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USING INTELLECTUAL PROPERTY LAW TO PROTECT TRADITIONAL MAORI CULTURAL EXPRESSIONS

An Alternative Perspective

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The author proposes that the intellectual property system can provide protection for traditional Maori cultural expressions that is compatible with the way Maori regard these expressions in contemporary society. There has been extensive exploration on the issues surrounding the protection of traditional cultural expressions, yet there has been limited progress on how these issues can be resolved. The author contends that the various issues that Maori commentators have identified with the intellectual property system which they contend makes it unsuitable as a protection mechanism are either not well-founded or not pertinent amongst Maori in contemporary society. This paper canvasses a range of possible options on how the intellectual property system can be used to provide stronger protection for traditional cultural expressions.

The author concludes that while the intellectual property system cannot provide comprehensive protection, it can provide an effective degree of protection for traditional cultural expressions that is compatible with the way Māori regard these expressions.

The text of this paper (excluding contents page, footnotes and references) comprises approximately 12,015 words.
I \hspace{0.4cm} \textbf{INTRODUCTION}

Frequent incidents where traditional Maori cultural expressions have been misappropriated have seen outcries by Maori over the lack of protection for their expressions. Their protests have been further exasperated by there being no system in place at either the domestic or international level that is dedicated to protecting traditional Maori cultural expressions, or traditional Maori knowledge in general, from unauthorised use. The use of the intellectual property system to protect these expressions has been largely overlooked by Maori spurred on by incessant depreciation by Maori commentators of its applicability and use to Maori. Common criticisms include philosophical conflicts between customary law systems and the intellectual property system, impediments to accessing this system and limitations in the protection it provides.

My intention in this paper is to demonstrate that the intellectual property system can be used to provide an effective degree of protection for traditional Maori cultural expressions that is compatible with the way Maori regard these expressions in contemporary society. The perspective of a handful of Maori commentators as to whether something is at conflict with Maori culture is too often construed to be the position of Maori as a whole. In my view, the criticisms regarding the intellectual property system do not, in actuality, prevent or deter Maori from using it to protect many of their cultural expressions.

To substantiate this claim, this paper is divided into two halves. The first half is dedicated to refuting the criticisms of commentators about the intellectual property system, referred to in this paper as the ‘common perspective’. I challenge the assertion that the customary law system conflicts with the objectives of the intellectual property system and also question the prevalence of customary standards amongst Maori today. I will demonstrate that the common perspective relies on a world view with values that are quite different to those of the majority of Maori today. While there are some Maori who hold steadfast to traditional beliefs, for a large portion of Maori, their traditional culture has fused with Western culture. This fusion and evolution must be recognised in any purported Maori world view for their values, behaviours and beliefs to be accurately captured.
The common perspective also claims that there are limitations in the protection provided by the intellectual property system as well as factors that impede access to this system. I contend that these perceived limitations are mostly unfounded. This paper will demonstrate that some of these limitations are based on a lack of understanding of the intellectual property system itself, while others are rationalised using traditional standards which have limited primacy amongst Maori today.

The second half of the paper puts forth an alternative Maori perspective on the intellectual property system. It sets out how the intellectual property system can be used to provide an effective degree of protection for traditional Maori cultural expressions that is compatible with the way Maori regard these expressions. The proliferation of Maori artists and businesses who support themselves financially through commercialising traditional cultural expressions is indicative of current Maori attitudes and behaviours in this area. This paper will show that cultural expressions are no longer viewed by Maori as solely a source of Maori identity but also a tool for economic development, at an individual and collective level.1

While the alternative perspective considers that the intellectual property system can provide useful protection in its existing form, it qualifies this by noting that this system has not yet fully evolved in this regard. This paper discusses strengthening measures that can be incorporated to provide different types of protection, termed as ‘positive’ and ‘defensive’ protection.2 Positive protection involves affording rights such as economic and moral rights over cultural expressions whereas defensive protection consists of measures to prevent the acquisition of intellectual property rights over these expressions that would be inappropriate or offensive. Suggestions are also offered as to how Maori can also utilise existing measures more effectively. The alternative perspective also recognises that complementary measures are also needed to work alongside the intellectual property system as it cannot provide the comprehensive protection desired by Maori. In any case, it is unlikely that any one regime could provide that level of coverage.

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1 See Te Puni Kokiri *Maori Economic Development* (Te Puni Kokiri, Wellington, 2003) 60 for examples of Maori commercial ventures using traditional cultural expressions.

I confine this paper to the use of the intellectual property system as there has been limited scholarship domestically on possible solutions using this system. While there has been extensive exploration on the issues surrounding the protection of traditional cultural expressions, there has been limited progress on how these issues can be resolved. At the same time, I seek to raise awareness of the usefulness of the intellectual property system to Maori. In my view, it is unfortunate that the intellectual property system has been viewed with such antipathy by some Maori when it can, in actuality, be a useful tool for protecting their cultural expressions and subsequently reducing incidents of misappropriation.

It is important to note that while traditional cultural expressions form part of traditional knowledge, it cannot be assumed that the arguments in this paper regarding Maori customary law are applicable to other areas of traditional knowledge. The prevalence of customary law is significantly greater in regard to rongoa Maori (Maori medicinal knowledge) and biodiversity-related knowledge. The physical nature of cultural expressions has more readily exposed it to western influences whereas the intangible quality of rongoa Maori has enabled it to be closely guarded, in general, by Maori. The link between traditional and western art forms has also fostered greater integration compared with rongoa Maori and western medicine which, it is contended, are based on markedly different paradigms. Traditional Maori healing is practised largely in isolation from the mainstream health sector.

II CONCEPTUAL FRAMEWORK

In examining the use of the intellectual property system to protect traditional cultural expressions, it is useful to demarcate the general scope of this subject matter. It is also important to conceptualise matters such as the imperatives for protecting these expressions as well as the range of options for providing protection and why consideration should be given to using the intellectual property system.

4 See P.M.E Williams Te Rongoa Maori (Touchwood, Hastings, 1996) for discussion on rongoa Maori.
A  Traditional Knowledge

Traditional cultural expressions are a subset of traditional knowledge. As Maori consistently emphasise the interrelatedness of their traditional knowledge, it is appropriate to firstly refer to this wider group before venturing a working definition of traditional Maori cultural expressions.

There is no official or agreed definition of traditional Maori knowledge nor is there an international standard for traditional knowledge. Given the diverse nature of this subject matter it would be highly arduous to develop a singular definition of the term. Even so, a singular definition may not be necessary in order to define the scope of the subject matter for its protection. For example, the Trade Mark Act 2002 does not define in exhaustive terms what constitutes a ‘mark’, leaving it to the examining authority and the courts to decide whether a mark meets the requirements for protection. Similarly, the Patents Act 1953 does not precisely define the concept of an ‘invention’ and international standard-setting in patent law has proceeded without specific international definitions of this concept.\(^6\)

In intellectual property law, the crucial element for the protection of subject matter is the identification of certain characteristics that must be meet as a condition for protection, such as originality for copyright or novelty for inventions. In regard to traditional knowledge, the World Intellectual Property Organisation (“WIPO”) has suggested that a similar approach could be utilised where emphasis would be put on the fact that traditional knowledge is ‘tradition-based’. This could refer to subject matter that generally:

- has originated and been preserved in a traditional context;
- pertains to a particular traditional or indigenous people who maintain a sense of obligation to preserve the knowledge;
- has been transmitted from generation to generation and disseminated according to the traditions of a traditional or indigenous people; and
- evolves constantly in response to a changing environment.

\(^7\) WIPO, above, 10.
\(^8\) WIPO, above, 10.
While it lacks precision as a technical or restrictive legal definition, WIPO contends that it provides the essential elements to delineate the nature and scope of traditional knowledge as legal subject-matter, and is consistent with the general approach to defining subject matter in the international intellectual property framework. Of particular note is that the ‘traditional’ aspect of traditional knowledge relates not necessarily to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated according to the traditions of a community or people. Contrary to a common perception, traditional knowledge is not, therefore, necessarily old or ancient.

