the right-owner. Further, these rights are all dealt with by broad analogy to property rights in tangible movables.²⁹

A fundamental principle of intellectual property is encapsulated in a 1918 judgement of Justice Brandeis where he states:³⁰

"The general rule of law is that the noblest of human productions - knowledge, truths ascertained, conceptions and ideas - become, after voluntary communication to others, free as the air to common use."

Thus, intellectual property rights are based upon the premise that creators should enjoy ownership of their own 'ideas' as a fundamental or natural entitlement; an intellectual creation is a natural extension of the creator's person, and becomes their naturally derived property. It is perceived that creators ought to receive the benefits, including economic benefits, of their creations and thus intellectual property law is generally framed to enable creators and producers of knowledge-based commodities to capture the full (or at least the fullest) benefits of those commodities.

²⁸ Ministry of Commerce *Intellectual Property Law Reform Bill: Maori Consultation Paper*, Business Policy Division, Ministry of Commerce, Wellington 1994, at 5.

²⁹ Cornish, W. R. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell, London, 1996, at 3.

³⁰ *International News Service (INS) v Associated Press*, 248 US 215 (1918) at 250, cited in Hammond, G. The Legal Protection of Ideas, *Osgoode Hall Law Journal* vol. 29, no. 1, pp. 93-125, at 97.

The intellectual property right system is also developed upon society's perception that it is important to have people innovating (eg developing inventions, writing books, building up a strong trade marks for their products etc) so that social and economic development can occur.³¹ Thus, the rights of the individual creator are, to a certain extent, circumscribed by the interests of the wider society. This is in part determined by the principle that ideas, or the free exchange of ideas, should never be sacrificed to the creation of a private property right in knowledge.

While the concept of intellectual property is commonly shared world-wide, the legal regimes providing for them differ amongst common law and civil law jurisdictions. Hammond identifies two general models within contemporary legal systems which seek to address the general objectives of intellectual property law.³² The first, the protective model, creates a series of discrete protective laws which give proprietary protection on closely defined terms. The second, the state support model, gives creators direct support or rewards, in one form or another, but allows relatively free appropriation by producers. Common law jurisdictions, such as New Zealand, have historically adopted the protective model.³³

The particular type of intellectual property that this paper discusses is copyright.

B Copyright

Copyright is a property right wholly created by statute, and gives an exclusive right to do or to authorise others to do certain acts in relation to "works", which are also defined by statute. Copyright is only concerned with works such as literary, artistic, dramatic and musical works. In general, copyright aims to protect the expression of the human mind by ensuring that the particular work or the subject matter is protected from unfair plagiarism or copying without the consent of the copyright owner, the creator of the copyright work. In New Zealand, copyright is created and provided for by the Copyright Act 1994.

³¹ Above n 28, at 6.

³² Hammond, G. *The Legal Protection of Ideas*, *Osgoode Hall Law Journal* vol. 29, no. 1, pp. 93-125, at 94.

³³ In comparison, most civil law jurisdictions place less emphasis on economic benefit and recognise the moral rights of creators. Thus authors' rights are commonly divided into two distinct categories - economic rights and moral rights. The scope, content and duration of the latter differ from country to country and are exercisable by an author even though he has completely parted with all the economic rights in his work.

The concept of copyright has its origins in the status given to writers and artists in early times and the adverse reaction to the plagiarism manifested in society over the centuries. In the Middle Ages the control of much writing rested in the Church. While there was still a concern in society at that time to discourage plagiarism, the copying of manuscripts, most of which were holy works, was accepted as a right on the basis that the originals belonged to the Church as well as the copies.

The invention of printing in approximately 1440 was a revolutionary development - printing being the first of the new technologies which over succeeding centuries have facilitated the copying of original works and created the need for copyright. After the introduction of printing, control over the books and the printing of them was taken into the hands of the Crown in many countries, initially for reason of censorship. In England, printing was controlled by letters patent and then by licensing (the theory being that all printing was the prerogative of the King). The exclusive rights to copy and sell books were granted to the Stationers Company comprising printers, book binders and sellers. An authors personal rights counted for little. The Crown, and through the Crown, the Stationers Company exercised monopoly powers over the printing of books.

Controls restricting the importation of books (as a means of evading the regulations governing printing) were introduced in 1623, 1625 and 1637 (a decree of the Star Chamber). In 1641 a Parliamentary Ordinance was passed prohibiting the printing or importing of books without the authority and consent of the book owners, giving explicit recognition to the property in 'copy' which was understood to exist at common law. In 1709 Parliament passed the first English copyright Act, the Statute of Anne, which conferred copyright on the author for all books published after 1710 for a period of 14 years (with a further 14 years protection in favour of the author if he was still living at the end of the first period).

As with intellectual property right's in general, rights associated with copyright are mainly economic in character. They are conferred upon an author for the economic benefit of doing so, moreso than in recognition of the creator's intrinsic or personal connection with their idea or invention. The latter relates to the idea of natural economic justice and recognises that it is the right of a creator to obtain financial reward for their intellectual endeavours. The former is more utilitarian in that intellectual property rights are granted to *encourage* intellectual

endeavour for social benefit. Without copyright, it is perceived that authors will have no incentive to create. In order to encourage intellectual endeavour, exclusive rights are created.

C Copyright & Tikanga Maori

Maori share concerns about the concept of copyright, and the principles and policies underpinning it.³⁴

1 Instrument of colonisation

Copyright is wholly legislatively created and, therefore, directly expressive of government policy. New Zealand copyright legislation mirrors the legislation of the United Kingdom which is sourced from and developed within that particular context. Maori have not had any (proper) involvement in developing policy concerning or establishing laws governing the utilisation and transmission of knowledge in New Zealand. It follows that their unique perception of knowledge, underpinning their practices concerning it, is not expressed in current policy and law.

In light of this, copyright legislation is seen as a tool for the continuing colonisation of Maori. The imposition by law of a copyright regime not necessarily suitable to cultural setting of New Zealand has meant that Maori have had to compromise their own perceptions and beliefs to 'fit within' this regime. This perception was espoused at a hui at Takapuwahia marae, in Wellington, where a hui participant stated:³⁵

"Many Maori are annoyed that when they do what they want to do in their own and - a Treaty right - they find they break the law because of a law made by non-Maori... Maori are only doing what they've been doing for the last thousand years."

³⁴ The more specific concerns of Maori in respect to the Copyright Act are discussed in more detail in chapter VI and VII.

³⁵ Above n 5.

Further, McNeill provides comment relevant to Maori concerning the marginalisation of indigenous peoples by intellectual property laws:³⁶

“For indigenous peoples, the loss of their cultural and intellectual properties - as with other forms - is linked to colonialist processes. This is so since historically the alienation of such properties has followed from their political marginalisation and their consequent inability to retain control over their use and disposal. Thus the protection of properties is also linked by indigenous peoples to the realisation of their right to self-determination - to the wresting back of the right to maintain their own models of knowledge ownership.”

Unless and until Maori have effective input in framing the laws governing the way in which their knowledge (indigenous to New Zealand) is provided for, fundamental difficulties will always arise in respect to legislation such as the Copyright Act.

2 *Economic rationale*

Maori do not accept the overtly economic rationale of copyright legislation. While copyright protection is mainly economic, Maori seek protection on other grounds, such as the maintenance of their culture and the integrity of the knowledge associated with it.

In their submission to a Ministry of Commerce discussion paper, Te Waka Toi refer to the impropriety of commodifying knowledge and state “Maori object to the commodification of their cultural and intellectual property to commercially profit others”.³⁷ They provide examples of ‘cultural exploitation’ with “the All Blacks copyright of the haka “Ka Mate!” and “Sam Freedman’s copyright of the haka “Ruamoko!”.

The inappropriate and unauthorised use of Maori images for which, it is submitted, copyright legislation provides inadequate protection are instances where Maori culture has been, to

³⁶ McNeill, M.J. *Intellectual Property Law Reform and the Marginalisation of Maori*, a thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts, University of Auckland, 1995, at 2.

³⁷ Submission of Te Waka Toi to the Ministry of Commerce Committee on the Intellectual Property Law Reform Bill Maori Consultation Paper, 1994, at 3. Te Waka Toi is a board of the Arts Council of New Zealand Toi Aotearoa, a board established by the Arts Council of New Zealand Toi Aotearoa Act 1994.

some degree, "desecrated."³⁸ Maori therefore expect copyright laws to emphasise the protection of their cultural interests, as well as their economic interests.

