

# **Coping with Culture:**

## **Copyright, cultural expressions and inadequacy of protection for Māori**

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## Chapter one: Introduction

*Ko ngā toi Māori  
He taonga tuku iho  
Hei waitohu ahurea Māori  
e noho torohū noa ana  
Hei waiū mō te whakatipuranga  
Mai i te puna mātauranga o te Ao Māori  
Ko te toi Puoro, ko te toi o Ngā Mahi a Te Rēhia  
ko te toi Ataata  
Mei kore noa e puta ēnei taha rerehua  
Te Wairua, te mana, te ihi, te wana, te wehi, te mauri*

*The Māori Arts are a treasure from our forefathers.  
It is nourishment for the people of this time, young and old,  
from the source of all beginnings. Toi Puoro (music),  
Toi Ataata (visual arts), Ngā Mahi a Te Rēhia (dance and drama)  
console the yearning of the spirit, of the mind and of the body,  
not the least of which is the aesthetic dimension of  
te wairua (spirituality), te mana (respect), te ihi (essential force),  
te wana (authority), te wehi (awe) and te mauri (life force)  
shall be conveyed.<sup>1</sup>*

In recent decades, the international community has been engaging in dialogue regarding the protection of Indigenous cultural expressions and traditional knowledge. Emerging from this dialogue is recognition that traditional intellectual property regimes may not provide appropriate and adequate protection for Indigenous cultural expressions. International bodies have acknowledged the disparity between the protection afforded by copyright and the protection needed to accommodate the cultural and spiritual significance of such works, beyond their economic value. For example, in 1985 the United Nations Educational, Scientific and Cultural Organisation, in conjunction with the World Intellectual Property Organisation published a set of model provisions for the protection of expressions of

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<sup>1</sup> Rawiri Hindle, "The Māori Arts in Education" (UNESCO Regional Meeting of Experts on Art Education in the Pacific, Nadi, Fiji), 25 – 29 November 2002

folklore.<sup>2</sup> Further, in 1989 the International Labour Organisation adopted its Convention concerning Indigenous and Tribal Peoples in Independent Countries. A key concern of this convention was the promotion of social, economic and cultural rights, and the appropriate protection of the property and culture of Indigenous peoples.<sup>3</sup>

In New Zealand, Māori cultural expressions hold a special place in our identity. To Māori, they are a critical means of transmitting culture, spirituality, customs and beliefs from generation to generation, and preserving traditional knowledge. Further, Māori culture and manifestations of that culture through song, dance and artistic works are an integral part of the New Zealand cultural tapestry. New Zealand as a whole takes pride in its Indigenous population, and celebrates its culture. Recently, the showcasing of Māori cultural expressions during the Rugby World Cup has exemplified this. Despite this, the New Zealand legal system still suffers shortcomings similar to those recognised by the international community.

In light of this, the purpose of this paper is to examine why New Zealand's Copyright Act 1994 (Copyright Act) fails to provide adequate and appropriate protection for Māori cultural expressions, in order to work towards a more holistic protection for these expressions. This chapter will briefly outline the justification for the protection of Māori cultural expressions in New Zealand. Chapter two will examine the protection provided by the Copyright Act, and put forward a number of reasons as to why the Copyright Act fails to provide adequate and appropriate protection for Māori cultural expressions. Chapter three will provide an overview of three foreign approaches to protecting Indigenous cultural expressions outside of the traditional copyright regime. This discussion will cover an approach to protection taken by the Australian judiciary, in addition to two forms of sui generis legislation.<sup>4</sup> Chapter four

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<sup>2</sup> United Nations Educational, Scientific and Cultural Organisation and World Intellectual Property Organisation *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions* 1985

<sup>3</sup> International Labour Organisation C169 Convention concerning Indigenous and Tribal Peoples in Independent Countries 76th sess 1989 (entered into force 5 September 1991), arts 2(2)(b) and (4)(1).

<sup>4</sup> Sui generis legislation is that which is unique and in a class of its own. In this context, sui generis legislation refers to legislation that is created for a particular type or class of works outside the existing legislative regimes.

will survey the recent recommendations of the Waitangi Tribunal in relation to intellectual property and taonga works<sup>5</sup> in New Zealand. Finally, drawing on the preceding chapters, Chapter five will outline a suggested protection regime for Māori cultural expressions, in the form of a sui generis legislative regime providing special rights to Māori communities.

### 1.1 Justification for the protection of Māori cultural expressions

By way of introduction, it is necessary to outline why Māori cultural expressions should be granted legal protection. In New Zealand, the relationship between the Crown and Māori is founded on, and governed by, the Treaty of Waitangi. In the 1987 decision *New Zealand Maori Council v Attorney General*,<sup>6</sup> President Cooke held the principles of the Treaty to be a “partnership between races”, that requires the Crown to act in good faith; “a duty to consult”; “a duty to remedy breaches of the past”; and “responsibilities analogous to fiduciary duties.”<sup>7</sup> These principles have become the guiding values in the relationship between the Crown and Māori, and are instrumental in ensuring that the Crown upholds its obligations under the Treaty of Waitangi. Of particular relevance to this discussion is Article 2 of the Treaty, in which the Crown confirmed “full exclusive and undisturbed possession of their Lands and Estates Forests and Fisheries and *other properties* which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.”<sup>8</sup> These ‘other properties’ appear in the Māori version of the text as ‘taonga katoa’, meaning all the treasured things of all Māori tribes and all Māori people.<sup>9</sup> It is difficult to argue that Māori cultural expressions do not fall within this category – they are the embodiment of Māori culture, history, creation and family,

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<sup>5</sup> Taonga works are defined by the Waitangi Tribunal as “a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narrative or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori. See Waitangi Tribunal, *Ko Aotearoa Tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity* (Volume 1) (2011) at 96

<sup>6</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641

<sup>7</sup> *Ibid*, at [51] – [56]

<sup>8</sup> Treaty of Waitangi (signed 6 February 1840) as incorporated in Schedule 1 of Treaty of Waitangi Act 1975, Art 2 [emphasis added]

<sup>9</sup> Waitangi Tribunal, *Ko Aotearoa Tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity* (Volume 1) (2011) at 79

and are central to the maintenance and preservation of Māori customs and beliefs. As such, it is the responsibility of the New Zealand government to provide protection for these treasured things, and the interests of Māori in them.