In regard to actual areas or subsets of traditional knowledge, these include biodiversity-related knowledge, medicinal knowledge, cultural expressions and moveable cultural properties. Excluded from this description would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general and other similar elements of ‘heritage’ in the broad sense.

**B Traditional Maori Cultural Expressions**

Traditional cultural expressions, or ‘folklore’ as it is often referred to in other jurisdictions, is a subset of traditional knowledge. In the same way as traditional knowledge, there is no official definition of traditional cultural expressions. Nonetheless, there are some basic characteristics of this subject matter. Traditional cultural expressions are typically derived from a foundation of underlying traditional knowledge that is generally intangible. WIPO refers to this foundation as ‘the base’. There is a distinction between the base and expressions derived from the base by current generations, referred to as ‘derivative works’. The concerns of Maori about protecting their expressions are equally applicable to both, however, this distinction is useful when assessing the protection the intellectual property system can provide to this subject matter.

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9 WIPO, above, 11.  
10 WIPO, above, 11.  
13 This is discussed in Part III of this paper.
For the purposes of this paper, a non-exhaustive list of the types of subject matter that can be considered traditional Maori cultural expressions includes:

- Performing creations including waiata (songs or chants), haka (ceremonial dance)
- Whakatauki (proverbs), tribal history and elements of languages such as names
- Artistic works including paintings, ta moko (tattoos), designs such as the koru, kowhaiwhai, costumes and textiles
- Moveable cultural property including carvings, weaving

There are also expressions that are considered to be an emblematic part of New Zealand culture such as the haka, “Ka Mate” and “Pokarekare Ana”. Ownership over these type of expressions could be seen to extend beyond Maori to include all New Zealanders due to the widespread knowledge of these expressions, albeit to various degrees. According Maori exclusive rights over the use of such expressions would be controversial, and in my view, undesirable. These expressions play an important social role in unifying the numerous cultures in this country. It would be difficult to foster awareness and respect for the Maori culture if its use is confined to Maori alone. This is not to suggest that protection is not required. Given the ongoing incidents of derogatory use of these emblematic expressions, protection is necessary to protect their integrity while ensuring access is maintained.

In terms of ownership of traditional cultural expressions, these emblematic expressions are more the exception than the rule. In my view, Maori can justly claim ownership rights over the majority of their cultural expressions. These expressions are the moral fibre of Maori culture and form an integral part of the identity of Maori people. As well, Maori have also fought and sacrificed to preserve these expressions largely on their own.

It is also useful to briefly note that ownership occurs at different levels within Maoridom including hapu/iwi (sub-tribe/tribe) specific expressions; expressions that traverse iwi boundaries and are often regionally specific; and generic expressions that are common to all Maori. Further discussion on this issue falls beyond the scope of this paper.

C Imperatives For Protecting Traditional Maori Cultural Expressions

There are a multitude of imperatives for protecting traditional cultural expressions. The Treaty of Waitangi provides a strong justification as Article 2 guarantees that the Crown will protect taonga Maori and traditional cultural expressions would discernibly be encompassed within this realm. Certainly, the courts have recognised the Crown’s duty to protect particular traditional cultural expressions such as te reo Maori (the Maori language).¹⁵

Due to the cultural dimension and social context of these expressions, they are an essential source of cultural identification. Traditional cultural expressions play an important role in defining and preserving the distinct identity of an iwi or hapu as well as their overarching identity as Maori. Protection could assist in ensuring the accurate and appropriate portrayal of Maori culture which helps to protect those traditions.

Another imperative for protection is the far-reaching role cultural expressions could play in Maori economic development which in turn, could benefit the national economy.¹⁶ Given the socio-economic struggles that many Maori confront, their unique and distinct culture provides a valuable tool with which they can use to move forward. As one of the objectives of affording exclusive intellectual property rights is to promote innovation in the public interest, it would be logical to also encourage innovation by Maori in their traditional cultural expressions by ensuring adequate protection is available.

D Possible Options for Protecting Traditional Cultural Expressions

There are a suite of mechanisms that can provide protection for traditional cultural expressions. This is crucial as Maori concerns surrounding its use are varied ranging from inappropriate use, such as girls performing the haka, ‘Ka Mate’, to having a right to share in the commercial benefits from its use by non-Maori. Protecting this subject matter cannot be remedied through one single solution. A multiplicity of complementary measures are required that traverse both the legal and non-legal domains.

¹⁵ See New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513 where the Privy Council held that the Crown had an obligation to protect and preserve Maori property, including the Maori language.

Legally-binding mechanisms may include: using or strengthening intellectual property systems; *sui generis* ("of its own kind") systems; regimes regulating access and benefit-sharing; contractual arrangements such as license agreements; and common law mechanisms such as breach of confidence and passing off. These instruments do not have the protection of traditional cultural expressions as an explicit objective, however, they have the potential to provide some degree of protection and when used collectively, broad and robust protection.

There are also policy measures and non legally-binding instruments such as public education programmes and codes of conduct that could provide protection where the law cannot. For example, the haka, 'Ka Mate' is often performed in an inappropriate way by some New Zealanders and people overseas, such as the Spice Girls, who may be impersonating the All Blacks. Despite the cultural offence caused, it is not the type of situation that is sufficiently severe to legislate against. This is more a case of a lack of cultural awareness. Public education could play an important role here by influencing societal attitudes and behaviours to achieve greater respect towards Maori culture.

The option of using the intellectual property system for protecting traditional cultural expressions has been dismissed by the common perspective. Many Maori have subscribed to this notion and rather than use this existing regime, have called for a sui generis system of protection. In my view, this is not the most pragmatic short-term approach.

The huge resourcing requirements alone of a new sui generis system inherently limit its ability to be implemented expeditiously not to mention the complex policy discussions that would need to take place in its development. This is assuming that there would be political support from the government for a new system that creates an exclusive property right for Maori. Given the opposition that erupted from suggestions for a separate criminal justice system for Maori, it is questionable whether urgent political priority would be given to protecting traditional cultural expressions which is by no means as severe a social issue as offending by Maori. Therefore, it would appear sensible to initially examine how existing systems can be properly applied to traditional cultural expressions.

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This view is reinforced by WIPO which has suggested that in the short term, attention should be focused on the extent to which the intellectual property system can be used to protect traditional knowledge while in the long term, new norms, such as sui generis systems, would be needed as the intellectual property system would not meet all the needs of traditional knowledge holders. Indeed, examples are emerging which illustrate how this system can be used such as the Trade Marks Act 2002 that prevents the inappropriate registration of trade marks containing Maori text and images. Despite the logic of this approach, the common perspective has expressed firm opposition to using the intellectual property system to protect traditional cultural expressions.

III THE COMMON PERSPECTIVE TOWARDS PROTECTING TRADITIONAL CULTURAL EXPRESSIONS USING THE INTELLECTUAL PROPERTY SYSTEM

The common perspective’s criticisms of the intellectual property system have centred around three key themes - the objectives of the system; impediments to accessing it; and limitations in the protection it provides. These criticisms have been identified in the context of intellectual property laws generally rather than targeted at actual pieces of legislation.

In this section, I dissect each criticism with a two-pronged approach examining the validity of each criticism and its applicability to Maori.

A Objectives of the Intellectual Property System and Maori Customary Standards Regarding Traditional Cultural Expressions

The common perspective contends that there are ideological differences between the objectives of the intellectual property system and customary law systems which makes the intellectual property system unsuitable as a mechanism for protecting traditional cultural expressions. These differences arise from the intellectual property system’s focus on exclusive property rights and commercialisation.

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18 See Moana Jackson *The Maori and the Criminal Justice System He Whaipaanga Hou – A New Perspective (Part 2)* (Department of Justice, Wellington, 1988).
1Exclusive property rights

Intellectual property rights are exclusive property rights which enable the rights holder to control the use of their creation for a particular period of time.