3 *Fallacy of "real" & "intellectual" distinction*

Copyright (as with other intellectual property concepts) is premised upon a distinction between 'real' and 'intellectual' property, and that proprietary rights exist in respect to both. This distinction, however, does not accord with the Maori world-view whereby entities are viewed holistically and the tangible and intangible exist as a whole. The knowledge relating to an entity is an inherent part of it, and can not be recognised in isolation. Moreso, emphasis is placed on the relationships between and associated with the two.

The fallacy of dealing with the immaterial in isolation of the material is highlighted by on-going debates concerning the "idea/expression dichotomy". Traditionally, courts have held that copyright can not subsist in an idea, only the form in which that idea is expressed. This dichotomy, however, has been challenged whereby it is argued that such a distinction is superficial - particularly if it is taken to mean that copyright protects only the form or expression of an idea and not its substantive content.³⁹

Arguably, copyright protects an idea in that any work can be seen as constituting the embodiment or expression of ideas and, therefore, to some extent, copyright is *protecting* those ideas. Laddie et al supports the assertion that copyright may effectively protect the idea where they state:⁴⁰

"It will be perceived that any literary or dramatic work contains a combination of detailed ideas, thoughts or information expressed in a particular language or notation; and once it is conceded that the protection is not confined to the actual language or notation used, it must follow that what remains, and is protected, consists of that collection of ideas, thoughts or information."

³⁸ Ibid.

³⁹ For example, see the judicial comment in *Plix Products Ltd v Frank M Winstone (Merchants) Ltd* (1984) 1 TCLR 176, and *Bleiman News Media (Auckland) Ltd* [1994] 2 NZLR 673.

⁴⁰ Laddie, H., Prescott, P. & Vitoria, M. *The Modern Law of Copyright* Butterworths, London, 1980, at 32.

A related point concerns the assumption within copyright law that all subject-matter requires to exist in some permanent form before it gains copyright. It is possible to look upon this as a corollary of the principle that the protection goes only to the particular expression of ideas. Ideas, thoughts and facts merely existing in a man's brain are not 'works', and in that form are not protected by copyright. However, once reduced to writing or other material form, the work, in most cases, qualifies for protection.⁴¹ As long as there is no fixation, the author of a work has no copyright and must seek legal protection elsewhere.⁴²

The prerequisite of fixation arguably contradicts tikanga Maori which provides that the predominant mode of transmission is orally. Intangible 'tools' such as waiata, whakatauki and purakau are the forms in which ideas are encoded or embedded. Korero tuku iho are not fixed but are passed on orally from generation to generation. According to copyright laws, such mechanisms do not qualify for protection and thus korero tuku iho are open to free (mis)appropriation. Laddie et al question the requirement of a work to be fixed *in writing* and state:⁴³

[W]e may appeal to common sense. It seems artificial, to say the least, to allege that a typewritten novel is a literary work but that exactly the same words embodied in a dictaphone tape is not. If that be the law, it might well be asked what rational policy is being served, and where lies the advantage to the community. There ought to be no magic in the particular mode the author has chosen to set down his work.

While it is doubtful whether or not the authors envisaged a work being fixed in an *immaterial* form, support remains that, from a Maori perspective, the requirement for fixation *in writing* is too limited and limiting.

⁴¹ Ibid, at 33.

⁴² Above n 29, at 345.

⁴³ Above n 40, at 14.

IV THE WAITANGI TRIBUNAL & THE CLAIMS PROCESS

A *History and Background to the Tribunal*

The Tribunal was established in 1975 by the Treaty of Waitangi Act 1975 ("the Act"). The Tribunal's role is "to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."⁴⁴ (The 'claims' into which the Tribunal inquires are those submitted pursuant to the provisions of the Act.) Prior to 1985, the Tribunal only considered claims concerning breaches of the Treaty from 1975 forward. However, as a result of the Treaty of Waitangi Amendment Act 1985, the Tribunal may now inquire into claims dating back to 6 February 1840. (This amendment is, in part, responsible for the nature of the claims submitted to the Tribunal, and accordingly the information utilised in relation to them.)

The Tribunal is a commission of inquiry.⁴⁵ It consists of the Chief Judge of the Maori Land Court (who is both a member of the Tribunal and its Chairperson) and up to 16 other members; each of whom is appointed for their personal attributes, and knowledge and experience in the different aspects of matter likely to come the Tribunal. Almost half of the Tribunal's members are Maori, whom are experts in a range of matters, including tikanga Maori and te reo Maori.

As a commission of inquiry, the Tribunal adopts an inquisitorial, rather than adversarial, approach when inquiring into claims. Therefore, it may order witnesses to come before it, order material or documents to be produced before it, and actively search out material and facts to help it to decide upon a claim. Further, the Tribunal is not bound by the normal rules of procedures (unlike a court of law) and it may therefore conduct its hearings in a manner and at a venue it deems appropriate. Often claims are heard on a marae, and the hearing is conducted according to the kawa of that marae.

⁴⁴ Treaty of Waitangi Act 1975, preamble.

⁴⁵ Ibid, Second Schedule, clause 8.

B The Claims Process

The four basic criterion for lodging a claim with the Tribunal are that:

- 1 the claim must be made by an **individual Maori person or persons**, although that person or persons may represent Maori groups or organisations including whanau, hapu or iwi groups;
- 2 the claim must clearly state the specific **legislative measures** and/or **Crown acts, omissions, policies and practices** that the claimants are complaining about;
- 3 the claim must clearly state that the matters complained of are **inconsistent with the principles of the Treaty of Waitangi**; and
- 4 the claim must clearly state **that the matters have prejudicially affected the claimant** and/or the group the claimant represents.

The general way in which the Tribunal inquires into claims is set out in the flow diagram included in appendix 1. This report will mainly focus upon the research and pre-hearing stages of a Tribunal inquiry.

C Claims Research

To conduct as comprehensive an inquiry as possible into claims, the Tribunal requires evidence and research concerning the matters claimed. For most inquiries, research is undertaken by the parties to the claims, namely, the claimants and the Crown (including Crown agents and government departments).⁴⁶ Research is also undertaken by the Tribunal's researchers (or researchers commissioned by it), independent researchers, and other organisations (such as the Crown Forestry Rental Trust and the Office of Treaty Settlements), which may be presented during a Tribunal inquiry.

There are various types of research required for any Tribunal inquiry, such as, historical research, anthropological research, legal research, socio-economic research and scientific

⁴⁶ I note however that not all the parties are required to present evidence or research before the Tribunal can report on a claim. For example, in Wai 143, the Taranaki Claims inquiry, the Tribunal issued an interim report without the Crown presenting evidence at the hearings.

research. To date, the Tribunal has largely focused upon 'historical' claims relating to Crown actions, policies, and such, of the nineteenth century concerning land and sea, and the resources contained upon and within them. Much research is, therefore, historical and concerns the claimants' history (such as their customary practices and socio-economic situation prior to colonisation), the actions of the Crown (including the actions of government departments, the Native (Maori) Land Court, and local authorities) and the consequences, particularly to the claimants, of these actions.

The main sources upon which researchers commonly rely to undertake historical research are written sources. Some major repositories within New Zealand of written, historical information are the National Archive, the National Library, the Alexander Turnbull Library, and Maori Land Court. These repositories contain records, such as published books, newspapers and periodicals, journals (such as the *Journal of Polynesian History*) and archival sources (such as the *Appendices to the Journals of the House of Representatives*, the *Great Britain Parliamentary Papers*, and minute books of the Maori Land Court). The authors of most of these types of records were commonly government agents, colonial officials, missionaries, and Maori (that is, those whom were literate during the nineteenth century).

These sources provide researchers with information concerning, for example, the history of the alienation of land blocks, the origins and development of legislation and Crown policies (both past and current) and the decisions (and consequences) of the Maori Land Court. The information is gathered, analysed and compiled into a written, research report. That report is then placed on the record of inquiry of a claim and referred to by the Tribunal during its inquiry.

D *Commentary Concerning Claims Research*

In respect to archival and similar sources, the authors of them were commonly government agents, colonial officials, missionaries, and judges and staff of the Native (Maori) Land Court. Although some Maori occupied these positions, most commonly they were held by Pakeha. The information sourced in most of the records is, therefore, provided from a Pakeha (or Crown) perspective. Depending on the purpose of the research, this fact alone does not detract from the usefulness of the information. For example, such sources are invaluable for

highlighting Crown and/or government opinion during the nineteenth century. As these are the main sources of information for research within the process, it is submitted that the research reports, in most cases, are espousing Pakeha (or Crown) opinion and/or perspectives.

