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UNDERSTANDING MAORI INTELLECTUAL PROPERTY RIGHTS

This paper will not explain or define what Maori intellectual property rights are. Rather, it will discuss some of the policy that underlies Maori intellectual property, and touch on how and why it is important for those wishing to assist in Maori development and/or work with Maori organizations, to understand the fundamental cultural imperatives that shape Maori opinion about intellectual property and ownership.

It is well documented that many Maori have significant concerns about the application of intellectual property laws in regard to Maori cultural resources, including traditional knowledge. Some characterize the concerns as stemming from a tension between individual and collective rights. Others, describe it as a fundamental difference over the value of property and ownership. I myself have referred to this difference as being "the second wave of colonization – grabbing what few resources Maori retained after the first wave of colonization left us landless and marginalized.

Maori Intellectual property rights is not just a legal issue – when Maori and other indigenous nations refer to ipr in the context of self-determination and tino rangatiratanga what we are saying is that we acknowledge the political background from which laws and policy are enacted – we acknowledge that it takes more than one action to bring about the changes we are seeking, and that in order to achieve any meaningful progress, Maori must have greater control over their knowledge and cultural and intellectual property. Greater control comes in many different forms – policy development, decision-making, access to funding, education curriculum, language revitalisation, employment research and commerce to name but a few.

When Maori commentators describe intellectual property rights within a context of colonization and self-determination, private and public sector organizations often throw their hands up in frustration. No knowing how to proceed or how to even have a constructive dialogue. Where should they begin? My experience in the public sector has shown me three consistent types of response:
Status quo – outright dismissal of the legitimacy of this view – carry on as before
Paralysis – I don't understand and therefore I won't make a decision
Best intention – Scoping Reports, Hui

In all cases, there is a very real reluctance to enter into a genuine dialogue with Maori and try and resolve the issues. On the "other side", there are Maori critics who give the impression that all forms of intellectual property rights are in breach of the Treaty of the Waitangi and therefore offer nothing constructive to Maori whatsoever.

In my experience, the majority of Maori do not hold this view. On the spectrum used by ethicists for identifying ethical issues, ie NO [under no circumstance], NO BUT [if certain conditions are met it might be possible in the future], YES BUT [under some conditions it might not be appropriate] and,YES, I would say the vast majority of Maori

sit within the NO BUT and YES BUT mid-point scale. I have never heard of any Maori who has ever come out and declared an unqualified YES.

We should take as a given therefore that intellectual property laws are not perfect in their current form Maori, but, nor are they of no use or relevance to Maori. In my opinion, we should put more effort into enabling dialogue around the middle ground rather than continue with the paralysis and fear at the two end points of the spectrum.

In 1993, as many of you will know Ngati Awa and the Iwi of the Mataatua Confederation hosted an international indigenous meeting on this topic. The result of the Conference was the now famous Mataatua Declaration. I did an Internet Search on the Declaration yesterday [Google Search Engine] - using the words Mataatua Declaration, it identified 613 global sites that have reprinted the Declaration. Although a lot has happened since 1993, the Declaration still remains one of the most useful articulations of the problems and the solutions. Those of us who drafted the Declaration were very clear that the main issue is one of indigenous self-determination. We were also clear that the issue was not soley a Crown vs Maori one - a “them” versus “us”. Already we could see that Maori have the potential to alienate our own cultural and intellectual property too. It is the vision of the Mataatua Declaration that any way forward had to be based on sound values and principles, such as, integrity, ethical and best practice, a commitment to the rights of future generations yet unborn, and a respect for the journeys, struggles and hopes of our ancestors. If Maori and non-Maori alike follow these principles, we are more likely to achieve a constructive outcome.

Failure by public and private sector agencies to recognize the broad canvas that Maori apply to the issue of intellectual property is a gross error of judgment. The blanket dismissal of the relevance of ipr for Maori by some Maori, is similarly unhelpful.

Maori of today are dynamic and diverse – some want to pursue global trade – a growing number are entering into business [graphic design, computer software, educational curriculum Maori inspired resources, fashion]. Their innovation needs protection. And, our culture needs protection from exploitation and inappropriate usage. Both levels of protection are possible.