It becomes apparent that the traditional copyright regime that operates in New Zealand cannot accommodate the complexity of Māori cultural expressions. It follows that the New Zealand government ought to provide alternative protection that can accommodate the complex Māori ideas and needs relating to their cultural expressions. Whilst New Zealand prides itself on its fair and just legal system, where ‘one system of law for all’ is applied, the New Zealand Law Commission has acknowledged, “more than one distinct group can be acknowledged and accommodated within a society. This recognition of distinct cultural communities does not preclude the existence of a collective national identity.”<sup>10</sup> This recognition of the importance of legal pluralism in a multicultural country like New Zealand has been reflected in more recent legislation such as the Trade Marks Act 2002, which created a Māori Trade Marks Advisory Committee that is guided by Māori custom and values,<sup>11</sup> the Patents Bill 2008, which proposes the introduction of a Māori Advisory Committee,<sup>12</sup> and the Te Ture Whenua Māori Act 1993, which governs Māori land in New Zealand.<sup>13</sup>

In this way, there exists a strong justification for the provision of special protection for Māori cultural expressions. Further, as the Waitangi Tribunal notes, even if the New Zealand government does not feel it necessary to grant special protection to Māori cultural expressions on the basis of its treaty obligations, it is in the national interest to do so.<sup>14</sup> Māori culture remains an integral part of the New Zealand identity, and Māori cultural expressions are a critical part of this. It is pertinent that adequate protection is provided to Māori so that their cultural expressions are preserved in order to ensure that such knowledge and works exist for future

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<sup>10</sup> New Zealand Law Commission *Study Paper 9: Maori Custom and Values in New Zealand* (NZLC SP9, 2001) at 5

<sup>11</sup> Trade Marks Act 2002, s177

<sup>12</sup> Patents Bill 2008, s275

<sup>13</sup> Te Ture Whenua Māori Act 1993, Title; Preamble

<sup>14</sup> Waitangi Tribunal, *Ko Aotearoa Tēnei – Factsheet 2* (2011) at 2

generations of New Zealanders to enjoy and learn from, while still giving Māori an economic incentive to share their works with the general New Zealand population. It is this justification on which this paper is premised, and provides the context for the proceeding discussion on the adequacy and appropriateness of copyright in protecting Māori cultural expressions, and the way forward on this issue in New Zealand.

## **Chapter two: The adequacy and appropriateness of the Copyright Act 1994 in protecting Māori cultural expressions**

The Copyright Act 1994 vests property rights in original literary, dramatic, musical or artistic works; sound recordings; films; communication works; and, typographical arrangements of published editions in New Zealand.<sup>15</sup> The property rights afforded by the Copyright Act grant the author exclusive rights to copy the work; issue copies of the work to the public; perform the work in public; play the work in public; show the work in public; communicate the work to the public; make an adaptation of the work; and to authorise another person to do any of these acts in relation to the work.<sup>16</sup> These exclusive rights exist in literary, dramatic, musical and most artistic works for the lifetime of the author, plus 50 years.<sup>17</sup> This duration varies for sound recordings and film, and communication works, in which copyright exists for 50 years,<sup>18</sup> and typographical arrangements of published editions, in which copyright exists for 25 years.<sup>19</sup> In addition to the traditional economic rights, the Copyright Act also grants authors of original works certain moral rights.<sup>20</sup>

On the face of it, the protection afforded to authors of original works by the Copyright Act seems extensive, and provides the author with the opportunity to utilise and benefit from the work for a certain period, without interference from others. Further, the protection afforded by the Copyright Act is in line with New Zealand's obligations under both the Berne Convention<sup>21</sup> and the TRIPS Agreement.<sup>22</sup> Despite this, it has become recognised internationally by organisations such as the World Intellectual Property Organisation and the United Nations Educational, Scientific and Cultural Organisation, that there is a significant gap existing in the protection afforded by existing copyright regimes, and the protection

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<sup>15</sup> Copyright Act 1994, s14

<sup>16</sup> Ibid, s16

<sup>17</sup> Ibid, s22

<sup>18</sup> Ibid, s23; s24

<sup>19</sup> Ibid, s25

<sup>20</sup> Ibid, Part 4

<sup>21</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, as revised at Paris on 24 July 1971)

<sup>22</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994)

required to effectively protect Indigenous cultural expressions. This gap in protection can be seen as stemming from the dual concerns of Indigenous peoples in gaining protection for their works. On the one hand, Indigenous cultural expressions hold a cultural and spiritual significance beyond that generally recognised by the legal protection afforded by the Copyright Act. Further, the communal nature of both Indigenous communities and the knowledge they hold means that it is not solely individuals who are concerned with the retention of control and protection of the cultural and spiritual material embedded in works. On the other hand, Indigenous communities recognise the economic benefits linked to their cultural expressions. The market for Indigenous cultural expressions is a lucrative one, with Māori culture being a key selling point in the New Zealand tourism market, for example. This chapter will explore whether the Copyright Act adequately and appropriately protects the first (non-economic) concern of Māori in relation to their cultural expressions. A number of reasons will be given as to why the Copyright Act fails to provide appropriate protection, namely the Anglo-American basis of the Copyright Act, authorship, originality, duration, and moral rights. Each of these will be examined in turn.

## 2.1 Anglo-American basis of the Copyright Act 1994

The overarching reason that the Copyright Act fails to provide appropriate protection for Māori cultural expressions is that it is based on an Anglo-American view of property rights, and the central concern of the Copyright Act is ensuring that an author's rights to economically exploit his or her creations are protected. While Indigenous communities do have economic concerns, they also have important cultural and spiritual concerns that are not addressed by the Copyright Act. In this sense, there is an unresolved tension between the Māori view of their cultural expressions, and the view attached to such works by the Copyright Act.