Problems can arise when such sources are referred to to evince *Maori* perspectives and *Maori* history. Arguably, a claimant perspective can not be provided by the written, archival sources that are more commonly used for claims research, such as government archives and manuscripts. More often than not the authors of such written, archival sources are not of the claimant iwi/hapu and, by definition, do not provide a perspective of that iwi/hapu. Rather, they may provide an *interpretation* of the iwi/hapu perspective. Further, such works can be riddled with eurocentric assumptions and broad, unuseful generalisations of the authors. One commentator refers to misunderstandings of past events that occurred and were recorded:⁴⁷

“The warmth and feeling of the incantations have disappeared, and all that was cherished, revered and tapu has come under academic scrutiny. When Te Whatahoro recorded the recitals of Te Pohuhu, Te Matorohanga and others, a new era had begun of misinterpretation, of misunderstanding, of tribal assessment and, sadly, ridicule. The ancestor has been dismembered, his recitals trespassed upon.”

It should be noted that there is a substantial amount of written sources that were recorded by *Maori* in the nineteenth century which, it is submitted, would provide a perspective of events that occurred in the past from their own cultural context.

In addition to research based on written sources, research of korero *tuku iho* is receiving increasing attention within the process. The philosophy underpinning and methodology applied for such research is discussed in the next chapter.

⁴⁷ Above n 26, at 6.

V KORERO TUKU IHO RESEARCH

For any claim, the claimants are often required to undertake research of their customary land tenure and uses, their customary practices prior to contact with Pakeha (and the how those practices have developed to the present), and their perspectives and/or accounts of events, people and/or places involved with the claim. The primary objective throughout this kind of research is to evince the claimant perspective of the claim, and/or aspects of it.

An interesting aside concerns the research required for historical claims (such as those involving confiscation) and with whom lies the onus of presenting particular aspects of that research. Regarding claims of unlawful confiscation and alienation of Maori customary land,⁴⁸ the Crown often assumes that such land was Crown land subject, however, to Native aboriginal title, unless and until that title was lawfully extinguished. Therefore claimants (currently) have the onus of producing evidence displaying some prior title, occupation and use of that land up and until the time that title was (allegedly) extinguished. Durie provides related comment on this point in respect to aboriginal title of Australia where he states:⁴⁹

“Were one to adopt the Maori perspective, one would find it difficult to understand why it is that under the Australian Native Title Act 1993, and the various state enactments, Australian Aboriginals must establish their right to land on evidence of past and continuing customary association, and why it is that the Crown does not have a larger burden of establishing its right, without reliance on legal presumptions still clanking in medieval chambers, or without recourse to legal fictions. Maori claimants have contended that if anyone is to have the benefit of the assumption in this, it ought to be them.”

Thus, an argument can be made “that the burden of proof should properly be on the Crown to establish its rights (and the rights of companies and citizens relying on state law) by proof of proper extinguishment of native title if it is asserted that it has occurred.”⁵⁰ It is submitted that

⁴⁸ That is, land for which title has not been registered.

⁴⁹ Durie, E.T.J. “Native Title Re-established”, a paper presented to the International Bar Association, 25th Biennial Conference, Melbourne, 13 October 1994, at 17, (cited in Williams, D.V. *Matauranga Maori and Taonga*, a report prepared for the Wai 262 claim, Waitangi Tribunal, Wellington, 1997, at 7).

⁵⁰ Above n 22, at 6.

such a change of onus would dramatically alter the nature of research undertaken by claimants.

A claimant perspective may be evinced from written recorded sources. Research involving korero tuku iho can also provide such a perspective and, for some of the reasons mentioned below, is receiving increasing recognition for the worth such research adds to the claims process. "Korero tuku iho research" is the term used throughout this paper to describe claimant research based upon oral literature of an iwi.

A Korero Tuku Iho Research

Korero tuku iho research involves recording the matauranga and korero tuku iho passed down by earlier generations within an iwi or hapu. At the same time it records the personal, and often shared, experiences of individuals of current generations. Korero tuku iho research is frequently undertaken at an iwi or hapu level, rather than at a general "Maori" level. One reason for this is that the Tribunal mostly hears claims by specific iwi, rather than claims of a generic nature. Each iwi is distinct and unique, as is their korero tuku iho. Pere provides useful comment on this point where he states:⁵¹

"I've always believed that there's not really any such thing as Maori history, but tribal history... because when we talk about things Maori, it doesn't seem to define clearly what we really mean.... But the word 'tribal' certainly does. And each tribe will tell you that it has its own history; it has its own mana; it has its own name; it has its own turangawaewae; it has all those things that make up a specific tribal group."

B Benefits of Korero Tuku Iho Research

It is submitted that korero tuku iho research provides a more reliable iwi perspective on matters as it based upon korero tuku iho that has been accumulated and transmitted within the unique cultural context of each iwi; the knowledge is accumulated and interpreted through their specific cultural lens. The resultant korero tuku iho thus embodies the perspective of that

⁵¹ Above n 7, at 1.

iwi/hapu. One commentator discusses tribal oral traditions and the maintenance of the claimant perspectives:⁵²

“...there have been great tensions between the different media by which knowledge is transmitted. Maori believe that the oral tradition is the best tradition for the transmission of knowledge, because this knowledge is never divorced from its cultural reality: it is always maintained in the whanau, hapu and iwi, the descendants of the people who are described in the histories.”

In addition to providing an alternative perspective to those promulgated by written sources, korero tuku iho may also supplement such sources. Historic events, the acts of notable persons were often commemorated in korero tuku iho. For example, it was common for a waiata to be composed in recognition of an agreement between two or more groups. In situations where these events have been recorded, korero tuku iho can be researched to complement and/or supplement written literature concerning that same event to procure a more detailed account of it for the Tribunal.

A notable example within the Tribunal's hearing process of korero tuku iho supplementing history derived from written historical sources occurred during the Wai 55, Te Whanganui-a-Orotu claim, hearing. After an analysis of the tribal oral literature presented during that hearing, the Tribunal was able to ascertain a “Maori history of Te Whanganui-a-Orotu” and also “the claimants' viewpoint” in respect to the history of the area. When analysed together with the written, historical evidence, the Tribunal was able to draw a fuller picture of events concerning a transaction between the claimants and the Crown over the alleged purchase of Te Whanganui-a-Orotu.⁵³

C Korero Tuku Iho Research Methodology

Korero tuku iho research involves activities common to those involved with oral history research. For example, the researcher will usually undertake preliminary research, prepare for and record interviews with individuals, and analyse and present the recorded information

⁵² Above n 3, at 21.

⁵³ Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Department of Justice: Waitangi Tribunal, (Wellington, Brookers Limited, 1995) at chapters 2 and 4.

gathered from the interviews. However, the way in which these activities are undertaken distinguishes a methodology concerning korero tuku iho research from other methodologies. This is mainly due to the nature of the subject-matter common to tribal oral history research, the participants involved with the research (that is, the interviewer and the interviewees), and the manner in which the oral history is gathered and presented.

In general, korero tuku iho research is unique because it is undertaken in accordance with tikanga Maori. The following are examples of how this occurs in practice.

1 Consultation

Research for a manawhenua report concerns land and resources over which the individuals within an iwi share a collective responsibility as kaitiaki. Additionally, iwi are kaitiaki of the korero tuku iho relating to that land and resources. Thus, any korero tuku iho researcher requires, firstly, the permission of the iwi, or representative thereof, to undertake the research. Iwi should be consulted about matters including the nature and scope of the research, the purpose to which the research will serve, the proposed methodology for undertaking the research, and the people who will undertake the research. Such hui will often be held on marae, the tikanga of which will dictate the way in which the hui is facilitated. Further, iwi will have an opportunity to discuss (and at times animated discussion) the research and reach a consensus on the matters put to them by the researcher.

2 Korero tuku iho researchers

In most cases, korero tuku iho research is undertaken by a Kaumatua and experienced researcher. A Kaumatua is often involved, firstly, because iwi perceive them as having the requisite mana to receive and interpret their korero tuku iho, and iwi assume that they will ensure that it is utilised properly. A Kaumatua has the requisite knowledge of tikanga and te reo Maori to ensure that the research is undertaken according to tikanga and to interact with iwi individuals in the manner that the latter are more accustomed. Thus a Kaumatua may converse in (or else be familiar with) the dialect of a particular iwi, and is able to identify and understand parts of the conversation where otherwise undetected metaphoric references are made.