The common perspective contends that under customary law, Maori are subject to complex rules within their natural environment, more akin to obligations rather than rights. Rights of use are said to come with obligations of reciprocity and respect for the mauri (life force) and integrity of the resource used. Commentators have expressed concern that rights granted under the intellectual property system are not subject to these obligations. For example, an artist could create a carving that qualifies for copyright protection but would be under no requirement to respect the mauri of the tree from which the carving is created.

Whether this generates a philosophical conflict for Maori with the intellectual property system depends largely on the prevalence of customary obligations amongst Maori. The process of urbanisation has over many decades resulted in many Maori who do not affiliate with traditional structures or practices and therefore do not consider themselves bound by customary laws or obligations. Academics point to the ravaging effects of colonisation on traditional social structures and Maori culture, but the effects it has had on customary law in contemporary Maori society is often not translated. The influence of western culture amongst Maori has been widespread. Customary obligations pertaining to cultural expressions may no longer play a significant role for many Maori. It is therefore questionable whether the lack of provision for these obligations alongside intellectual property rights is a ground for Maori not to be able to use the intellectual property system. Other aspects of how customary laws controlled the use of cultural expressions have evolved and many restrictions have waned. For example, in traditional society, ta moko were only performed by men but now Maori women also perform them. It is plausible, therefore, that customary obligations may have changed as well.

22 Solomon and Watson, above, 50.
23 Te Puni Kokiri Maori Economic Development - Te Ohanga Whanaketanga Maori (Te Puni Kokiri, Wellington, 2003) 44.
The common perspective also contends that Maori do not view their expressions as ‘property’ - that is, something which has an owner and is used for the purpose of deriving economic benefits.\(^{26}\) This is debatable given the proliferation of Maori using cultural expressions in commercial enterprises.\(^{27}\) Derivative works created by artists are likely to be often considered to be property, particularly in a commercial setting. Furthermore, Maori continually assert their rights and ownership over their cultural expressions in general. The tumult that continually erupts from Maori when cultural expressions have been misappropriated clearly indicates this strong sense of ownership. The distinction between ownership and property is unclear but it is suggested it seems to be mostly semantical.

Maori are also said to view their heritage in terms of their community responsibility as guardians of traditional culture for future generations. The common perspective contends that if an entity obtains intellectual property rights to cultural expressions, this creates a risk that the expression would no longer be available for future generations.\(^{28}\) This risk is overstated. Typically, it is only derivative works which would meet the criteria for intellectual property protection. Therefore, it does not follow that ‘the base’ would be put in jeopardy by others obtaining intellectual property rights over their own derivative works. The base of cultural heritage from which traditional cultural expressions are created would continue to be available for future generations.

2 Commercialisation

Intellectual property rights are essentially designed to promote innovation and to stimulate growth, by enabling right holders, including Maori, to exploit their ‘creations’. The commercialisation of traditional cultural expressions is rejected by the common perspective as it claimed to conflict with the way cultural expressions were used and controlled under the customary law system. Indeed, in the customary context, particular cultural expressions were not commercialised due to their highly tapu nature. However, to cast this standard across the breadth of traditional cultural expressions is a gross oversimplification both within a traditional and contemporary context.


\(^{27}\) Examples of commercial initiatives by Maori using traditional cultural expressions are discussed in Part IV of this paper.
During the early days of colonisation, Maori thrived as a commercial force with tribal trading activity. In the 1820s, they developed substantial trades in flax and kauri with Sydney-based firms and virtually monopolised the coastal shipping trade in Auckland, the East Coast and Bay of Plenty. Their economic dominance continued for several decades after the Treaty of Waitangi was signed in 1840 only to collapse due to the land wars.

Some have termed the last decade as the “awakening of the sleeping giant of Maori business.” Indeed, it is becoming increasingly recognised that Maori will become a very major force in the economy in the not too distant future. Te Puni Kokiri (Ministry of Maori Development) has noted that Maori economic development is burgeoning, particularly within the cultural services sector.

Maori people and businesses form a distinctive and important component of the New Zealand tourism industry. World famous attractions run by Maori include the Maori Arts and Crafts Institute and Tamaki Maori Village in Rotorua and... Kia Kaha clothing produces casual and sports clothing that incorporates distinctive Maori designs. Many Maori tourism businesses focus on performing arts and crafts, followed by adventure activities. Accommodation, including marae stays, is also a major area of business.

Evidently, the range of commercial activities which Maori are undertaking in the cultural sector are varied and encompass most areas of traditional cultural expressions. This trend is likely to escalate, particularly as the production of cultural commodities is one of the fastest growing sectors in the world economy. Te Puni Kokiri contends that the increasing global demand for authentic cultural experiences to offset the blandness of globalisation provides a limitless base for growth of this sector. This potential has been recognised by many Maori who have embraced the opportunities which commercialising their culture offers.
Many commercialisation activities play an important role in preservation and retention of the Maori culture by making it accessible for Maori as well as other New Zealanders. This is important given that many Maori are growing up with little or no knowledge of their culture, mostly due to the effects of urbanisation. The commercialisation of Maori culture through television programmes, albums and education resources enables both Maori and non-Maori to learn about the Maori culture.

Some of the resistance put forward by the common perspective seems due to a lack of security of some Maori that the Maori culture will not be undermined and as such commercialisation is seen as a threat. This insecurity has spilled over into a self-imposed limit on economic development. Rather than oppose commercialisation outright, particularly when it has a number of benefits for Maori, the judicious option would be to improve cultural awareness to reduce the likelihood of offensive activities or products.

B Impediments to Accessing the Intellectual Property System

1 Criteria for protection

Intellectual property must be new, novel, original or distinctive. The intellectual property system, in general, requires a certain degree of creativity in a work for it qualify for protection. For example, it requires originality in copyright and designs and distinctiveness in trade marks. As traditional cultural expressions and the knowledge underlying these expressions has been handed down for generations, it is often considered to not meet this criteria. The common perspective has identified this as an impediment to accessing protection under the intellectual property system.

However, upon more thorough examination it becomes apparent that this assertion is not categorically correct. In common law jurisdictions, a relatively low level of creativity is required in order to meet the originality requirement under the copyright system. A work could be considered ‘original’ if some degree of intellectual effort has been involved and it

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40 WIPO, Analysis of National Experiences, 18.
has not been copied from another’s work.\textsuperscript{41} In the Australian case of \textit{M and Others v Indofurn Pty Ltd and Others},\textsuperscript{42} the judge was of the opinion: “Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.” As the meaning of ‘originality’ is not defined in the Copyright Act 1994 and is left for the courts to determine, this is a highly persuasive authority on what this constitutes in the context of traditional cultural expressions. At least at common law, derivative works could be considered to be sufficiently original to be protected by the intellectual property system.

The issue becomes more complex with unoriginal imitations of pre-existing cultural expressions, which are unlikely to meet the ‘originality’ requirement. Nonetheless, it is questionable whether this creates significant unfairness. It seems inappropriate for an artist to be awarded the economic and moral rights afforded by the copyright system if they have merely recreated an expression and not exerted the innovation required of other artists to have their works protected. As the intent of the intellectual property system is to encourage creativity, it is only fitting for those who have been sufficiently creative to be rewarded.