The Anglo-American view of property rights is centred on the idea that individuals who own property have more power and influence than those who do not. In this way, with the exception of moral rights, copyright gives value to an author's work

not for its creativity and expression, but for the ways in which it can be exploited.<sup>23</sup> The incentive of exclusive rights to exploitation, which generally result in financial gains, is what is considered to drive new creativity and innovation of original works. This is at odds with one of the main purposes of the creation of Indigenous cultural expressions. Generally speaking, cultural expressions are not viewed in a proprietary way. Rather, they are seen as a method of preserving and transmitting cultural knowledge.<sup>24</sup> In New Zealand, Māori cultural expressions reflect the body of knowledge and understanding concerning the environment: mountains, rivers, sea and sky, plants and animals; the rights and obligations of the living, and their connection to the dead; and people's relation with the myriad of elements of creations, animate or inanimate.<sup>25</sup> For example, the importance of song to Māori is not based in its economic worth; rather "these songs put us in touch with ourselves, our identity, and our roots for as we sing them the scenes of history and visions of ancestors pass dimly before our eyes."<sup>26</sup> In this way, the importance of protection for works is much greater than merely protecting economic interests. Māori have obligations to safeguard works that embody such cultural and spiritual material, and protect the relationship that they have with these works. This crucial relationship, known as a kaitiaki relationship,<sup>27</sup> is not recognised by the traditional Anglo-American approach to copyright and the protection it provides.

The underpinnings of the Copyright Act demonstrate its inadequacy of protection for Māori cultural expressions. This inherent clash of cultural perceptions permeates the Copyright Act, and renders parts of the Copyright Act inappropriate and inadequate for protecting Māori cultural expressions. This can be seen through the following specific issues with the Copyright Act.

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<sup>23</sup> Marian de Beer "Protecting echoes of the past: intellectual property and expressions of culture" (2006) 12 Canterbury L. Rev 95 at 96

<sup>24</sup> Erin Mackay "Indigenous traditional knowledge, copyright and art - shortcomings in protection and an alternative approach" (2009) 32 U.N.S.W.L.J. 1 at 6

<sup>25</sup> Waitangi Tribunal, above n 9, at 31 and 35

<sup>26</sup> de Beer, above n 22, at 94

<sup>27</sup> Waitangi Tribunal, above n 9, at 31

## 2.2 Authorship

The authorship requirements of the Copyright Act do not appropriately protect Māori and their interests in cultural expressions, a concern that is very much linked to the clash between Anglo-American and Māori views of cultural expressions and their worth. Authorship in the Copyright Act is concerned with identifiable authors. Under the Copyright Act, there are two forms of authorship: individual authorship and joint authorship. For an individual to be recognised as an author, they must be the creator,<sup>28</sup> while to be recognised as a joint author, a work must be produced by the collaboration of two or more authors, where the contribution of each author is not separate from the others.<sup>29</sup>

In terms of Māori cultural expressions, the requirement of identifiable authors does not provide any recognition for Indigenous communities that have cultural or spiritual ties with particular forms of cultural expressions, thus denying them protection. As Graham Dutfield notes, “intellectual property rights, and copyright law especially, unduly emphasise the role of individuals in knowledge creation and consequently fail to reward those knowledgeable communities and collaborators that provided the intellectual raw material that formed the true basis for the work.”<sup>30</sup> In this way, the idea of Māori creators of cultural expressions being custodians of their communities’ traditional knowledge, who have been permitted to create a work for the purposes of preserving and transmitting that knowledge on behalf of the community, is lost. Instead, the Anglo-American concept of an author who ‘owns’ the work is imported onto the work and the creator, without recognition of the communal nature of the knowledge, and the importance of the work to people other than the identified creator.

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<sup>28</sup> Copyright Act 1994, s5(1)

<sup>29</sup> Ibid, s6(1)

<sup>30</sup> Graham Dutfield "TRIPS-related aspects of traditional knowledge" (2001) 33 Case W. Res. J. Int'l L. 233 at 250

It has been suggested that this issue could be resolved through the assigning of copyright to Māori communities in their capacity as corporate entities.<sup>31</sup> Under section 114 of the Copyright Act, copyright can be assigned to another in writing. In New Zealand, given that many Māori groups have existing incorporations established for land claim settlements, and the ownership and governance of land and other assets, there is little reason that such incorporations could not be assigned copyright in a work, thus granting the community as a whole copyright in the work by virtue of their interests in the incorporation. While this is a valid suggestion in response to the issue of authorship under the Copyright Act, this would only provide a case-by-case solution where authors and their communities came to an arrangement, rather than a broader solution. Further, it would not address other protection-related issues in the Copyright Act, as will be seen.

### 2.3 Duration of protection

The second substantive issue arising out of the Copyright Act concerns the duration of protection afforded to works. Under the Act, traditional works, such as artistic and musical works, are afforded copyright protection for the lifetime of the author plus 50 years.<sup>32</sup> The duration restrictions placed on copyright protection reflect the perceived need to strike a balance between the Lockean theory that individual property rights are based on reward for labour, and the demands of the public domain.<sup>33</sup> More specifically, the limitation on the duration of protection is designed to reward authors for their creations for a period of time, before allowing the work to enter the public domain where it can be freely used to encourage further innovation and creation. It is generally accepted that this balance, which does not allow for creators to have a permanent monopoly over their work, is beneficial for society. This, however, is a cause for concern for Māori and other Indigenous groups. As previously mentioned, Māori cultural expressions often contain important

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<sup>31</sup> For example, see Megan M Carpenter "Intellectual property law and indigenous peoples: adapting copyright law to the needs of the global community" (2004) 7 Yale Human Rights and Development Law Journal 51

<sup>32</sup> Copyright Act 1994, s22(1)

<sup>33</sup> Robert K Paterson and Dennis S Karjala "Looking beyond intellectual property in resolving protection of the intangible cultural heritage of Indigenous peoples" (2003) 11 Cardozo J. Int'l & Comp. L. 633 at 640

cultural and spiritual knowledge that relates to a particular community's history, ancestors and cultural identity. Such works are seen as being central to a group's identity and continuing traditions, and it has been argued that they should not be fully released into the public domain to the extent that any person is free to use them as they wish.<sup>34</sup>