Where a younger researcher is involved with the project, either assisting a Kaumatua or undertaking the research alone, iwi will want to ensure that he or she is the proper person to be receiving their korero tuku iho. The mana and whakapapa of the researcher will be considered, along with their recognised personal attributes and skills. Mana in this respect refers not only to the perceived personal mana of the researcher, but also the mana of the iwi, hapu or whanau with whom the researcher shares whakapapa. Often, as a priority for some iwi is to ensure that the korero tuku iho remains within their iwi, the researcher (if he or she is not of that iwi) will often be required to recite their whakapapa to establish a common link with them.

The researcher will also need a minimum level of expertise with tikanga and te reo Maori to participate properly within the research process. Iwi need to be assured that the researcher will utilise the korero tuku iho in their (the iwi) best interests, and in a manner required for one of their taonga. Royal proffers the following advice to novice researchers undertaking korero tuku iho research:⁵⁴

"Intrinsic to all research is a sense of direction. A researcher travels along a pathway in order to reach certain objectives. Familiarising yourself with the dynamics of your family and tribe will help clarify goals and make the pathway clearer. Researching tribal histories is a complex task, and the experts within your family and tribe will enable you to find the *meaning* that you seek in this kind of research.... The spoken word was very important to the old people. They believed in the power of language. Whakairo often record incidents and personages, but without language and the ability to speak it well, the stories behind whakairo, tukutuku and other visual arts cannot be unlocked."

3 *Format & forum*

Interviews with the iwi are commonly facilitated within the claimant rohe. Even in circumstances where the interviewee(s) live away from the rohe, they will often return to their turangawaewae for research purposes. Interviews are frequently facilitated upon marae, within wharenuī, as these are recognised forum within which korero tuku iho may be

⁵⁴ Above n 3, at 39.

transmitted. Alternatively, they may be facilitated outdoors upon the area of land to which the korero tuku iho relates.

Interviews to gather korero tuku iho may be facilitated in a group format, rather than individuals. Within any group, the individuals participating with the interviews (and their respective mana/whakapapa) will determine the way in which the interview proceeds and for example, the order in which the participants will speak. A group forum provides the opportunity to discuss, debate and validate the korero tuku iho of the group, and further discussion will often be prompted.

Whether interviews are conducted with an individual or in a group setting, the appropriate tikanga Maori is always followed. More obvious examples of tikanga are the powhiri and mihi during the initial stage of the interview to welcome the researchers and to establish the kaupapa for the hui. Both prepares the forum and participants, and conveys information relevant to the discussion, establishing a platform or base for further discussion. Karakia also play an important part within the process. During the interview stage, karakia are said to prepare the forum within which the korero tuku iho will be communicated and to prepare the participants (researchers and iwi) for communicating it. Some karakia will relate specifically to the researcher to ensure that he or she receives and processes the korero tuku iho in the manner suitable for it. And karakia may be said at the completion of the project, in respect to the final product of the research (the report or tapes) to ensure that the tapu and mana of it are retained and maintained.

Additionally, there is the less obvious tikanga to be followed that, with a knowledge of 'whakapapa dynamics', one may not be aware is occurring. The whakapapa of a person will determine what topic and what order he or she will speak upon.

4 Presenting the research

There are several modes available for claimants to present the collated and processed korero tuku iho to the Tribunal, including written, audio, video and multi-media presentations. However, in light of the limited time and resources available to claimants, the most common

mode is to present the information in the form of a written report, often referred to as *manawhenua* reports.

D *Commentary Concerning Korero Tuku Iho Research*

The processes and aspects outlined above are typical for any korero tuku iho research. Tikanga Maori is observed during the various stages of the research, and the korero tuku iho involved is utilised within a cultural context from which it originates. In this way, it is submitted that the integrity of the korero tuku iho is (relatively) maintained along with the mana associated with it. However, there are at least two concerns relating to korero tuku iho research undertaken for the purposes of a Tribunal inquiry.

1 *Time*

The time ordinarily provided for claimants to complete the research is inadequate for iwi to undertake the preparation for and facilitation of such a process. In light of the consultation required with the wider iwi, and the involvement of several individuals and groups, the methodology concerning korero tuku iho research often can take longer to implement than other oral research methodologies.

2 *Funding*

The funding available in general for claimants to undertake research according to the appropriate tikanga Maori is also limited. Expenses involve traveling to various rohe, accommodating people at hui, providing koha at marae, and equipment. Without funding from Treaty or research agencies, claimants have the onus of meeting these expenses. Unfortunately, most do not have the financial capacity to do so, and the quality of the research they are able to produce is compromised as a result.

²² While the Act imposes other qualifications concerning whether or not copyright will subsist in a work, as outlined in sections 18 to 20, these are not immediately relevant to this paper and will not be discussed in any depth.

²³ Section 2 of the Act defines a literary work as "any work, other than a dramatic or musical work, that is written, spoken, or sung."

²⁴ Copyright Act 1994, s.14(2).

²⁵ *Ibid.*, s.21. Further section 5(3) provides that the author may be a natural person or a body corporate.

²⁶ *Ibid.*, s.5(1).

²⁷ *Ibid.*, s.3(2)(a).

VI KORERO TUKU IHO RESEARCH & THE COPYRIGHT ACT

This chapter analyses the application of certain provisions of the Copyright Act 1994 to manawhenua report prior to it being filed with the Tribunal. This paper adopts a scenario whereby an individual of an iwi undertakes research in support of a claim to the Waitangi Tribunal. Funding to research and complete the report is provided by the claimants. The research is based upon korero tuku iho gathered by the Kaumatua, Kuia and other knowledgeable persons of that researcher's iwi, and the collated information is presented in the form of a written report.

A Provisions of the Act

Part I of the Act contains provisions describing copyright and the works in which it may subsist, the acts restricted in respect to a work by copyright, whom may "own" the copyright, and the duration of the copyright.

Section 14(1) of the Act provides that copyright is a property right that exists in original works,⁵⁵ including literary works.⁵⁶ A work is not original if it is (or to the extent that it is) a copy of another work, or if it infringes (or to the extent that it infringes) the copyright in another work.⁵⁷

Copyright in a literary work subsists initially in the person who is the *author* of that work.⁵⁸ The author of a work is the person who *creates* it⁵⁹ and, in respect of a literary work, is the person by whom the arrangements necessary for the creation of the work are undertaken.⁶⁰ The copyright

⁵⁵ While the Act imposes other qualifications concerning whether or not copyright will subsist in a work, as outlined in sections 18 to 20, these are not immediately relevant to this paper and will not be discussed in any depth.

⁵⁶ Section 2 of the Act defines a literary work as "any work, other than a dramatic or musical work, that is written, spoken, or sung..."

⁵⁷ Copyright Act 1994, s.14(2).

⁵⁸ Ibid, s.21. Further section 5(3) provides that the author may be a natural person or a body corporate.

⁵⁹ Ibid, s.5(1).

⁶⁰ Ibid, s.5(2)(a).

in a literary work does not expire until the end of the period of 50 years from the end of the calendar year in which the author dies.⁶¹

If the work is deemed to be original, and meets the other qualifications for copyright, the copyright owner has the exclusive right to utilise the work in accordance with the acts listed in section 16(1) of the Act, including copying the work, issuing copies and showing the work to the public, broadcasting the work, and making adaptations of the work. Infringement of the copyright occurs where a person, other than the copyright owner or licensee thereof, undertakes any of the acts in relation to the copyright work.⁶²

B Copyright Provisions & Tikanga Maori

Maori share several concerns about the subsistence of copyright, as provided by the Act, in respect to works such as a manawhenua report.⁶³ From a Maori perspective, the provisions of Part I of the Act have shortfalls and, to a large extent, are incompatible with tikanga Maori associated with manawhenua reports.

1 "Originality"

In respect of whether a work is original, Cornish asserts that "the root requirement [for attracting copyright is] that sufficient skill, judgement, and labour or selection, judgement and experience... be expended by the author in creating the work".⁶⁴ It is not fatal that a purported original work is not *novel*⁶⁵ (as is required for patent protection), nor, in certain circumstances, that it was apparently derived from a similar, existing work⁶⁶ In general, as long as there has been sufficient originality in the *expression* of an idea, copyright will subsist in a work. The threshold for achieving originality in a work is a relatively low one. An explanation for the limited level of requisite originality is that "it reduces to a minimum the

⁶¹ Ibid, s.22.