I’d like to now talk about three initiatives which highlight current Maori ipr issues and policies. The first relates to the possibilities that exist to reform intellectual property laws to be more responsive to Maori ipr. The second, provides an example of a sui-generis mechanism, based on existing ipr laws but targeted specifically for Maori. The third initiative demonstrates the capacity of Maori to reclaim research and policy development and re-define the values and principles that Maori researchers can operate under and push new frontiers of scientific knowledge.

(1) REFORM OF THE NZ TRADEMARKS ACT

Last year, the Associate Commerce Minister Laila Harre introduced the Trademarks Bill into Parliament. The Bill included a number of proposals to change the law, but of particular significance to Maori was a new provision enabling Maori words and designs to be vetoed as trademarks if they were judged to be culturally offensive. While the previous Trademarks Act had always contained a provision to refuse registration of offensive trademarks, the amendment brought greater scope to the definition of "offensive by including cultural offence.

The Bill provided for the Commissioner of Trademarks to form a Maori committee to advise whether a proposed trademark that appears to be derivative from Maori imagery or text is offensive or likely to be offensive to Maori. In an interview with the NZ Herald [27 June 2001] Hon Harre said "A particular moko or tiki design, or Maori word, at the moment could be used as a trademark by anybody without a specific process by which Maori could object to its use."

The Bill went through the public submissions process. The WAI262 Claimants were not in favour of the provisions, but many other Maori were. What the amendments represented to me was the possibility to strengthen an existing ipr law. Alongside the legal revisions was a parallel revision of the application process itself – instigating for the first time ever, questions to ascertain the degree of informed consent when a Trademark application comprises imagery or text based on Maori cultural design. The consent applied to Maori applicants as well as others. The Trademarks Bill was also the first step in a strategy to revise other ip laws, such as Plant Variety Rights, Patent and Copyright Acts.

The Bill has yet to be passed. The Select Committee recommend deleting the provisions of most potential to Maori, and government has since moved to put them back in.
Adapting ipr laws to protect cultural designs for commercial use is a much simpler process than that of adapting Patents and Plant Variety Rights laws. There are more fundamental differences that can not be "tweaked" or covered through the insertion of new clauses. The Spanish-based organisation Genetic Resources Action International [GRAIN] has just released a report entitled Traditional knowledge of biodiversity in the Asia-Pacific Region. The Report identifies five main reasons why Patents can never protect traditional knowledge, these being:

- It is often impossible to identify an individual inventor due to the collective nature of traditional knowledge
- Traditional knowledge often can not be attributed to a particular geographical location
- Ownership of varieties of plants is alien to many social and cultural beliefs
- The required criteria of "novelty" and "inventive step" are not always possible particularly in cases where the traditional knowledge has been in existence over a long period of time
- The costs of applying for a patent and pursuing patent infringements cases are prohibitive

There are calls from Maori and indigenous peoples globally to develop totally new and additional mechanisms to protect traditional ecological knowledge. On the issue of utilising ipr laws to assert ownership over genetic resources however – this is a highly controversial area. Not only indigenous peoples object to this practice – large numbers of others in civil society share the same concerns including many scientists and Patent lawyers.

(2) SUI GENERIS: MAORI MADE TRADEMARK – TOI IHO

The Maori mark of authenticity was launched last year. It is a registered trademark of authenticity and quality for Maori arts and crafts and offers the opportunity for Maori designers, artists, musicians, performers to identify themselves and their products as being bona fide quality indigenous art forms . The Maori Made Mark was born from 20-30 years of criticism by Maori artists of the lack of protection for their works, and the ever-increasing amount of Maori-design products that were produced offshore or by non-Maori artists for the tourism sector. The Mark enables artists to identify themselves as bona fide and quality Maori artists and enables tourists to purchase products with the full knowledge of their authenticity. To date there have been two licensing rounds, and the following applications have been approved.

57 Maori made [individuals]
1 Maori co-production
32 Maori Honorary users
10 Licensed Stockists

No one has yet made an application for registration for the Mainly Maori mark designed for Maori Kapa Haka and theatrical performers composed of 100% Maori performers. Either the 100% Maori membership threshold is too prohibitive, or Kapa Haka and theatrical performers do not see any value in the mark at this point in time. The existence of the Toi Iho mark places Maori in a select group of indigenous peoples who have taken the same step in utilizing and adapting an intellectual property mechanism to ensure greater protection and development opportunities for Maori individuals and collectives.