The concern with such cultural expressions being released into the public domain is linked to the fact that the authors of, and communities linked to, such works are the custodians of the knowledge embedded in them. The obligations to ensure that such works are treated with respect, and not altered or used in ways that Māori would deem inappropriate or offensive should not expire at a certain time, as the cultural and spiritual significance of works is not diminished over time, and the offence caused by using these expressions inappropriately is not lessened. A prime example of this concern can be found in the use of *Ka Mate*, commonly known as "the haka". Te Rauparaha, leader of the Ngāti Toa Rangatira, composed it following his escape from Ngāti Te Aho in the early 1800s. While it has become a national symbol for some of New Zealand's sporting teams, and is often used respectfully, this is not always so. There have been a number of uses of *Ka Mate* that are seen as disrespectful of the integrity and values of the chant, including the recent use of it in an Italian car commercial, where women performed a mock haka.<sup>35</sup> Evidently, no copyright in the work could exist given the author has been dead for much longer than 50 years. Despite this, the significance of *Ka Mate* has not lessened, and inappropriate uses of the work still cause substantial offence to Māori. In this way, it is clear that copyright protection cannot adequately protect the interests of Māori in relation to cultural expressions, given the limited period of protection afforded.

## 2.4 Originality

A further issue with the current copyright regime stems from the originality requirement in section 14 of the Copyright Act. While originality does not pose as much of an issue as the other concerns raised in this chapter, it is worthwhile to note

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<sup>34</sup> Dutfield, above n 29, at 251

<sup>35</sup> Waitangi Tribunal, above n 9, at 40 - 41

it. The New Zealand courts have set the originality threshold for copyright protection low, but despite this, the nature of Māori cultural expressions, particularly artistic works, means that on occasion there is little originality or creativity added to works as they are, by their nature, derivative works based on accurate reproduction of cultural and spiritual material. This means that there is a possibility that such works would not attract copyright protection as original works. In short, the nature of Indigenous cultural expressions is not innovative, rather it involves a process of slow creative development based on existing work. Indigenous art's function is as a historical sacred text – innovation is restricted, and faithful and accurate reproduction is important.<sup>36</sup>

## 2.5 Moral rights

Finally, moral rights in the Copyright Act do not extend sufficiently to provide adequate or appropriate protection for Māori cultural expressions. Moral rights are personal or non-economic rights of creators. They are based on a European-imported concept of the inalienable artistic worth that exists within a creation, regardless of its economic value. The Copyright Act provides creators with three relevant moral rights: the right to be identified as the author or director of a work,<sup>37</sup> the right to object to derogatory treatment of a work,<sup>38</sup> and the right against false attribution of a work.<sup>39</sup> The right to be identified as the author of a work is generally seen as a paternity right, meaning that even when an author assigns copyright in a work to another, such as a publisher in the case of literary works, the author still retains the right to be prominently identified as the original creator. The right to object to derogatory treatment of a work is derived from the idea that the author has embodied an element of their personality in the work, and thus the author has

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<sup>36</sup> Megan M Carpenter "Intellectual property law and indigenous peoples: adapting copyright law to the needs of the global community" (2004) 7 Yale Human Rights and Development Law Journal 51 at 69 - 70

<sup>37</sup> Copyright Act 1994, s94

<sup>38</sup> Ibid, s98

<sup>39</sup> Ibid, s102

an important bond with the work.<sup>40</sup> Finally, the right against false attribution ensures that the correct author is attributed to a work.

On the face of it, moral rights seem to provide some of the protection that Māori are seeking for their work that traditional copyright does not afford. This is particularly true of the right to object to derogatory treatment. This right can be seen as legal recognition of the “sacred, spiritual and impenetrable bond between an [Indigenous] artist and their work.”<sup>41</sup> Such a right allows authors to object to the mutilation, distortion, placement or other uses of works that cause offence to the honour and reputation of the author as an artist. Further, the right against false attribution could be of significant use to Māori. It is possible that this right could be used to stop works being falsely attributed to Māori communities, that is, works that falsely identify the author as being part of that group. Such practices are quite common, as it gives works a sort of authenticity as a Māori cultural expression, allowing it to be marketed at a higher price. Assertion of this right would ensure that only works that are truly Māori cultural expressions are marketed as such.

Despite these advantages, there are still a number of issues with the moral rights contained in the Copyright Act. These moral rights exist within New Zealand’s copyright framework, not in addition to it. This means that many of the problems regarding protection that exist in relation to copyright are also true for moral rights. Copyright must exist in the work for moral rights to attach to the author. This is made clear in each of the moral rights provisions within the Copyright Act. This presents an initial hurdle, as if copyright does not exist in a cultural expression due to a lack of originality or issues with authorship, Māori cannot use moral rights to protect their interests. Secondly, the duration of moral rights is for a limited period, creating the same concerns as those in regard to duration of copyright. The right to be identified as an author and the right to object to derogatory treatment expire at the same time that copyright expires in the relevant work,<sup>42</sup> while the right against

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<sup>40</sup> Cate Banks "The more things change the more they stay the same: the new moral rights legislation and Indigenous creators" (2000) 9 Griffith L. Rev. 334 at 339

<sup>41</sup> Ibid.

<sup>42</sup> Copyright Act 1994, s106(1)

false attribution as an author exists for a lesser period, expiring 20 years after the death of the author.<sup>43</sup> Therefore, the ability to use moral rights for protection in addressing issues such as those concerning *Ka Mate* is limited. Finally, moral rights are still individual rights, and thus provide no additional protection to communities that wish to protect their interest in a cultural expression. In summary, while moral rights appear to address some of the inadequacies of the traditional copyright regime, moral rights in New Zealand are dependent on the existence of traditional property rights, and are therefore based on the same foundations.<sup>44</sup> This means that, to a great extent, moral rights still do not fulfil the needs of Māori in relation to cultural expressions.