⁶² Ibid, s.29(1).

⁶³ The following critique of the Act, primarily concerns the provisions relating to the description, ownership, and duration of copyright in a work such as a manawhenua report. Other provisions such as those concerning the infringement of copyright will only be referred to indirectly, to the extent that they relate to or are affected by those already mentioned.

⁶⁴ Above n 29, at 332.

⁶⁵ For further commentary, see the decision of Davison CJ in *Wham-O MFG Co v Lincoln Industries Ltd*, [1984] 1 NZLR 641, at 664.

⁶⁶ For further commentary, see the decision of Lord Oliver of Aylmerton in *Interlego AG v Tyco* [1989] AC 217 at 263.

element of subjective judgement (and the attendant uncertainties) in deciding what qualifies for protection.”⁶⁷

The fundamental requirement of originality, arguably does not accord with tikanga Maori. Tikanga Maori concerning the transmission of knowledge recognises the dynamic nature of the form in which the knowledge is embedded. A Kaumatua of Ngati Porou refers to the dynamic nature of such tikanga as follows:⁶⁸

“oral history [is] something passed down by word of mouth and it is still transmitted by word of mouth... oral history is dynamic, it is not fixed... it's constantly changing... transmitted from generation to generation [and] transmitted vertically on one hand and the other horizontally... it is passed around.”

While the expression of the idea may change in character, the idea remains relatively the same and it is the idea that is important to Maori. In this light, Maori would not necessarily view an altered expression of an idea as a new entity or as “original.” Nor would Maori perceive their prior relationship and collective interests they share with the knowledge as being altered. For example, the iwi, Tuhoe, recognise that the waiata *Taku Rakau* is a “Tuhoe waiata”, and that it is part of their identity. Regardless of whether *Taku Rakau* is sung at a hui, or written in a manuscript or recorded on audio-tape, Tuhoe will continue to recognise as “their waiata”. Although the way in which the waiata is expressed may be different, the waiata - the idea - remains constant. It follows that Tuhoe would expect that *Taku Rakau* continue to be utilised and transmitted in accordance with their tikanga associated with it.

It is submitted that the case remains the same for a manawhenua report. Maori view such a report as a written record of their korero tuku iho, regardless of the change in the form of in which that korero tuku iho is represented. Even although its compilation may be different, overall Maori would not view it as “original”. Accordingly, they too would expect the korero tuku iho recorded in such a report to be transmitted and utilised in a manner consistent with their tikanga.

⁶⁷ Above n 29, at 335.

⁶⁸ Personal communication, Te Kapunga Matemoana Dewes, at Te Araroa, 15 July 1997.

It is submitted that, as with the courts, the degree to which a work such as a manawhenua report is deemed "original" would need to be assessed in light of the circumstances of each case, and be determined according to the perspective of the iwi to whom the report relates. However, Maori apply a more subjective approach to determining originality and the threshold for achieving originality is relatively higher one than that copyright law requires.

2 "Author" & owner of copyright

The Act assumes that the author (the person whom creates or undertakes the arrangements necessary for the creation of, the work) is, in the first instance, the rightful owner of the copyright in the work. Consequently the author has the exclusive right to undertake certain otherwise restricted acts in respect of that work.

Maori recognise that such works are not created in isolation and that the author was not the sole individual responsible for the compilation of it. For example, a manawhenua report represents a record of the efforts of all those whom imparted knowledge in the creation of it. As the iwi shared collective interests in the korero tuku iho prior to its recording in a manawhenua report, so too would they expect to share a collective interest in the actual report. Royal makes this point in respect to literary, historical works within New Zealand that are published only under the name of the individual whom created that work. He states:⁶⁹

"I say 'published in the names' of those people in order to make it clear that no one author could have written any of those histories. Authorship also belongs to the tribal experts whom the various writers approached. Those writers gathered information together and, perhaps, rewrote the descriptions of historical incidents. All historians operate in this way. They gather information, analyse and make interpretations and judgements as to what is important to record. Therefore, there are varying degrees of authorship present within a single book."

⁶⁹ Above n 3, at 23.

The rights and interests of the individual whom created the report must be viewed within a wider context of the rights and interests of the iwi, or contributors to the report.⁷⁰ It follows that any purported use or exploitation (including commercial exploitation) of the work by the immediate author would need to be undertaken in cognisance of the interests of the iwi.⁷¹

The Act does provide for "joint authorship" where a work is "produced by the collaboration of 2 or more authors in which the contribution of each author is not distinct from that of the other author or authors."⁷² Copyright will subsist in the work by virtue of the qualifying provisions relating to reference to the author.⁷³ Co-authors will usually hold the copyright as tenants-in-common.⁷⁴ The joint authorship provisions the Act are based upon similar (if not exact) principles and premises of ownership as those legal provisions relating to land.

In respect to a manawhenua report, these provisions, at first glance, appear to provide for what Maori would argue as their collaborative endeavours in producing it. Unfortunately the same problems Maori have in respect to current land laws apply in respect to copyright law.

From a Maori perspective, the common, yet fundamental, problem with both areas of law is the failure of both to recognise and provide for the collective nature of rights and interests shared by iwi. The joint authorship provisions remain based upon the notion of exclusive, individual ownership of the resource. As stated above, this notion is compatible with tikanga Maori.

⁷⁰ Posey, D.A. and Dutfield, G. *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Ottawa, 1996, at 92.

⁷¹ An analogy can be drawn with land, and the rapid alienation of it in the nineteenth century. Land in which iwi shared collective interests was alienated on numerous occasions by individuals, for individual benefit, to the Crown or settlers. Problems arose later (and continue to arise) as the nature of these transactions were (and are) assessed in light of the tikanga Maori or Maori custom law concerning land. While an individual had rights and interests in land, those rights and interests were assessed in view of those of the collective iwi or hapu to which he or she belonged. It was for the collective to determine whether, and if so how, any land would be alienated and how the collective would benefit from the transaction. The same principles apply to knowledge and the inclusion of it within manawhenua reports.

⁷² Copyright Act 1994, s.6.

⁷³ *Ibid*, s. 18(4).

⁷⁴ A consequence of this being that upon the death of one tenant-in-common, relevant interests in the copyright pass to the personal representative of that persons estate.

3 *Duration of copyright*

The Act provides that copyright in a work endures until 50 years following the death of the author. At the end of this period, any other person may undertake otherwise restricted acts in respect of a work.

This provision is problematic for iwi in that, as discussed above, they adopt a wider definition of "author" than that commonly understood. That is, the iwi are included as the author of the work, or at least those whom collaborated in its production. The difficulty arise therefore in identifying the *individual* whose life (or death) is to be used as the starting point of the 50 years.

It is submitted that some Maori the copyright in a work, or at least similar protection, should endure longer than that currently provided by the Act. In some cases protection may be required in perpetuity. The perception that certain knowledge is tapu (such as te kauwae runga knowledge) does not alter according to any prescribed time period. Rather, perceptions change and alter in their own time. It is only if and when the iwi recognise and determine that certain knowledge ought not be as restricted as they originally perceived, that it may be more commonly transmitted and utilised.

C Commentary

The above discussion highlights the 'cultural incompatibilities' between the Act and tikanga Maori, and, in general, the failure of that Act to adequately provide for Maori perceptions of knowledge. In respect to certain manawhenua reports, it is submitted that a Maori perspective would view it as a tangible expression of the korero tuku iho (and matauranga Maori) in which the individuals of an iwi share a collective interest. Any acts purported to be undertaken in respect to it would thus need to accord with their interests and their associated tikanga.

It is submitted that a strictly legal approach would provide that (a) the resultant manawhenua report is an original work; (b) the researcher is the author of the work; (c) the qualifications for copyright are met and thus copyright will subsist in the manawhenua report and be owned by the researcher; and (d) that copyright will subsist for a period of 50 years following the

death of that researcher. Although not the ideal, an iwi may be satisfied with this result as the mana over the report, which may include the ability to assert rights in the protection of it, remains with them. However, the nature of the copyright in that report, and the associated rights of iwi, change once the report is filed with the Tribunal.

Once filed with the Tribunal, research reports are entered onto the *record of inquiry* of the claim for which the report was completed. The record of inquiry consists of two parts.