At a Pacific Regional Level, a draft Model Law has been created for the Protection of Traditional Knowledge and Expressions of Culture. The Model Law was commissioned through the South Pacific Community, UNESCO and Council of Pacific Arts. It is a substantial work, and I would highly recommend those with an interest in this area – reading through the provisions. It certainly goes far beyond anything we have here in NZ – including the Taonga Maori Protection Bill.

The issue of Maori Branding is of growing importance. On September 5th 2002, the maori.nz domain was launched making Maori the first indigenous peoples in the world to have a dedicated second-level Internet domain name. Interest in registrations was phenomenal with over 60 registrations being recorded in the first 24 hours. It came to the

early notice of the administrators of the domain, that a company had registered a number of Iwi and Maori generic names, including,

auckland.maori.nz | central.maori.nz | eastcoast.maori.nz
kahungunu.maori.nz | kingitanga.maori.nz | muriwhenua.maori.nz
ngaitahu.maori.nz | ngapuhi.maori.nz | ngatiawa.maori.nz
ngatiporou.maori.nz | northland.maori.nz | tainui.maori.nz
tamaki.maori.nz | taranaki.maori.nz | waikato.maori.nz
wanganui.maori.nz | wellington.maori.nz | whakatohea.maori.nz

In a purely commercial sense – speculation and eying an investment opportunity is considered a clever thing. But in a Maori business sense – opportunism of this kind was deemed unethical. He was asked to relinquish the Iwi registrations and after some media coverage and plans for a High Court action, the 'cyber squatter' offered to return the Iwi names to their rightful owners

As at Tuesday 1 October, 398 names had been registered with Maori.nz domain demonstrating a clear wish for Maori individuals and organizations to "brand' themselves as Maori. In so doing they are joining the global world voluntarily and enthusiastically and becoming active participants in the developing national and global policies on e/commerce and the use of indigenous cultural and intellectual property. I include this example in my paper not only to illustrate the developments in Maori branding, but to also highlight the values that underpin Maori initiatives. We do things differently.

(3) RECLAIMING MAORI RESEARCH AND POLICY

Last year, government announced the creation of the country's first Centres of Research Excellence. Of the 8 CoRE, one is NGA PAE O TE MARAMATANGA – NEW HORIZONS OF INSIGHT – National Centre of Research Excellence. The objectives of Nga Pae o te Maramatanga are to achieve critical engagement of Maori expertise in all phases of research; research excellence and to build national maori research capability. It has three inter-dependent research themes, (i) sustainable and healthy communities, (ii) social and educational transformation, and (3) new frontiers of knowledge for Maori. There are 8 partner institutions involved in this initiative, including my own Maori Business Unit at VUW. We are about to embark on a series of thematic workshops and of particular relevance to this presentation is the upcoming workshop on 'New Frontiers of Knowledge'. Some of the questions we have to ask ourselves as Maori researchers and writers of policy – when an individual Maori scientist discovers something new but has been guided and/or informed by Maori cultural knowledge – is it new knowledge? Or is part of the evolving dynamic nature of Maori cultural knowledge? What is a Maori framework for benefit-sharing of research results? What role will ipr laws have in new Maori scientific knowledge?

I can't answer these questions for you yet, but this the excitement and the challenges that lie ahead of us, as Maori reclaim and redefine knowledge creation and cultural relevance. In a similar vein, we are currently working towards the establishment of a national Maori

Business & Development Centre that will be able to undertake even more focussed research on Maori ipr and business development issues.
I have tried to share with you stories of progress and movement – rather than articulate yet again problems and difficulties. In conclusion, the thrust of this presentation is that understanding Maori intellectual property policy should be seen as an exciting challenge rather than cause for paralysis or blame. There are many aspects which can be worked through. There are other ipr issues which are simply repugnant to most Maori and to many others. I would suggest these concerns should be treated very seriously. It wouldn't be the first time Maori and other indigenous peoples are foreseen potential environmental and social problems before policy and decision-makers.

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ANNEXES

A. The World Benefiting From Indigenous Knowledge

B. Macro Biological Indigenous Knowledge Innovations

C. The Mataatua Declaration on the Cultural & Intellectual Property Rights of Indigenous Peoples 1993 [E/CN.4/Sub.2/AC.4/CRP.5 26 July 1993

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