Thirdly, the right to object to derogatory treatment may not adequately cover such treatment of Māori cultural expressions. There are two requirements that must be satisfied in order to show that a work has been treated in a derogatory manner. First, there must be treatment of a work, and secondly, for that treatment to be derogatory it must be prejudicial to the honour or reputation of the author.<sup>45</sup> While in many cases it is not difficult to show that there has been treatment of a work by mutilation, distortion, or deletion of part of the original work, the second requirement may not align with Māori ideas about prejudice to honour or reputation in relation to cultural expressions. The term 'prejudicial to the honour or reputation of the author' is generally interpreted as requiring more than the author himself being offended or feeling aggrieved by the treatment of the work. The treatment must prejudice the honour and reputation of the author as an artist, or reduce the value of the work in the eyes of others.<sup>46</sup> Therefore, whether a treatment of a work is prejudicial is judged from the view of the author's peers. As Cate Banks notes, the peer group used for this assessment will vary the outcome greatly. If one looks to how the opinion of the artistic community, or even the community at large, has been prejudiced by the treatment, the cultural and spiritual offence caused by some treatments of Māori cultural expressions may not be recognised, and as such, the

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<sup>43</sup> Ibid, s106(2)

<sup>44</sup> Banks, above n 39, at 347

<sup>45</sup> Copyright Act 1994, s98

<sup>46</sup> *Pasterfield v Denham* [1999] FSR 168

right to object would not be available.<sup>47</sup> This again highlights the inadequacy of the copyright regime, and the moral rights within it, in recognising and appropriately dealing with Māori and their cultural and spiritual views in relation to their cultural expressions. As a final note, it is not possible for a Māori community to own and assert moral rights while they are available. Unlike copyright, under section 118 of the Copyright Act, moral rights are not assignable, thus restricting the ability of a relevant Māori incorporation from owning both copyright and moral rights, and using them to control the use of such cultural expressions.

## 2.6 Conclusion

For these reasons, the Copyright Act does not provide adequate or appropriate protection for Māori cultural expressions. While New Zealand's copyright regime does protect the economic interests associated with such works for a certain period, there are cultural and spiritual concerns that are not recognised or addressed by the Copyright Act. The overtly individual and commercial focus of the Copyright Act is at odds with the concerns of Māori in relation to their desire to control and protect significant cultural and spiritual material that is often embedded in cultural expressions. In saying this, while the Copyright Act does not adequately provide protection of this kind, given that Māori also have economic interests, the solution to this issue is not as simple as removing all cultural expressions from the public domain. Māori seek a balance between retaining control and having rights to redress when their cultural expressions, and indirectly, their knowledge, are misappropriated; and being able to derive economic benefits from their own commercial use of their cultural expressions.

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<sup>47</sup> Banks, above n 39, at 342

## Chapter three: Foreign approaches to protection

The issue of adequacy and appropriateness of copyright protection for Indigenous cultural expressions is not one limited to the New Zealand context. Indigenous communities in other common law countries such as Canada, Australia and the United States of America, and groups in some African nations face similar challenges. A number of different approaches have emerged as to how to resolve these copyright protection issues. This chapter will explore two different methods – fiduciary duties and equitable remedies, and sui generis legislation – that have been suggested for filling the void between the protection copyright affords and the protection desired by Indigenous communities.

### 3.1 Fiduciary duties and equitable remedies

The concept of fiduciary duties and equitable remedies as a means of providing protection to parties, such as Indigenous communities, that fall outside the protection of copyright laws has been explored in Australia, as well as in some African nations.<sup>48</sup> These concepts have been suggested by the judiciary as a means of providing some recourse to Indigenous communities when the copyright in a work created by an Indigenous individual has been breached by a third party. This reflects a recognition of the communal interests of Indigenous peoples in works that hold cultural and spiritual significance, or depict culturally sensitive material. As Andrew Kenyon notes, “Equitable principles offer a relatively apt way to consider Indigenous relationships to cultural heritage.”<sup>49</sup>

In the Federal Court of Australia’s decision *Bulun Bulun v R&T Textiles Pty Ltd*<sup>50</sup> significant concerns were expressed about the inadequacy of copyright laws for protecting all groups that may be interested in a copyright work. This case concerned the importation and sale of printed clothing fabric, infringing the copyright of John Bulun Bulun in an artistic work. In addition to breach of copyright, and misleading and deceptive conduct, counsel for the Bulun Bulun and the second applicant

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<sup>48</sup> For example, in the Ghanaian decision *Kwan v Nyieni* (1959) 1 GLR 67

<sup>49</sup> Andrew T Kenyon "Copyright, Heritage and Australian Aboriginal Art" (2000) 9 Griffith L. Rev. at 311

<sup>50</sup> *Bulun Bulun v R&T Textiles Pty Ltd* (1998) 86 FCR 244

George Milpurrurru claimed that the Ganalbingu people of Arnhem Land, Northern Territory were the equitable owners of copyright in the artistic work, and that the “Ganalbingu people are the traditional Aboriginal owners of Ganalbingu country who have the right to permit and control the production and reproduction of the artistic work under the law and custom of the Ganalbingu people.”<sup>51</sup> Before the case went to trial the respondents admitted copyright infringement. At this point, John Bulun Bulun concluded his involvement in the proceedings; however, George Milpurrurru continued to pursue a claim on behalf of the Ganalbingu people in relation to their rights in the work, based mainly on fiduciary obligations and equitable remedies.

In addressing this submission, Judge von Doussa surveyed a substantial body of evidence regarding the spiritual importance of the art work to the Ganalbingu people, and the obligations and responsibilities arising from being the artist of a work that holds sacred meaning.<sup>52</sup> He also touched on the possibility of communal rights of Aboriginal communities being recognised under Australian law as an incident of native title, but ultimately confined his discussion to the claim of equitable interest. Von Doussa J framed the issue this way: “Do the circumstances in which the artistic work was created give rise to equitable interests in the Ganalbingu people?”<sup>53</sup> Von Doussa J addressed the argument that “customs and traditions regulating the use of the corpus of ritual knowledge places Mr Bulun Bulun as the author of the artistic work in the position of a fiduciary, and moreover, make Mr Bulun Bulun a trustee for the artwork, either pursuant to some form of express trust, or pursuant to a constructive trust in favour of the Ganalbingu people.”<sup>54</sup> In doing this, he explored whether the circumstances gave rise to an express trust, whether Bulun Bulun held the copyright as a fiduciary, and what his fiduciary obligations were.