The first part, the *record of proceedings*, comprises all the documentation related to the pleadings and the conduct of the inquiry. It includes the statement of claim and any additions or amendments made to the original claim, Tribunal commissions and memoranda, requests and memoranda of counsel, and transcripts. Transcripts include proceedings at judicial conferences, or evidence, including claimant evidence, presented at a hearing. The second part, the *Record of Documents*, is a record of the documents on which the Tribunal may rely, any submissions or written evidence received and any texts or other writings that Tribunal members may choose to read in making their own inquiries. Reports, such as manawhenua reports, are entered onto a claim's record of documents. A claim's record of inquiry is maintained by the Tribunal's claims administration section.

Several legal and other issues arise in respect to copyright works, such as manawhenua reports, held by the Tribunal. In particular, issues arise concerning whom may view and copy such works. At present, documents held on a claim's record of inquiry are made available to Tribunal members, staff of the Tribunal, parties to the claim (including claimant's, the Crown, and/or their counsel), and any other interested persons, including the public. However, the extent to which the Act applies to each of these groups differs.

B Provisions of the Act

Part III of the Act contains provisions permitting Royal commissions and commissions of inquiry, for the purpose of their proceedings, to undertake otherwise restricted acts in regard to copyright works.²⁵ The Waitangi Tribunal is a commission of inquiry²⁶ and, along with the copyright works it holds, is subject to these provisions.

²⁵ Above n 27, at 38 to 40.

²⁶ Treaty of Waitangi Act 1975, Second Schedule, clause 4(1).

VII THE WAITANGI TRIBUNAL & THE COPYRIGHT ACT

A Record of Inquiry

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⁷⁵ Above n 57, ss 58 to 66.

⁷⁶ Treaty of Waitangi Act 1975, Second Schedule, clause 8(1).

1 *Tribunal members*

The Act provides that the Tribunal may, for the purposes of its proceedings, do "anything" in respect to these works, without infringing the copyright in them.⁷⁷ This includes issuing to the public copies of reports of its proceedings which may contain the copyright work, or parts of it.⁷⁸ Presumably the Tribunal is also legally able to copy the work, issue copies of it to the public, or show it to the public, as long as it is done "for the purposes of its proceedings."

This paper assumes, rightly or wrongly, that a distinction need not be drawn between the general members of "the Tribunal", and the specific members constituted specifically for each claim. Therefore, although a Tribunal member is not part of the specific Tribunal constituted to hear a specific claim, he or she may do anything with the copyright works held on that claim's record of inquiry.

2 *Tribunal staff*

Documents on a claim's record of inquiry are also available to staff of the Tribunal. Staff of the Tribunal are appointed under the State Services Act 1962 and are employed by the Department for Courts, a government department, to assist in "the efficient operation of the Tribunal."⁷⁹ Tribunal staff are therefore not part of the Tribunal, rather, it is submitted, they are employees of and agents for the Crown.⁸⁰ Researchers commonly view and copy works held on records of inquiry for research and other purposes.

It is questionable whether section 60 applies to *staff* of the Tribunal. If it does not, by viewing and copying works held on a claim's record of inquiry, without licence by the copyright owner to do so, the researcher may be infringing the copyright in it.⁸¹ However, as the Tribunal may do "anything" in respect of copyright works it holds, perhaps researchers have licence, albeit an implied one, by the Tribunal to utilise them. If this were the case, it is

⁷⁷ Copyright Act, s.60(1).

⁷⁸ Ibid, s.60(3).

⁷⁹ Treaty of Waitangi Act 1975, Second Schedule, clause 9.

⁸⁰ Section 2 defines "Crown" as Her Majesty the Queen in right of New Zealand, and includes a Minister of the Crown, a government department, and an Office of Parliament."

⁸¹ Reports such as manawhenua reports are communicated by the claimants to the Tribunal, and not to the Crown, and therefore it is submitted that Tribunal staff are not covered by section 62 of the Act.

submitted that the researcher would only have the Tribunal's licence to view and copy the work if doing so was for the purposes of a claim's proceedings.

3 *The public*

The records of inquiry for each claim are currently available for the public to inspect and refer to. Although not all documents are available.⁸² Members of the public, particularly students, academics, government employees, and other researchers, frequently view and copy documents held on a record of inquiry for their own personal or professional use. It is, again, questionable whether they are legally able to do so in respect to copyright works.

Section 61 of the Act provides that where material is open to public inspection or public reference pursuant to a statutory requirement, or is on a statutory register, copyright in the material is not infringed by the copying of the material, by or with the authority of the appropriate person, for a purpose that does not involve the issuing of copies to the public.⁸³ For the purposes of the Act, the "appropriate person" means the person required to make the material open to public inspection, and may include the person maintaining the register.⁸⁴ "Statutory register" means a register maintained pursuant to a statutory requirement, that is, a requirement imposed by a provision of an enactment.⁸⁵

One must first ask whether or not the Tribunal is statutorily required to make works available to the public, or to maintain them on a statutory register. A review of the Treaty of Waitangi Act 1975 and the Commissions of Inquiry Act 1908 reveals no express provision obliging the Tribunal to make material available to the public. Nor is there express provision in either Act obliging the Tribunal to maintain a register. (Even although the Tribunal does maintain a register, it is not statutorily required to do so.) The authority of the "appropriate person" to

⁸² The Tribunal's practice note 7, concerning its procedures, provides that, in certain circumstances, where documents of evidence are given which a party wishes to remain confidential, application can be made to the Presiding Officer who, after consulting with parties, may limit those who may view the evidence to counsel only, or to counsel and other selected persons.

⁸³ Copyright Act, s.61(1).

⁸⁴ *Ibid.*, s. 61(6).

⁸⁵ *Ibid.*, s. 61(6).

utilise a work is irrelevant if the work is not statutorily required, or otherwise, to be made available to the public in the first instance.⁸⁶

Overall, it seems difficult to trace the legal justification for the Tribunal making copyright works held on a claim's record of inquiry open to the public.⁸⁷ It follows, therefore, that if a member of the public views or copies such works, he or she is infringing the copyright in it. Additionally, the Tribunal may be infringing the copyright in the work by, for no purpose relating to a claim's proceeding, issuing copies of it to the public, showing the work in public, or authorising other persons to undertake acts in respect of it.⁸⁸

4 *The Crown*

Section 62(1) of the Act provides that where a literary work has, in the course of public business,⁸⁹ been communicated to the Crown for any purpose, and the Crown owns, or is in the custody or control of it, the Crown may copy the work, or issue copies of the work to the public, without infringing copyright in that work.⁹⁰ This section is qualified, however, in that, firstly, the work must be communicated "by or with the licence of the copyright owner".⁹¹ Secondly, the Crown may only copy the work, and so on, for "[t]he purpose for which [it] was communicated to them, or for any related purpose that could reasonably have been anticipated by the copyright owner."⁹²

⁸⁶ The Treaty of Waitangi Act does provide that the Tribunal may "regulate its procedure in such a manner as it thinks fit" (Treaty of Waitangi Act 1975, Second Schedule, clause 5(9)) and "may do any... act preliminary or incidental to the hearing of any matter by [it]" (Treaty of Waitangi Act 1975, Second Schedule, clause 5(8)(c)). And the Tribunals Practice Notes (Note 7 concerning procedure) merely requires the Tribunal to communicate copies of the record of inquiry to claimants or claimant's counsel.

⁸⁷ It is submitted that members of the public would not be covered by section 60(1) as that section only applies to acts allowed by the Tribunal. Moreover that section only provides that the Tribunal may issue to the public copies of its report of the proceedings, rather than reports considered *during* its proceedings.

⁸⁸ See the restricted acts in s. 16.

⁸⁹ Section 62(4) provides that "public business" includes any activity carried on by the Crown". In the context of a Tribunal inquiry, presumably, the term "course of public business" would mean any activity carried on by the Crown *in respect to that hearing*.

⁹⁰ Copyright Act 1994, s.62(2). This section is qualified in that such copying/issuing may only be done for (a) the purpose for which the work was communicated to the Crown; or (b) any related purpose that could reasonably have been anticipated by the copyright owner.

⁹¹ Copyright Act, s.62(1)(a).

⁹² *Ibid*, s.62(2).

Copies of a claim's record of inquiry, which includes manawhenua reports, are provided to the parties of each claim, or group of claims, which, in all cases, includes the Crown.⁹³ The Crown would, therefore, receive a manawhenua report during the course of public business.

The section is silent as to whether or not the copyright owner must give *express* licence or whether licence may be implied. While it is rare that a claimant would *expressly* state that they permit the Crown to receive a manawhenua report, the claimants would reasonably foresee that a copy of it would be communicated to the Crown and, in the absence of statement from the claimants to suggest otherwise, arguably their licence is implied.