This is not to suggest that pre-existing cultural expressions cannot be protected. If the government wishes to provide some form of protection, there are a number of overseas approaches that can be drawn on, most of which are separate sui generis systems. While sui generis systems fall beyond the scope of this paper, it is worthwhile to note that the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982 makes no reference to an originality requirement nor do some other sui generis systems.\textsuperscript{43}

The designs system has a similar criteria to copyright with a requirement for designs to be “new or original”.\textsuperscript{44} Although there is no established definition of the notion “new” in international treaties, it generally means that no identical or very similar design is known to have existed before.\textsuperscript{45} While the common perspective has not focussed on the designs

\textsuperscript{42} \textit{M and Others v Indofurn Pty Ltd and Others} (1994) 130 ALR 659, 665.
\textsuperscript{43} See South Pacific Model Law on the Protection of Traditional Knowledge and Expressions of Culture (Secretariat of the Pacific Community, Noumea, 2002).
\textsuperscript{44} Trade Related Aspects of Intellectual Property Rights Agreement, art 25(1).
\textsuperscript{45} WIPO, Analysis of National Experiences, 46.
system, it is noted that contemporary forms of traditional designs may meet the “newness” requirement whereas recreations of well-known designs may not, for similar reasons as for copyright, and would therefore need to be protected through sui generis laws.

In order to be eligible for protection under the trade mark system, a mark must be distinctive of the proprietor so as to identify the proprietor’s goods or services and to prevent customers from being misled or deceived. The common perspective has expressed concerned that Maori cannot protect their words and symbols using the trade mark system due to the distinctiveness criteria. However, there are a range of examples of Maori businesses and organisations that have registered Maori images as trade marks. It is contended that it is not so much the distinctiveness criteria that is the impediment, but rather the requirement that the mark must be linked to trade use.

2 Trade use

For Maori to register a mark containing Maori text or imagery as a trade mark they are required to use it in the course of trade or have the genuine intention to do so. The common perspective contends that it is inappropriate to use traditional cultural expressions in the course of trade due to the cultural significance and traditional use of that material.

It is contestable whether this is a shared view among Maori. While the use of particular cultural expressions may not be appropriate in commercial activities, this does not apply to the majority of cultural expressions. Many Maori are embarking on commercial ventures which utilise their cultural expressions in their goods or services and in their business branding to distinguish themselves on the international stage. Mead suggests that the blanket dismissal by some Maori of the relevance of intellectual property for Maori has been unhelpful noting that some Maori entering into business want to pursue global trade.

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46 Trade Marks Act 2002, s 18.
47 Maori have also expressed concern that they cannot prevent others from using their expressions and/or obtaining intellectual property rights over them. Their concerns could be addressed through the new registration provisions in the Trade Marks Act 2002 discussed in Part IV of this paper.
48 Examples of registered trade marks using Maori images and owned by Maori organisations or businesses are provided in Part IV of this paper.
Another concern raised by the common perspective is that some Maori groups have attempted to use registration as a way to protect their words and other marks against exploitation by others but have been unsuccessful because of the lack of trade use. The new Trade Marks Act 2002, discussed later in this paper, will address this concern by preventing the registration of trade marks that contain Maori text and imagery which may be offensive to Maori. There is no requirement for the cultural expressions to be used in trade. This is a useful example of how an intellectual property law can be strengthened without compromising its distinguishing characteristics and without requiring Maori to change aspects of their culture.

3 Identifiable author requirement

Intellectual property laws require the identification of a known individual creator or creators. Identifying a single source of traditional cultural expressions, according to the common perspective, is not easy due to the collective ownership of this knowledge and the fact that it has been passed on orally for many generations.

This assertion is not applicable to all traditional cultural expressions though. In respect of derivative works, there is almost always an identifiable creator, or creators, and this requirement is generally met. Therefore, traditional cultural expressions such as paintings, waiata and carvings created by current generations would not be impeded by the identifiable author requirement to obtaining intellectual property protection.

It is highly difficult, however, to identify the creators of pre-existing Maori cultural expressions because they have been communally created and often the creators are unknown. While pre-existing expressions must have had an ‘author’ at some stage, it is likely that there is no ‘identifiable author’ as it was not customary of traditional Maori society to record these details compared with Western cultures which generally ascribed and recorded authorship. Therefore, it is conceded that this condition is an impediment to the obtaining of intellectual property rights as claimed by the common perspective, but only for pre-existing expressions.

50 WIPO, Analysis of National Experiences, 20.
A solution for addressing this issue could come under a sui generis regime where the need to identify an ‘author’ could be obviated by vesting authorship rights in Maori authorities such as runanga for traditional cultural expressions developed by unknown Maori creators. This approach mirrors that of the South Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture which vests rights in expressions of culture in ‘traditional owners’ defined as the group, clan or community of people in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.\(^{51}\)

4 Conceptions of ‘ownership’

The common perspective contends that the intellectual property system recognises individual notions of ownership rather than collective ownership which is at odds with Maori custom.\(^{52}\) There are several weaknesses in this argument.

Firstly, intellectual property protects not only individual creators but also groups of creators. The Copyright Act 1994 provides that copyright can be owned by a body corporate.\(^{53}\) Most intellectual property assets are owned by collective entities, which in many cases represent large and dispersed groups of individuals.\(^{54}\) For example, General Motors owns intellectual property rights on behalf of a group of shareholders much larger than all iwi and hapu. The need to be organised as a legal entity is not a foreign concept for Maori who have established themselves into legal entities such as trusts and incorporations to utilise and administer Maori land which they own collectively. While the experience of Maori with these corporate structures has not been without problems,\(^ {55}\) this illustrates that legal entities can be used effectively by Maori to manage collectively held property.

Even so, the majority of collectively-held expressions would be mostly pre-existing expressions which do not generally qualify for intellectual property protection. Therefore, the need for collective ownership through legal entities would be limited. Under a sui generis system, however, some form of collective entity is likely to be required.

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\(^{51}\) South Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture, cl 4.

\(^{52}\) Moana Jackson “Getting to Grips with GATT” (February 1995) *Kia Hiwa Ra Te Kuiti* 8.

\(^{53}\) Copyright Act 1994, s 18(1)(c).

\(^{54}\) WIPO, A Sui Generis System, 18.

The second weakness in this argument is the assertion of the collective worldview of Maori when Maori live in a world that is clearly based on individual responsibility. The common perspective seems to suggest that the individual does not exist within the Maori worldview. Certainly, collective responsibility and obligations played a significant role in traditional society but the culture has changed and evolved. Some traditional values continue to be highly relevant in contemporary Maori society, however, perhaps not to the extent which the common perspective suggests. A Maori artist, it is suggested, would feel a firm sense of individual ownership over a work they have created while at the same time respecting the base of knowledge from which that work is derived. The individual nature of society inherently requires them to consider their own needs for subsistence purposes.

5 Fixation

The Copyright Act 1994, which is the primary intellectual property law for protecting traditional cultural expressions, has fixation as a condition for protection. This requirement is more apparent than under the previous copyright legislation. The common perspective contends that traditional cultural expressions are passed on orally and are therefore not in material form nor is it desirable to do so. Consequently, it is claimed that the fixation requirement prevents intangible and oral expressions of culture from being protected.

According to general international principles, copyright protection is available for both oral and written works. Article 2.2 of the Berne Convention makes it clear that national laws need not provide that fixation in a material form is a condition for protection:

It shall, however, be a matter for legislation...to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

The Copyright Act 1994, similar to many other common law countries, does so because fixation confirms the existence of the work which provides for a clearer basis for rights. This is not a treaty requirement though, and in fact, many countries do not require fixation, such as Spain, Germany and France. If Parliament considers it desirable to do so, it is able to waive the fixation requirement.

56 Copyright Act 1994, s 15.
57 See Copyright Act 1962, s 3(2).
Removing this requirement would extend the coverage of protection for traditional cultural expressions. On the other hand, there would be no way to prove that an expression was created by a particular individual or group which could lead to disputes over ownership. In other cases, it would create difficulties in establishing the existence of a work. These problems would similarly arise in a sui generis system with no fixation requirement.

In any event, the fixation requirement only poses a problem for intangible cultural expressions which are a limited portion of traditional cultural expressions. It is suggested that the benefits created for these expressions by removing the fixation requirement would not justify the uncertainty created within the regime.