Turning first to whether an express trust existed, Von Doussa J quickly dismissed the possibility, given that there was no expression of intention to create an express trust

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<sup>51</sup> Ibid, at 249

<sup>52</sup> Ibid, at 249 - 252

<sup>53</sup> Ibid, at 258

<sup>54</sup> Ibid.

on the facts.<sup>55</sup> On whether Bulun Bulun held copyright as a fiduciary, considerable time was spent surveying the law relating to the essential characteristics of a fiduciary relationship, citing *Breen v Williams*<sup>56</sup> as identifying two sources of fiduciary duties – relationships of agency and relationships of dependence or trust.<sup>57</sup> In applying the relevant law to the circumstances of the case, Von Doussa J concluded that a fiduciary relationship did exist between Bulun Bulun and the Ganalbingu people, giving rise to fiduciary obligations. This conclusion was based on the laws and customs of the Ganalbingu people, which required spiritual knowledge to be used in certain ways, and required the permission of appropriate members of the community when such knowledge was proposed for use in an artistic expression. Given that permission was only granted in circumstances where trust and confidence existed between the parties, this was sufficient to establish a fiduciary relationship. Von Doussa J, however, made a point of noting that he was using the laws and customs of the Ganalbingu people as part of the factual matrix from which a fiduciary relationship could be inferred, and not recognising them to be part of the Australian legal system.

Finally, Von Doussa J discussed whether there had been a breach of fiduciary obligations by Bulun Bulun. He held that “equity imposes on him obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the law and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.”<sup>58</sup> As Bulun Bulun had successfully obtained remedies for the copyright infringement by the respondent, he had fulfilled his duties. If he had not done so, or denied he was under a duty to do so, equity may have allowed for a constructive trust to be created so that the beneficiaries could sue the third party for breach of copyright. Therefore, the claim was dismissed as Bulun Bulun had fulfilled all duties imposed on him by equity. Despite this, the case has been heralded as a significant development in providing alternative remedies in

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<sup>55</sup> Ibid.

<sup>56</sup> *Breen v Williams* (1996) 186 CLR 71

<sup>57</sup> Ibid, at 260

<sup>58</sup> Ibid, at 263

cases of copyright infringement of Indigenous cultural expressions, and providing an example of how cultural laws and customs can be given recognition in the mainstream legal system.<sup>59</sup>

The New Zealand courts could take an approach similar to that in *Bulun Bulun* as a means of providing a remedy to Māori groups affected by copyright infringement of a cultural expression. There are, however, a number of issues with this approach. While it is an avenue of protection in the sense that in certain circumstances, a community group could sue a third party for copyright infringement when the author of the work is unwilling to do so, it falls short of addressing all issues related to copyright protection for cultural expressions. First and foremost, it would only provide a solution where copyright exists in a work. Once copyright in a work expires, the original concern of controlling the production and reproduction of spiritually significant material arises again as the link to the third party who used the work is lost. Secondly, this approach does not provide a sustainable long-term solution to the problem. Each time a community wishes to seek a remedy for an alleged breach of fiduciary duty, it would require them to undertake costly court proceedings. Further, given the body of expert evidence on the Indigenous group's particular laws and customs regarding cultural expressions required to substantiate a claim of fiduciary relationship, the preparation required for such a case would be significant. In conclusion, while the principles behind the *Bulun Bulun* decision are innovative and would provide some recourse for Indigenous communities in certain situations, it fails to provide a comprehensive or sustainable solution to the problem that would be accessible to all communities that wish to pursue a claim.

### 3.2 Sui generis legislation

A further approach to protection is sui generis legislation, which creates a special rights and protection regime for cultural expressions. These regimes exist outside of traditional intellectual property laws, and purport to provide appropriate and adequate protection where copyright cannot. There have been a variety of regimes

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<sup>59</sup> For example, Jane Anderson "The politics of Indigenous knowledge: Australia's proposed Communal Moral Rights Bill" (2004) 27 U.N.S.W.L.J. 585 at 595

developed in different jurisdictions, each with slightly different aims and protections. Two of these regimes are Panama's Law No. 20 of 26 June 2000 on the Special Intellectual Property regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge (Law No. 20), and the Model Law for Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples 2002 (Model Law), drafted by the Secretariat of the Pacific Community. While both are positive steps towards providing greater protection for Indigenous cultural expressions, outside of the protection afforded by copyright, neither model achieves an appropriate balance between cultural and economic concerns.

### *3.2.1 Panama's Law No. 20*

Panama's Law No. 20 takes a commercially-oriented approach to providing additional protection. The scope of the legislation itself is rather narrow, with its purpose being "to protect collective intellectual property rights and traditional knowledge of indigenous peoples in their creations ... suitable for commercial use, via a special system to register, promote and market their rights."<sup>60</sup> The regime created by Law No. 20 allows for Indigenous general congresses or traditional authorities to request registration of collective rights in works covered by Law No. 20 from the Department of Collective Rights and Expressions of Folklore.<sup>61</sup> Works that can be registered include models, drawings, figures, symbols, and traditional forms of artistic expression.<sup>62</sup> Applications for registration are vetted to ensure they are legitimate,<sup>63</sup> and once registered, the rights to use and market the arts, crafts and other cultural expressions of those Indigenous peoples must be governed by their own rules for use.<sup>64</sup> Law No. 20 also sets out a number of prohibitions and sanctions. There are specific prohibitions on the exportation of imitation products purporting

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<sup>60</sup> Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge, art 1