More important issues relate to the uses permitted to the Crown in respect of the record of inquiry. A manawhenua report provides, or at least adds to, the basis of the claimant's claim. The Crown therefore needs to consider the contents of the report when preparing its response to the claim. In preparing their response, the Crown use the report as basis for further research it may undertake into the claim, or to dispute the matters contained in it. It is foreseeable then that copies of the manawhenua report may be made and, in doing so, the Crown would not breach the claimant's copyright (by virtue of section 62(2)) in it.

However, it is submitted that the Crown, which includes government departments, may not use information from a claim's record of inquiry, for purposes other than those relating to the Tribunal's inquiry into that claim. For example, copyright in the work may be infringed where copies of it were made and disseminated to government departments not directly involved with the claim's inquiry, or if the work was used to develop government policy, or if it were used for other Crown research (such as that undertaken by Crown research institutes). Issuing copies of the work, or substantial parts of it, to the public would, arguably, also breach the copyright in it if the issuing was not done in the course of the Crown's public business.⁹⁴

⁹³ The Crown Law Office is part of the Crown and thus references throughout this paper to "the Crown" and "Crown's counsel" are used interchangeably.

⁹⁴ It is questionable whether there would be any purpose during a Tribunal proceeding for the Crown to issue copies of it to the public notwithstanding it has a legal right to so.

C “Public Administration” Provisions & Tikanga Maori

Further issues arise when the current practices of the Tribunal are assessed according to tikanga Maori. While certain acts in respect to manawhenua reports are permitted by the Act, tikanga Maori may dictate otherwise.

1 Retention of rights & interests in the manawhenua report

Firstly, even although the manawhenua report is filed with the Tribunal, iwi would recognise that it, and the knowledge it contains, remains as one of their taonga and, consequently, would expect it to be utilised according to their tikanga. By filing a manawhenua report with the Tribunal, iwi are not recognising an extinguishment of their rights and interests in respect to it. They are merely providing the Tribunal with an understanding of their specific claim by sharing their knowledge with it. From a Maori perspective the Tribunal may only utilise this knowledge for the purpose it was provided. Once this purpose is complete, the Tribunal would have no further rights or interest in it.

At the completion of a Tribunal inquiry documents on a claims record of inquiry remain with the Tribunal or are transferred to the New Zealand Archives. It is submitted, however, that iwi expect these documents, or at least those concerning their traditional knowledge, to return to them and held within their rohe. Just as the knowledge contained in a manawhenua report was derived from the land, so too should it return to land.

In a practical sense, this may mean returning the report to an iwi archive or other repository within the iwi. Meads, for examples, discusses the establishment of Te Pataka Iringa Korero o Ngati Awa (the Ngati Awa Archives) to house tribal archives.⁹⁵ He states:⁹⁶

“It is important today to have a central system of controlling information that has been collected at great expense over many months... As well, this information should be made available to the iwi under terms of control which safeguard the knowledge resource.”

⁹⁵ Meads, H.M. *Tribal Archive Research: the Ngati Awa Experience*, in *Oral History in New Zealand*, 1989, vol 2, pp. 27-30, at 28.

⁹⁶ *Ibid*, at 29.

By returning documents such as manawhenua reports to the claimants, the knowledge remains "rooted in the land" and can be utilised within the cultural context from which the knowledge it contains was derived. Further, the iwi can continue to act as its proper kaitiaki.

2 *Classes of People*

The relatively wide access to information held on a claims' record of inquiry would, it is submitted, breach tikanga Maori concerning the dissemination of knowledge. Namely, certain tapu knowledge was only transmitted to those within the iwi whom were recognised as the appropriate persons, with the requisite mana.

Individuals are appointed to the Tribunal for not only their personal attributes, but also because of their "knowledge of experience in the different aspects of matters likely to come before the Tribunal."⁹⁷ Tikanga Maori is constantly considered by the Tribunal and, in light of this, approximately half of the members are Maori with considerable knowledge of and experience in matauranga Maori. In the eyes of Maori, these members bring a distinct mana to the Tribunal. The fact that Maori are providing the Tribunal members with their knowledge implies that they perceive the Tribunal (or at least its Maori members) to be appropriate persons to receive and acts as kaitiaki for it.

Different perceptions may exist towards other whom currently have access to the material.

The Crown may not be an appropriate body to receive certain knowledge (particularly as the knowledge is provided within the context of a claim *against* the Crown). Maori may need to be satisfied that the Crown has, firstly, appropriate personal whom recognise the tapu and importance of the knowledge, and will treat with it accordingly. Further, Maori may need to be aware of the Crown procedures concerning the utilisation and transmission of their knowledge, and be satisfied that these are adequate. And as with the Tribunal, Maori would only be providing the information for the purposes of the claim, and no other.

⁹⁷ Treaty of Waitangi Act, 1975, s.4(2A)(b).

3 *Exploitation & misappropriation of knowledge*

Finally, the current practice of the Tribunal allowing any member of the public to view and copy a claim's record of inquiry does not accord with tikanga Maori. Firstly, iwi provide a manawhenua report for the benefit of the Tribunal and, specifically, in respect to the claim to which it relates. Arguably it would be a rare occasion for iwi to intend that it be viewed and utilised by anyone other than the Tribunal, and other parties directly involved with the claim.

The Tribunal is arguably one of the largest single repositories of recorded matauranga Maori in New Zealand. As such, the information it contains is of interest to several groups other than those directly involved with a Tribunal claim. Posey lists several groups whom have an interest in indigenous knowledge, including matauranga Maori.⁹⁸ These include tourists, government and corporate representatives, artists, researchers (including "bioprospectors") and academics. The relatively wide access these groups have to a claim's record of inquiry means that copyright works and other materials may be copied and appropriated without the consent or licence of the copyright owners.

Iwi are concerned, firstly, the integrity of the knowledge contained in reports on the record of inquiry may be compromised when its transmission and utilisation occurs outside of a suitable cultural context. An example of a traditional work being misconstrued is the waiata, *Te Awatea-a-Maui*.⁹⁹ The verses of the original waiata refer to the Maori maramataka, or calendar. The maramataka consisted of a post representing the mast of Maui's canoe around which measurements of the shadows cast by the sun from this post could be made. These observances were made in the most sacred part of the day, *te awatea*, at first light, and the angles marked by the special string wound onto carved pegs, indicating the seasons of the year. These pegs represented some of the offspring of Papatuanuku and Ranginui. For example, the peg representing Rongomatane (the patron of edible foods) was used to determine the spring equinox, and when it was time to plant kumara.

Unfortunately, the waiata has been misinterpreted and misrepresented as a myth of how Maui "slowed down the sun". The myth tells of how Maui and his brothers ensnared held down the

⁹⁸ Above n 70, at 5.

⁹⁹ Maui is a recognised demi-god popular within Maori tradition.

sun with magical flax ropes. Maui and his brothers then beat the sun so that it would move across the sky slower, thus allowing more daylight for Maui and his people to work. The original waiata, however, makes no mention of Maui (nor his brothers) fashioning flax ropes to lasso the sun, haul it down and beat it to submission. And nowadays the myth is portrayed as a mere childrens tale.

Iwi are also concerned about their works being exploited. Several documents, including manawhenua reports, contain knowledge about iwi history, customary practices concerning land use, fisheries, resource management and conservation, traditional healing, navigation and philosophy. Works containing such knowledge are valued, for example, by academics (historians, anthropologists, scientists) as they are resource for personal or professional research. current research. This research is often published and added to the public's pool of knowledge. Depending on the quality of the 'original' published work, the author may be recognised as an "expert" and receive numerous benefits, for instance, an enhanced reputation, formal tertiary qualifications, and monetary returns and royalties.

Additionally the works held by the Tribunal, and those published by academics whom have referred to these works, are commonly referred to by industry researchers, and become part of the research and development efforts of commercial enterprises. Research and development efforts may result in 'discoveries' of new pharmaceuticals, or plant breeds, or medical processes. When this occurs, companies may, firstly, acquire legal protection, such as a patent, over these discoveries. Further they have an exclusive right to commercially benefit from these discoveries.

Iwi are rarely, if ever, acknowledged and/or compensated for their contribution to the academic and commercial efforts referred to above. While iwi may receive a grateful mention in a preface to a book or thesis, the author of such works is recognised as the expert of the matters contained in it and the rightful recipient of its royalties. While corporations may acknowledge that their developments or discovery originated, in part, from iwi, rarely will they include iwi in the continuing development of these discoveries, or provide the share of

¹⁰ It is acknowledge that the causal connection between iwi knowledge and a discovery will differ in each case. It is further acknowledged that a formula for proper compensation is not would be difficult and specific to each case.

the revenue received from them.¹⁰⁰ The overall issue, however, is that iwi knowledge provided to the Tribunal for a specific purpose, is currently susceptible to misappropriation and exploitation for other non-related purposes.