This may not create the difficulties purported by the common perspective. There are a number of publications by leading Maori authorities on cultural expressions such as waiata and whakatauki.\(^{59}\) It is generally these types of expressions that were only passed on orally under customary systems and which the common perspective contends should not be fixed. The intention of these authors seems mostly to preserve the knowledge in a tangible form to ensure it is available to current and future generations. The extent of knowledge that has been lost has not gone unnoticed and the shift towards fixation is increasing.

In many ways, fixation is a double-edged sword. Maori can opt to only pass on knowledge orally and retain their customary practices. But this approach has seen a wealth of knowledge disappear. The alternative is to record the knowledge to ensure the continuation of important cultural practices. In my view, the survival of Maori and iwi culture is paramount and this is often the impetus behind its ongoing evolution. To this end, the Maori culture has never been stagnant.

Many Maori commentators have a tendency to ‘freeze’ the Maori culture as it was before colonisation and defining it within that context. The common perspective is clearly founded on this approach. Recognising the evolution in Maori culture will not necessarily mean surrendering to assimilation within Western culture particularly as Maori culture is still highly distinctive and unique. Assimilation is likely, however, if the knowledge is lost.

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\(^{59}\) See generally, Apirana Ngata \textit{Nga Moteatea} (Reed for the Polynesian Society, Wellington, 1972); Margaret Orbell \textit{Waiaata: Maori Songs in History} (Reed, Auckland, 1994); Hirini Moko Mead \textit{Nga Pepeha a nga Tipuna = The Sayings of the Ancestors} (Victoria University Press, Wellington, 2001).
6 Costly to access and utilise the intellectual property system

The common perspective has emphasised that the ability of Maori to utilise intellectual property rights is significantly hindered by the cost involved in the application process and if successful in their application, subsequent enforcement of the right. This is perhaps the most straightforward issue to remedy. Facilitating measures designed to assist Maori to access, understand and use formal intellectual property systems could accommodate this and no legislative amendments would be required. An example could be public information activities aimed at Maori to explain intellectual property rules and systems. Another option could be the reduction of filing and renewal fees for Maori but this may create a situation of inequity particularly in the business sector which is where registration is most applicable. Therefore, some parameters would be required such as limiting it to businesses in their preliminary years of trade. In addition, Maori artist groups such as Toi Maori Aotearoa could form copyright collectives to promote the interests of their members.

C Limitations of Protection Under the Intellectual Property System

1 Fixed term of protection

The fixed term of protection afforded under most intellectual property laws has been identified as a limitation of protection by the common perspective which has asserted that traditional cultural expressions need to be protected in perpetuity.\(^{60}\)

Indefinite protection is not a new concept in intellectual property law as trademarks and geographical indications can provide continuous protection provided that re-registration occurs.\(^{61}\) The duration of copyright protection extends to 50 years after the death of the author in New Zealand or 70 years in some jurisdictions. The Berne Convention stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. Therefore, New Zealand is able to provide indefinite protection for cultural expressions under the copyright system as well.


\(^{61}\) WIPO, Analysis of National Experiences, 24.
Whether an exception should be granted for indefinite protection of traditional cultural expressions raises a number of issues as it would create tensions with general policy assumptions about the copyright system. The copyright system provides creators with exclusive rights over their works on the condition that it is for a limited period of time after which it will fall into the public domain. Yet the effect of perpetual rights would be that Maori would receive exclusive rights without needing to give something back to the public. When contrasted with the fact that Maori artists enjoy the benefits of being able to draw on other mainstream artists works that have fallen into the public domain, perpetual rights for traditional cultural expressions, which are generally created by Maori artists, seems inequitable. For example, the Maori Merchant of Venice production62 was based on a William Shakespeare’s play that has entered the public domain, but based on the common perspective’s rationale, Maori would have perpetual rights to this rendition.

It is important to note that this issue is only applicable to derivative works as pre-existing expressions would not, in general, qualify for intellectual property protection. As derivative works are created by current generations who would have exerted a similar level of creativity as other artists, it also seems only equitable for these cultural expressions to fall into the public domain. It would create a situation of unfairness if the creators of traditional cultural expressions were afforded perpetual rights while other artists only received protection for a limited period.

If traditional cultural expressions fall into the public domain, the concern of the common perspective seems more about derogatory use rather than expiration of property rights and this concern will outlive any intellectual property right.63 This is a valid concern but there are other options to address it. Frankel and McLay have suggested that copyright law could allow for perpetual moral rights which would be more compatible with the cornerstone principle of limited duration.64 This is discussed later in this paper.

64 Frankel and McLay, above, 111.
There are some negative implications of perpetual rights for Maori which seem to have been overlooked. Perpetual rights would most likely be granted at an iwi level and in that case, an artist of Te Arawa descent would be restricted to expressions of that tribe in perpetuity in the absence of approvals to use another tribe’s expressions. The development and continued evolution of Maori cultural expressions depends largely on works becoming part of the public domain. If perpetual rights were established, overprotection could be the outcome as artists would be limited to expressions in the public domain at that point in time.

2 No holistic protection

The intellectual property system is a combination of laws which cater for different types of subject matter and therefore it can only protect the elements of traditional knowledge separately. According to the common perspective, this division is not compatible with the holistic nature of traditional knowledge and its components, including traditional cultural expressions. This is not disputed, however, there are advantages in separating this subject matter when developing systems of protection. Whether under an intellectual property or sui generis system, traditional knowledge needs to be separated to achieve effective protection. It would be problematic to operate a robust singular regime for such diverse subject matter. In overseas jurisdictions, the approach of sui generis systems has been to separate traditional knowledge into two groupings of ecological knowledge and cultural expressions. The lack of holistic protection is not, therefore, a limitation of the intellectual property system per se.

IV AN ALTERNATIVE PERSPECTIVE TOWARDS PROTECTING TRADITIONAL MAORI CULTURAL EXPRESSIONS USING THE INTELLECTUAL PROPERTY SYSTEM

An alternative perspective suggests that the intellectual property system can, by using some existing measures more effectively and strengthening other measures, provide an effective degree of protection for traditional cultural expressions that is compatible with the way Maori regard these expressions. It concurs with the common perspective’s assertion that these expressions are an integral part of Maori cultural identity but contends that Maori also view their cultural expressions as a powerful tool for their economic development.

A Maori and Traditional Cultural Expressions in Contemporary Society

1 Maori commercial initiatives

Maori have recognised the commercial value of their unique culture within an ever-increasing global economy and are using the full spectrum of traditional cultural expressions in a range of commercial initiatives.

Maori people and businesses form a distinctive and important component of the New Zealand tourism industry. Examples of commercial initiatives include the Tamaki Maori Village which operates a recreated Maori village as well as kapa haka groups who meet the demand for performing arts displays for tourist entertainment. Given the increasing involvement of Maori in this sector, Te Puni Kokiri contends that there is a need to improve protection for their intellectual property and has suggested a mark of authenticity for Maori tourism products and services be developed. If this is pursued, care will be required to ensure that confusion is not created within the market with the Maori Made Mark, particularly as certification marks rely on their market profile. To safeguard against this, an option could be to broaden the scope of the Maori Made Mark beyond artworks and performances to include Maori tourism initiatives such as marae visits.

The ‘Maori cultural renaissance’ has also seen Maori undertake a range of commercial enterprises aimed at preserving their culture. For example, Huia Publishers (NZ) Ltd is a publishing and communications company which, among other things, focuses on Maori publishing for the commercial book trade and educational resources for Maori-medium schools. In the creative sector, Taki Rua Productions is a theatrical production company that produces plays that explore a Maori view of life and promotes te reo Maori.