<sup>61</sup> Ibid, art 7

<sup>62</sup> Ibid, art 1

<sup>63</sup> Ibid, art 9

<sup>64</sup> Ibid, art 15

to belong to the Indigenous peoples of Panama,<sup>65</sup> and the industrial reproduction of works in which a group has collective rights.<sup>66</sup> There is also a general prohibition on breaches of registered collective rights.<sup>67</sup> In all cases, the sanction imposed is a fine, which varies in severity depending on which prohibition is breached, and whether the person is a repeat offender. Fifty percent of the fine is allocated to the National Treasury, and fifty percent is earmarked for investment in the affected Indigenous region or group.<sup>68</sup>

Law No. 20 has some positive elements. It works to ensure that only Indigenous communities commercially benefit from Indigenous expressions, and limits the production of imitation products. This regulation of authenticity is beneficial for Indigenous communities as it ensures that their works are valued for their cultural and spiritual ties. It also acknowledges the concept of communal ownership of cultural works, which is significant. However, it becomes clear that there are a number of unresolved concerns. First, Law No. 20 is overwhelmingly concerned with ensuring that any profits from commercial exploitation of cultural expressions are directed to the relevant Indigenous group. As previously discussed, Indigenous communities do have economic concerns regarding their cultural expressions, and have a desire to control and gain from their works. This, however, is only part of the issue. Indigenous communities also have a desire to protect their works of cultural and spiritual significance from inappropriate and insensitive use by those outside the Indigenous community. This is not reflected in Panama's legislative regime. Law No. 20 is solely concerned with those works appropriate for commercial exploitation, as stated in Article 1. Protection of works that Indigenous communities deem inappropriate for commercial use, but still hold significant spiritual and cultural value worthy of protection are not contemplated by the Act. In this way, the solely economic focus of Panama's Law No. 20 causes it to be an inadequate means of protection for Indigenous cultural expressions, due to its lack of recognition of the

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<sup>65</sup> Ibid, art 19

<sup>66</sup> Ibid, art 20

<sup>67</sup> Ibid, art 21

<sup>68</sup> Ibid, arts 19; 21

dual concerns framing the claims of Indigenous communities to special protection for cultural expressions.

### *3.2.2 Pacific nations' Model Law*

By contrast, the protection suggested in Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples 2002 is at the other end of the spectrum to Panama's Law No. 20. While it is a model law, and was drafted by a group representing a number of Pacific nations with the aim of giving them a starting point for providing protection for cultural expressions and traditional knowledge, it is a worthy point of comparison given the different approach it takes. The Model Law essentially creates a rights regime, consisting of two key rights: traditional cultural rights, including the right to prior and informed consent for uses of traditional knowledge and expressions of culture;<sup>69</sup> and moral rights.<sup>70</sup> These rights vest in the traditional owners of traditional knowledge or expressions of culture,<sup>71</sup> who are defined in section 4 as "(a) the group, clan or community of people; or (b) the individual who is recognized by the group, clan or community of people as the individual; in whom custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with customary law and practices of that group, clan or community."<sup>72</sup> Traditional knowledge and expressions of culture are defined in very open-ended terms, which creates a substantial class of works that would be covered by the regime.<sup>73</sup> From the outset,

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<sup>69</sup> Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples 2002, ss6 - 12

<sup>70</sup> Ibid, s13

<sup>71</sup> Ibid, s6

<sup>72</sup> Ibid, s4

<sup>73</sup> Ibid, s4:

**expressions of culture** mean any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the preceding words, includes:

- (a) names, stories, chants, riddles, histories and songs in oral narratives; and
- (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; and
- (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and
- (d) the delineated forms, part and details of designs and visual compositions; and
- (e) architectural forms.

therefore, it is clear that the Model Law takes a much broader approach than Law No. 20.

Looking at the nature of the rights granted by the regime, there are two important points to note: first, all rights exist in perpetuity,<sup>74</sup> and secondly, the rights exist in all traditional knowledge and cultural expressions, created before and after the legislation comes into force.<sup>75</sup> Traditional cultural rights created by the legislation effectively disallow any use of traditional knowledge and cultural expressions, regardless of whether the use is commercial or non-commercial, without the prior and informed consent of the traditional owners.<sup>76</sup> There are a limited number of exceptions to this blanket ban, which include use for face-to-face teaching, criticism and review and news reporting among other things.<sup>77</sup> The moral rights granted by the legislation are essentially the same as those granted by the Copyright Act, the right to attribution of a work, the right against false attribution and the right to prevent derogatory treatment of knowledge and expressions.<sup>78</sup> Part 3 of the Model Law establishes the process for gaining prior and informed consent of the traditional owners of cultural expressions and traditional knowledge, and creates a body to oversee the regime and its implementation. In terms of enforcement, the Model Law creates a number of criminal offences for breach of traditional rights,<sup>79</sup> moral rights,<sup>80</sup> and importation and exportation,<sup>81</sup> as well as allowing for civil claims to be

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**traditional knowledge** includes any knowledge that generally:

- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative or decorative or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular traditional group, clan or community of people in [*Enacting country*]; and
- (d) is collectively originated and held.

<sup>74</sup> Ibid, ss9, 13(4)

<sup>75</sup> Ibid, s3(1)

<sup>76</sup> Ibid, s7(2)

<sup>77</sup> Ibid, s7(4)

<sup>78</sup> Ibid, s13(2)(a) – (c)

<sup>79</sup> Ibid, s26

<sup>80</sup> Ibid, s27

<sup>81</sup> Ibid, s29

brought against any person who violates rights set out in the regime.<sup>82</sup> The remedies made available are those normally available in civil proceedings.<sup>83</sup>