Arguably, incompatible with tikanga Maori associated with knowledge. The philosophies upon which the Act, and other intellectual property laws, are based differ fundamentally to those underpinning the Maori world-view. And, accordingly, the provisions within the Act purporting to protect the rights and interests of Maori, or at least New Zealanders, fall short of doing so.

The current practices of the Tribunal, and the provisions of the Act relating to them, also fall short of Maori expectations that their knowledge will be adequately provided for and protected during its utilisation within the claims process. Unless and until, these practices and provisions are reviewed and amended, Maori are faced with the potential dilemma of seeking redress for their Treaty grievances within the Tribunal, but having to compromise their tikanga, and identity, in the process. It is admitted that the real impact of the current misuse of Maori knowledge will be felt not by this generation of Maori, but by those generations to come.

The principal justification for addressing and rectifying the shortfalls Maori perceive in respect to not only copyright legislation, but intellectual property legislation in general, is the Treaty of Waitangi. The Treaty provides a framework for the partnership between iwi and the Crown, and imposes certain obligations upon the Crown to adequately provide for this partnership. In particular, the Treaty reaffirms the right of Maori to live according to their tikanga, and to have their interests protected and provided for.

Article 1 of the Maori version of the Treaty guaranteed to Maori "te kawawāhanga katoa o o ratou wenua" which translates in article 1 of the English version as cession to the Crown of the "sovereignty" of the Chiefs of New Zealand. The Tribunal have interpreted this article in terms of "an exchange of gifts" whereby Maori gave the gift of the right to make laws and the promise to do so as to accord the Maori interest an appropriate priority.¹⁰⁰ Later, in the Mannkau report, the Tribunal suggested that under Article 1 of the Treaty, Maori ceded all

¹⁰⁰ It is acknowledged that the causal connection between iwi knowledge and a discovery will differ in each case. It is further acknowledged that a formula for proper compensation to iwi would be difficult and specific to each case. (Tribunal of Justice, Waitangi Tribunal, 1992, *Te Kaitiaki*, Wellington, Government Printing Office, 1993) at 32.

VIII CONCLUSION

To conclude, the Copyright Act 1994 is, arguably, incompatible with tikanga Maori associated with knowledge. The philosophies upon which the Act, and other intellectual property laws, are based differ fundamentally to those underpinning the Maori world-view. And, accordingly, the provisions within the Act purporting to protect the rights and interests of Maori, or at least New Zealanders, fall short of doing so.

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¹⁰¹ See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, (2nd ed, Wellington, Government Printing Office, 1989) at 52.

rights and powers of sovereignty to the Crown upon the basis that Maori interests would be protected.¹⁰² The Court of Appeal has also commented that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.¹⁰³ It is submitted, that by enacting legislation, such as copyright and intellectual property legislation, the Crown has a duty to actively protect Maori interests, including their interests in their knowledge.

Maori also assert that their knowledge and korero tuku iho is a taonga, the protection of which is specifically guaranteed in article 2 of the Treaty. That article states:

“Ko te Kuini o Ingarangi 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.... “

An English translation of that article provides:

“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...”

In the Motunui-Waitara report, the Kaituna report and the Manukau report the Tribunal noted that taonga means ‘all things highly prized’ by Maori which includes intangibles such as the Maori language and the mauri of tangibles.¹⁰⁴ In the Te Reo Maori report, the Waitangi Tribunal recognised that te reo Maori was an intangible taonga guaranteed protection to Maori under article 2 and stated:¹⁰⁵

¹⁰² See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1985, (2nd ed, Wellington, Government Printing Office, 1989) at 70.

¹⁰³ Per Cooke J. in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, at 664.

¹⁰⁴ See, respectively, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, (2nd ed, Wellington, Government Printing Office, 1989) at 50; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1984, (2nd ed, Wellington, Government Printing Office, 1989) at 13; and Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1985, (2nd ed, Wellington, Government Printing Office, 1989) at 67.

¹⁰⁵ Waitangi Tribunal, *Report of the Waitangi Tribunal on Te Reo Maori Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, (2nd ed, Wellington, Government Printing Office, 1989) at ???

“When the question for decision is whether te reo Maori is a taonga which the Crown is obliged to recognise we conclude that there can only be one answer. It is plain that the language is an essential part of the culture and must be regarded as a valued possession.”

The Tribunal further stated in the Te Reo Maori report that the word ‘guarantee’ meant more than merely leaving the Maori unhindered and that it required steps to be taken to ensure that Maori have and retain the full exclusive and undisturbed possession of their language and culture.¹⁰⁶

Finally, Meads comments upon the guarantee of protection of knowledge provided in article 2 and states:¹⁰⁷

“Article two of the Treaty of Waitangi guaranteed “te tino rangatiratanga” (full control) over “a ratou taonga katoa” (over all of their valued cultural possessions). The language has been accepted by the Waitangi Tribunal as coming within the definition of taonga. It can be argued quite convincingly that if this is so then knowledge, traditions and customs are included as well. Thus it is the right of every tribal group to have control over what information should be gathered, who does the gathering and storing of the information, and in determining the terms of access to the information.”

Thus, it is submitted that the Treaty is the principal justification for implementing proper laws and policies to provide for tikanga Maori associated with knowledge.

Any such laws would have to result from effective dialogue between iwi and the Crown to establish frameworks and policies from which laws can be developed. This sentiment was expressed at a hui at Otakou marae, in Otago, whereby a hui participant stated:¹⁰⁸

¹⁰⁶ Ibid, at 29.

¹⁰⁷ Above n 95, at 28.

¹⁰⁸ Minutes of the New Zealand Conservation Authority’s Consultation Hui concerning the draft discussion paper *Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, Otago Peninsula, Otakou Marae, 9 November 1994.

"The problem is with the legislation, the law of the land regulating us away from our taonga. There is no greater law than tapu. Pakeha say Maori have no law, but they still live by the lore of tapu. The power of tapu is stronger than Pakeha jails.... Let us come in with our lore, and work alongside you [Crown]. Today the law is making our people criminals in their own lore - because we have to break the law to survive. By breaking that law we break the lore of our tipuna as well. I want to see our lore recognised in the law as well - that's what the Treaty of Waitangi was to do, to allow the colonial government to put their laws alongside ours. Unless you can get that you make us dishonest people."

In the short term, however, the Tribunal can review its procedures concerning the way in which it deals with traditional Maori knowledge. The issue of the protection of Maori knowledge is an ever growing one and it is only a matter of time before iwi not only focus on their claims, but the process by which their claims are heard. Any shortfalls perceived with the process, will inevitably result in a lack of faith in it.

* person or persons
commissioned by
claimants under
authorisation of the
Waitangi Tribunal
and/or
* Tribunal staff and/or
* the Crown Law Office.

Claim withdrawn before
hearing

A report is written and sent
to the Minister of Maori
Affairs and Cabinet giving
the findings and
recommendations of the
Waitangi Tribunal

Government officials study
the Tribunal's
recommendations.

Flow chart of the claims process

Application received.



Checked against Treaty of Waitangi Act 1975.



Entered as a claim on the register. * At this stage, the claim may be joined with similar claims.



All people with an interest are notified.



Research is carried out by:

- person or persons commissioned by the Waitangi Tribunal; and/or
- person or persons commissioned by claimants under authorisation of the Waitangi Tribunal; and/or
- Tribunal staff; and/or
- the Crown Law Office.



A Tribunal is constituted to hear the claim. * Hearings begin, witnesses are called, experts consulted, and evidence examined.



The claim may be referred to mediation. The Tribunal appoints a mediator who reports back to the Tribunal.



Claim withdrawn before hearing.



A report is written and sent to the Minister of Maori Affairs and Cabinet giving the findings and recommendations of the Waitangi Tribunal.

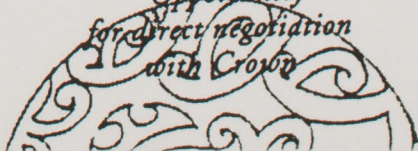


The Tribunal recesses to consider its decision.



Government officials study the Tribunal's recommendations. *

* Opportunity for direct negotiation with Crown



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