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66 See generally, Law on Biodiversity of Costa Rica; Panama Law No. 20 of June 26 2000; Tunis Model Law On Copyright For Developing Countries, 1976; South Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture.
67 Te Puni Kokiri Maori in the New Zealand Economy (Te Puni Kokiri, Wellington, 2002) 32.
68 Te Puni Kokiri, above, 33.
69 Arts Council of New Zealand Rules Governing the Use By Artists of the Toi Iho Maori Made Mark (Arts Council of New Zealand, Wellington, 2002) 2.
71 Te Puni Kokiri Maori in the New Zealand Economy (Te Puni Kokiri, Wellington, 2002) 40.
72 Te Puni Kokiri, above, 42.
This cultural renaissance has also seen the emergence of a market for Maori-inspired products, particularly within the clothing industry. An example is Ngaru Toa Tribal Surf Ltd which is a clothing label that uses kowhaiwhai patterns in its designs.\textsuperscript{73}

Evidently, Maori are pursuing commercial initiatives using their cultural expressions across a range of sectors. Recognition of this dispersion is important when attempting to identify what Maori seek to achieve from protection mechanisms. For example, preservation initiatives may not be profit-driven but more concerned with maintaining the integrity of cultural expressions. Other initiatives may be profit-driven and the exclusion of non-Maori competitors from the market may be important. Any prescription for protection should reflect the objectives Maori collectively wish to achieve.\textsuperscript{74}

2 Objectives of protection

The alternative perspective contends that the objectives of protection of Maori may be broadly categorised into three main areas:

(1) Preservation, retention and use: Promoting respect for and preservation of traditional cultural expressions and to ensure that normal and continued use of these expressions is not interfered with;

(2) Development: Protecting economic interests arising from cultural expressions developed in commercial activities; and

(3) Control over use: Controlling access to and use of traditional cultural expressions, whether commercial or not, and to prevent derogatory, offensive and fallacious use.

B The Role of the Intellectual Property System in Protecting Traditional Cultural Expressions

While the alternative perspective considers that the intellectual property system can provide useful protection for traditional cultural expressions in its existing form, it qualifies this by noting that this system has not yet fully evolved in this regard. This may be because the economic benefits of protecting traditional cultural expressions are not as eminent as the benefits of protecting other subject matter such as new technologies.

\textsuperscript{73} Te Puni Kokiri, above, 38.

Yet Dutfield suggests that traditional knowledge, including traditional cultural expressions, benefits national economies and has the potential to benefit them still further.75 Traditional knowledge-based products are traded in both domestic and international markets and can provide substantial benefits for exporter countries. While estimating the full value of traditional cultural expressions in monetary terms is difficult if not impossible,76 protecting this subject matter could improve the performance of New Zealand’s economy through increasing exports of products based on cultural expressions.

Given this potential, it is contended that the intellectual property system should evolve to provide greater protection to Maori businesses who utilise their traditional cultural expressions similar to the way it has evolved to protect the technology industry. Intellectual property has rapidly evolved to accommodate the new technologies of doing business generated by the global economy.77

The promotion of commercial interests under the intellectual property system also need to be balanced against the equitable and cultural imperatives for protection as well as the objectives of protection. These are not necessarily mutually exclusive. It simply means that intellectual property rights should not contravene these factors.

A secondary question is whether the intellectual property system can evolve to meet this requirement. Certainly, there are indications that it can with the advent of the Trade Marks Act 2002 which prevents the registration of trade marks containing Maori text or imagery that would be offensive to Maori.78 This approach recognises the need to balance cultural concerns against business development. Not all would subscribe to this view, particularly portions of the business sector. The ‘added value’ and marketing opportunities that a distinctive Maori identity can give New Zealand businesses operating in the international

76 Dutfield, above, notes that traditional knowledge is often an essential component in the development of other products yet as many traditional knowledge-derived products never enter modern markets, they are excluded from GDP indices.
77 WIPO, A Sui Generis System, 13.
78 Trade Marks Act 2002, s 17.
market is becoming increasingly recognised. Yet this approach restricts the ability of non-Maori businesses to exploit traditional cultural expressions. In my view, this restriction is appropriate as Maori can rightfully claim ownership over these expressions.

It is further suggested that the intellectual property system can do much more without altering its fundamental nature. For example, measures can be implemented to prevent derogatory use in perpetuity or to ensure intellectual property rights are afforded to the rightful parties. As well, Maori can be assisted to utilise existing measures more effectively.

C The Positive and Defensive Protection Model

In the context of protecting traditional knowledge, WIPO has categorised intellectual property protection measures into two general types. Measures which grant rights to authorise and control use are referred to as ‘positive protection’ whereas measures which prevent the acquisition of intellectual property rights that would be inappropriate are referred to as ‘defensive protection’. This distinction is particularly helpful as the common perspective’s assessment of the intellectual property system has been largely based on the ability of the intellectual property system to afford rights to Maori. It is not necessary to restrict an assessment to this outcome alone. For example, the aforementioned provisions in the Trade Marks Act 2002 do not afford any rights to Maori but provide practical protection that meets the objective of protection concerning offensive use.

Existing laws already provide measures that provide positive protection for traditional cultural expressions. For example, the Copyright Act 1994 provides protection by giving artists who create copyright works the right to prevent others from performing, playing or showing their works in public. Similarly, under the Designs Act 1953, the proprietor of a design registration has the exclusive right in New Zealand to prevent others from the manufacture, sale, use or import for sale of any article in which the design is registered.

81 Copyright Act 1994, s 16.
82 Designs Act 1953, s 11.
Positive measures can meet all three objectives of protection to various degrees. In regard to preservation, copyright provisions can ensure that literary works on traditional cultural expressions such as waiata or carvings are protected. This could act as an incentive to record important knowledge pertaining to cultural expressions. This enables Maori to access and learn more about Maori cultural expressions which is crucial to its retention.

The development objective can be met through positive measures such as copyright and trade marks. Development needs primarily concern the protection of economic interests. As this is a primary objective of the intellectual property system, there are a number of measures which can be used to protect traditional cultural expressions in the commercial context. For example, copyright would enable the creator of a painting to negotiate the terms of use of their work on the cover of a publication.

Copyright can also prevent unauthorised use, including derogatory use through moral rights which give the owner of copyright works the right to object to derogatory treatment.

Defensive protection measures do not have the scope of positive protection in terms of meeting the objectives of protection. Defensive protection measures do not afford rights directly. Instead, it involves measures at the registration stage which ensure works are not registered for particular reasons such as causing offence which is relevant to the third objective of protection. The effectiveness of defensive protection measures is limited as it only prevents registration and does not stop actual use which may be offensive. Therefore, a company could use a sacred image such as the tiki, which is a symbol of fertility, in conjunction with a devil’s pitchfork and defensive measures could not stop this use.

D Positive Protection Measures

Positive protection for traditional cultural expressions is provided under intellectual property laws such as copyright, trade marks and designs. However, some measures could be utilised more effectively such as certification marks and registration of trade marks. Strengthening measures can also be incorporated such as perpetual moral rights and the ability to assign moral rights.
1 Certification marks

Certification marks are a form of trade mark used to distinguish goods and services which possess a certain quality or characteristic. The use of these marks can increase consumer recognition of authentic goods, services and works of art produced by Maori. There are several examples of uses of certification marks by traditional knowledge holders overseas. In Canada, the Cowichan Band Council has received a certification mark on the words and design for “Genuine Cowichan Approved” to protect articles of clothing such as sweaters. There is also an Indigenous Label of Authenticity in Australia.

The Maori Made Mark (‘the Mark’) in New Zealand was launched in February 2002. It is a registered trade mark of authenticity and quality which indicates that the creator of the good is of Maori descent and produces work of a particular quality.

The Mark will not prevent the actual misuse of Maori concepts, styles and imagery but can decrease the market for “copy cat” products. This depends largely on market presence and consumer awareness. Since the Mark was launched, its has not yet developed sufficient reputation for consumers to be aware of the importance of authentic and high quality cultural expressions. Obtaining consumer recognition and customer loyalty is not easy to achieve, particularly as it requires a significant financial investment for marketing. Other certification marks such as the ‘Woolmark’ are advertised widely but promotional campaigns for the Mark have, by no means, reached this magnitude. This is most likely to be a result of funding restraints. However, as certification marks depend on reputation, the Mark will be worthless if adequate promotional activities are not undertaken.

It is also important to recognise that the Mark does not assign rights to Maori directly, and therefore it is not strictly a positive right. If the Mark develops a strong market presence, Maori will be in an advantageous position as only Maori can utilise it. Therefore, it provides an exclusive access right to Maori which is a form of positive protection. Conversely, the Mark also has aspects of defensive protection as it attempts to restrict non-authentic or copy-cat works being passed off as authentic Maori works.

83 Trade Mark Numbers 629775-629930.
84 Arts Council of New Zealand Toi Aotearoa Rules Governing the Use By Artists of the Toi Iho Maori Made Mark (Arts Council of New Zealand Toi Aotearoa, Wellington, 2002) 6.
2 Registration

The registration of trade marks can provide protection for traditional cultural expressions. Traditional and contemporary Maori groups have registered trade marks with Maori imagery. For example, The House of Tahu\(^{85}\) is a registered trade mark for a commercial fisheries enterprise of the Ngai Tahu tribe. However, it has a more significant meaning as it is also used by Ngai Tahu as “a metaphor for the different components of the tribal collective, and how they all inter-relate to represent, protect and advance the tribe’s aspirations in the changing world.”\(^{86}\) This is a useful example of how an iwi has used the intellectual property system to protect a traditional concept. Other registered trade marks by Maori include Te Mana Maori Motuhake\(^{87}\) and Aotearoa Traditional Maori Performing Arts Society.\(^{88}\)

In a commercial setting, if Maori groups protected their names by registration, consumers might prefer to buy their products and services in the interests of buying authentic products. In Canada, registered trademarks are being used by aboriginal groups to identify a wide range of goods and services, ranging from traditional artwork to tourist services. Trade marks have also been registered by aboriginal Australians in respect of cultural festivals, clothing and textiles and music.\(^{89}\) However, Janke also notes that many such applications do not proceed to registration and suggests that this is because indigenous people need to know much more about the system, namely how to apply and overcome descriptiveness of marks and other issues raised in adverse reports.\(^{90}\)

It is contended that this situation is also applicable to Maori. The trade mark system could be used more effectively by Maori if they are better informed of how the system operates which could be addressed through information initiatives by the Intellectual Property Office of New Zealand (“IPONZ”) on how the trade marks system operates. Such a measure could be implemented expeditiously as no legislative amendment would be required.

\(^{85}\) Trade mark number 294595
\(^{86}\) Interview with Anake Goodall of Ngai Tahu (the author, Wellington, 24 March 2003).
\(^{87}\) Trade mark number 661355
\(^{88}\) Trade mark number 312024
\(^{90}\) Janke, above, 17.
3 Moral rights

Moral rights are provided under the copyright system and are recognised in a number of jurisdictions other than New Zealand including the United Kingdom, Switzerland, France, and recently Australia. The Copyright Act 1994 give creators of copyright works the right to protect their works against derogatory treatment, the right to have their works attributed to them and the right not to have someone else's work falsely attributed to them. Each of these moral rights are applicable to the protection of traditional cultural expressions.

The right to have paternity acknowledged is useful in securing the authentication of traditional works. The right against derogatory treatment can protect works from distortion, alteration or misrepresentation. Australia’s copyright legislation provides for the additional moral right of publication which allows a creator to decide whether a work should be made public which would enable the dissemination of spiritually sensitive works to be controlled.

While moral rights can address certain concerns of Maori regarding derogatory treatment, it is important to recognise that moral rights only apply to copyright works which are generally derivative cultural expressions. Therefore, moral rights would not provide protection for pre-existing cultural expressions.

Moral rights also only apply for fifty years after the death of the creator. Frankel and McLay have suggested a strengthening measure of providing for perpetual moral rights. It could prevent derogatory treatment in perpetuity which is a reason why some Maori are concerned about their expressions falling into the public domain as there has been many incidents of derogatory use.

The identification of the creator of a work and subsequent acknowledgement of paternity could be difficult if the work was created several centuries earlier. Policymakers may also view the notion of perpetual moral rights with some apprehension as it could provoke calls

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91 Copyright Act 1994, s 98.
92 Copyright Act 1994, s 94.
93 Copyright Act 1994, s 102.
94 Copyright Act 1994, s 106.
for extension of other intellectual property rights. However, it would be inapt to avoid this proposal based on this possible repercussion alone given its potential for protecting cultural expressions. Perpetual moral rights are not likely to produce difficulties for Maori, or other artists. As well, it is not likely to affect the ongoing expansion of the public domain. It is also not untested as some European copyright systems provide for perpetual moral rights. For example, in France, a creator's moral rights are regarded as a separate body of protections, rather than as a component of the creator's pecuniary rights.\footnote{Roberta Rosenthal Kwall “Copyright and the Moral Right: Is an American Marriage Possible” 38 Vand. L. Rev. 1 (1985) 15.}

Aplin has suggested another strengthening measure of enabling artists to confer their moral rights to the relevant traditional knowledge holders who could be nominated as a joint author of the work.\footnote{Tanya Aplin “Submission to Our Culture, Our Future” in Terri Janke Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights (ATSIC, Sydney, 1998) 119.} This would require an amendment to the Copyright Act 1994 as currently moral rights cannot be assigned.\footnote{Copyright Act 1994, s 118.} Consequently, Maori must rely on the creator to enforce moral rights in that expression.

An important benefit of this proposal is sufficiently flexible to enable artists to recognise their customary obligations if they choose to. An example could be an author of a book that depicts particular iwi legends. In that case, it would be appropriate for the iwi from which those legends originate to have some rights in this publication. It is suggested that the primary concern of the iwi would be to ensure that legends are depicted accurately to uphold their integrity. That said, there would be no compulsion on artists who do not maintain customary obligations to assign which is important given the varying prevalence of these obligations among Maori.

\textbf{E \quad Defensive Protection Measures}

Defensive protection measures are useful in regimes that require registration to obtain intellectual property rights such as trade marks and designs. Measures can be implemented at the pre-registration and post-registration stage.
Defensive measures can be used to prevent the registration of cultural expressions if it would be offensive to Maori. Parliament has introduced defensive protection measures in the Trade Marks Act 2002 which provide an absolute ground for refusal to register a trade mark where the Commissioner of Trade Marks considers its use or registration could be offensive to Maori.  

To ascertain potential offensiveness, an Advisory Committee is established, comprising experts in tikanga Maori (Maori protocol and culture) and te ao Maori (Maori worldview) to provide advice in this regard. This centralised decision-making structure could be at odds with some Maori who consider only they can speak on whether something is offensive to them. However, at a practical level, concessions may need to be made. The characteristics of these experts should not centre on a fair distribution of iwi representatives but rather an assortment of experts in Maori iconography, tikanga Maori and business. It is important not to confuse the intent of this measure with political assertions.

As this legislation has only recently been passed, the offensiveness standard has not yet been tested. Nonetheless, it is suggested that offensiveness should not necessarily be limited to something derogatory. Offensiveness could also mean giving exclusive rights to a company over specific text or imagery. For example, it could be seen as offensive for a company to have exclusive rights to use the word ‘kikorangi’ for a range of blue cheese.

It is important to note that the extent of this legislation’s effectiveness is limited to New Zealand. It will not prevent the registration of Maori text and imagery in overseas jurisdictions such as ‘Moana’ in Germany which prevented performing artist, Moana Maniapoto from using her name when selling her music in that country. While trade mark legislation in Germany would, arguably, permit Moana to trade in that country under her name ‘Moana’ on the proviso that it is not contrary to morality, the situation is still problematic as Maori are deprived of the basic right to use their names and their language.

100 Trade Marks Act 2002, s 17(1)(b)(ii).
101 Trade Marks Act 2002, s 177.
102 Trade Marks Act 2002, s 179(2).
103 See Moana and the Tribe <http://www.moananz.com> (last accessed 2 December 2002).
104 Trade Marks (Germany) Act 1995, s 23 (1).
Moreover, it is of concern that such a generic word as ‘Moana’ was registered. This may be an overall weakness of the trade mark system at the international level in terms of the registration of foreign words. It is not likely that the examining office in Germany would have been aware that Moana is a generic Maori word.

While international mechanisms fall beyond this paper, it is useful to note that the United States Patent and Trademark Office has established a comprehensive searchable database of the official insignia of all State and federally recognised Native American tribes. Based on this approach, a similar searchable database could be implemented at the international level of symbols, names, words etc of traditional knowledge holders, including Maori, and operated by an organisation such as WIPO. If an application for registration contained a foreign word, national intellectual property offices could request a search of this database to establish whether it is word of a traditional or indigenous group. To ensure that this database does not assist misappropriation, strict controls would be needed.

Similar defensive measures to the trade mark registration provisions could be implemented in the Designs Act 1953. Currently, it is not possible to oppose registration of a design. A similar offensive test in the design application process could play an important role in preventing rights being obtained inappropriately over this subject matter.

2Opposition and expungement procedures

Section 47 of the Trade Marks Act 2002 enables a person to oppose an application for registration. Any Maori, regardless of standing within the Maori community, can oppose an application with written notice that includes a statement of the grounds of opposition. Possible grounds could include that the sign denotes the community’s identity.

However, WIPO has noted that on the basis of available reports, it seems that there are very few cases in which indigenous peoples, including Maori, have opposed the registration of a mark. Janke suggests that indigenous peoples have limited access to legal advice and the relevant official gazettes and journals in which trademark applications are notified.

105 The word ‘Moana’ means sea or ocean in Maori.
106 WIPO, Analysis of National Experiences, 42.
107 WIPO, above, 43.
While policy initiatives to better inform Maori on these proceedings could be introduced, it is suggested that the Advisory Committee could render opposition proceedings unnecessary for Maori in terms of culturally offensive marks as these would be filtered out during the examination stage. Whether this eventuates, will depend largely on whether the committee is able to capture a general Maori worldview on offensiveness. Given the diversity of Maori, this may be no easy task.

In recent years, it has become increasingly evident that there are divergences within Maori as to whether something is culturally appropriate or inappropriate. For example, the genetic modification issue witnessed a difference of opinion amongst Maori, some supporting its development while others opposing it on the grounds that it was culturally inappropriate. As there is no one Maori view on cultural offensiveness, the Advisory Committee may need to use the majority view of Maori as its point of reference and concede that there will often be dissension to their recommendations. Nonetheless, this is a potent example of the government meeting aspects of its Article 2 obligations to protect taonga Maori. Through this approach, Maori are not burdened with opposition proceedings nor are they required to regularly inspect the IPONZ journal for trade mark applications.

The expungement procedure is another defensive measure Maori can utilise. The Trade Marks Act 2002 provides that persons who are “culturally aggrieved” have standing to seek a declaration that a registered trade mark is invalid where the mark is likely to offend Maori.\footnote{Trade Marks Act 2002, s 73.} For example, the trade mark for Maui Campervans could be the subject of an expungement application on the grounds that Maui is an ancestor of all Maori and exclusive rights to this word are offensive.

3 Documentation

Documentation is a different defensive approach to the advisory committee model to prevent inappropriate registration. Public domain tradition-based designs data could be made available to IPONZ to allow them to integrate this data into their existing examination procedures.\footnote{WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO, Geneva, 2001) 110.} The inclusion of cultural expressions in an international design registry such
as the Hague Agreement could also help examiners identify traditional cultural expressions and refusing any applications on the legal basis that they are not new and original, and the applicant is not the creator of the design.\textsuperscript{111}

Documentation is a useful measure as it utilises existing processes and thereby avoids additional resourcing. It also promotes certainty and clarity in the examination process. In the same way as the Trade Marks Act, it also places the burden on the government to carry out the protection mechanism rather than Maori.

It also has some minor shortfalls. A database cannot provide the contextual assistance which experts can. An application could fall within a ‘grey area’ in which a judgment call is required. A combination of documentation and expert advisors could be a useful approach to address this where the expert advisors could be utilised on an as needs basis. Another shortfall is that countries appear to be moving away from substantive examinations of industrial design applications, and therefore extensive activities in relation to the integration of cultural expressions information into searchable prior art for industrial design purposes may not serve practically useful purposes.\textsuperscript{112}

\textbf{V \ CONCLUSIONS}

The use of the intellectual property system to protect traditional cultural expressions has been overlooked by many Maori based on tenuous criticisms of this system by the common perspective. Through detailed analysis, it has been shown that these criticisms lack persuasiveness. Some criticisms are unfounded. For example, Maori are not opposed to commercialisation and collective ownership is also available. Other criticisms such as the costs of accessing the intellectual property system are not symptomatic of a defect in the intellectual property system itself and could be remedied through policy initiatives. Conversely, some criticisms do exist such as the fixed term of protection, however, this paper has illustrated that it would not be equitable to afford perpetual rights nor would it assist the ongoing evolution of Maori cultural expressions. The fixation requirement also exists but it does not appear to be an impediment to obtaining intellectual property protection as many Maori are recording their expressions for preservation purposes.

\textsuperscript{111} WIPO, Analysis of National Experiences, 48.
\textsuperscript{112} WIPO, above, 49.
The common perspective has also failed to recognise the distinctive realities between derivative and pre-existing expressions and appears to have dismissed the intellectual property system based on its ineffectiveness for a portion of traditional cultural expressions without recognising what it can do for other expressions. It is apparent that protection is available for tangible, derivative cultural expressions. In terms of pre-existing traditional cultural expressions and imitations thereof, these are unlikely to meet the originality and identifiable author requirements to qualify for intellectual property protection.

The common perspective base their contention of Maori standards in contemporary society on the customary values and beliefs of Maori in traditional society. This paper has shown that the Maori culture has changed and evolved to meet Maori needs and as a consequence, the primacy of customary standards in contemporary society may not be as widespread as suggested by the common perspective. This does not mean that Maori have been ‘Europeanised’. In traditional society, Maori culture was never static and it continually evolved. It would thus be consistent that it has continued to evolve since colonisation. Recognition of this evolution is imperative as any new system or adaptation of an existing system should realistically reflect Maori cultural values in contemporary society.

There is no question that Maori view their cultural expressions as an integral part of their Maori identity. However, it has been shown that Maori are also using the spectrum of their traditional cultural expressions in commercial initiatives across a range of sectors. Maori are undertaking commercially-driven initiatives as well as preservation focused enterprises. Within this dispersion, the objectives Maori collectively wish to achieve from protection include not only preservation and control, but also development through protecting economic interests. This paper has demonstrated that these various objectives can be accommodated, albeit not comprehensively, within the intellectual property system.

This system can provide protection for many traditional cultural expressions in its existing form as evident in the examples provided of traditional and contemporary Maori groups who have obtained intellectual property rights over their traditional cultural expressions. However, the intellectual property system has not yet fully evolved to meet its potential in protecting these expressions as it can be strengthened and used more effectively by Maori.
Several options for providing additional positive and defensive protection for traditional cultural expressions have been canvassed in this paper. As well, suggestions have been put forward on how Maori might use the intellectual property system more effectively to protect their cultural expressions. In this regard, Maori should be encouraged and assisted to make full use of the existing intellectual property system.

It is conceded that the intellectual property system will not provide comprehensive protection. However, it can provide an effective degree of protection for traditional cultural expressions that is compatible with the way Maori regard these expressions. It is important to bear in mind that intellectual property is just one avenue that Maori can explore for protecting their traditional cultural expressions. To fully achieve all their objectives of protection, a multiplicity of complementary approaches will be needed. Nonetheless, the judicious option for protecting traditional cultural expressions in the short term lies in the strengthening and more effective use of the intellectual property system.

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