Unlike Law No 20, the Model Law recognises the dual concerns of Indigenous communities in relation to their cultural expressions: the desire to benefit economically from works when it is appropriate to do so, and the desire to protect spiritually and culturally significant works from inappropriate and insensitive use by people outside the immediate Indigenous community. This is achieved through the two types of rights granted: traditional rights that protect an Indigenous community's economic interests, and moral rights that protect their more abstract, spirituality-based interests. While this is a very positive aspect of the Model Law, there are some aspects that raise cause for concern. First, the Model Law dictates that traditional and moral rights vest on the creation of a cultural expression or traditional knowledge, and exist in works created before the legislation. This could be seen as beneficial for communities, as it grants them automatic protection, as copyright legislation does. The very broad nature of the definitions of cultural expressions and traditional knowledge, however, makes this automatic vesting a potential issue. Given that the definition of expressions of culture encompasses all manner of works, both tangible and intangible, and the definition of traditional knowledge is quite vague and uncertain in its applicability, due to its somewhat intangible nature, it essentially opens up a substantial body of works and knowledge that will have rights automatically vested in them. Unlike in Panama, there is no initial vetting procedure, which establishes the authenticity of a work, and the veracity of a claim to the additional rights. This creates a situation where works that are not worthy of such wide-ranging and comprehensive protection are granted these rights, and there would be limited means for disputing it. Further, the broad definitions create inherent uncertainty in the legislation from the outset. How are those outside the immediate Indigenous group to know whether a work meets the criteria of being an expression of culture due to the way in which it manifests traditional knowledge? In this way, the registration system of the Panamanian

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<sup>82</sup> Ibid, s30

<sup>83</sup> Ibid, s31

regime is much more accessible to the general public, and those who may be affected by its provisions (for example, those in the art world, or involved in the import and export of goods with a 'Pacific feel'). Finally, the broad applicability of the legislation has the potential to impact on the public domain, and to stifle innovation and creativity. The general nature of the definitions, which provide no particular level of spiritual or cultural connection to be present before the rights vest, could have the negative impact of deterring non-Indigenous people wishing to incorporate some Indigenous-derived ideas into their own works from doing so. In relation to works that do hold spiritual and cultural significance to a particular Indigenous group, this is a positive outcome. However, with the threshold being so uncertain, those who previously were influenced by traditional Indigenous works, in an appropriate and culturally sensitive way, may be dissuaded from reflecting those influences in their works.

### 3.3 Conclusion

Both Panama's Law No. 20 and the Pacific nations' Model Law show different sui generis legislative approaches to the issue of providing special protection for Indigenous cultural expressions. There are parts of both laws that could provide inspiration for New Zealand in developing its own response to this issue, while at the same time raising questions about what sui generis legislation needs to include, and how broad its reach should be. In comparison to an approach such as fiduciary duties and equitable remedies, sui generis legislation provides a much more comprehensive, long-term approach to protection. Sui generis legislation is a more apt forum for creating an appropriate, issue-specific response to the problem.

## Chapter four: Approach of the Waitangi Tribunal

In July 2011, the Waitangi Tribunal released its report *Ko Aotearoa Tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity*. This report is the Waitangi Tribunal's response to the Wai 262 claim, often referred to as the 'Indigenous Flora and Fauna and Cultural and Intellectual Property Claim'.<sup>84</sup> Broadly speaking, the Wai 262 claim concerned "te tino rangatiratanga o te Iwi Māori in respect of flora and fauna *me o raou taonga katoa* (and all their treasures) including but not limited to mātauranga, whakairo, waahi tapu, biodiversity, genetics, Māori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga."<sup>85</sup>

### 4.1 Recommendations of the Waitangi Tribunal

Chapter one of volume one of the report, titled 'Taonga works and Intellectual Property', covers the Waitangi Tribunal's views and recommendations regarding taonga works and their interaction with New Zealand's intellectual property regime. The chapter commences with an overview of Māori designs, symbols, art works, carvings, and other works, their spiritual and cultural importance, and the connection that Māori have with such works. It then turns to survey the concerns of Māori in relation to the protection afforded by copyright, patent, trademark and design laws in New Zealand. The chapter concludes with the Waitangi Tribunal's recommendations for protection of taonga and taonga-derived works.

These recommendations provide an important point of consideration in discussing the way forward for copyright protection for Māori cultural expressions in New Zealand. The Tribunal recommends two major institutional changes: the establishment of a commission that will have a number of functions; and the creation of a general objection mechanism in respect of derogatory or offensive public use of two categories of protected works, taonga works and taonga-derived

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<sup>84</sup> Waitangi Tribunal, above n 9, at 1

<sup>85</sup> Waitangi Tribunal, above n 9, at 4

works, and by which kaitiaki can prevent any commercial exploitation of taonga works or closely held mātauranga Māori. The Tribunal suggests that the two categories of protected works could be defined in the following ways:

A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narrative or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.

A taonga-derived work is a work that derives its inspiration from mātauranga Māori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories, in any direct way. A taonga-derived work is identifiably Māori in nature and contains identifiably Māori elements, but has neither mauri nor living kaitiaki in accordance with tikanga Māori.<sup>86</sup>

Drawing on the Tribunal's report, mātauranga Māori can be expressed as the body of knowledge and understanding concerning the environment: mountains, rivers, sea and sky, plants and animals; the rights and obligations of the living, their connection to the dead; and people's relation with the myriad of elements of creations, animate or inanimate.<sup>87</sup> Similarly, kaitiaki can be defined as those who are responsible for safeguarding taonga works, whether or not they are the original creators of the works, and have a very special relationship with them.<sup>88</sup> The Tribunal also notes that "the concept of mauri expresses the Māori view that everything, whether animate or inanimate, contains a living essence that cannot be easily destroyed."<sup>89</sup> In New Zealand legislation, tikanga Māori is generally defined as "Māori customary values and practices."<sup>90</sup>

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<sup>86</sup> Ibid, at 96

<sup>87</sup> Waitangi Tribunal, above n 9, at 31; 35

<sup>88</sup> Ibid, at 31

<sup>89</sup> Ibid, at 37

<sup>90</sup> For example, Te Ture Whenua Māori Act 1993, s4

The first key change recommended by the Tribunal concerns the creation of a method for objecting to derogatory or offensive public use of taonga works, taonga-derived works and mātauranga Māori, and the prevention of commercial exploitation of those works. In its report, the Tribunal does not define what constitutes derogatory or offensive public use. Any person would be able to object to the derogatory or offensive public use of any mātauranga Māori, taonga work or taonga-derived work. Only kaitiaki would be entitled to object to non-derogatory or non-offensive commercial use or proposed commercial use of mātauranga Māori and taonga works. In relation to objections about derogatory or offensive public use, objections would be made to the commission, who would then decide if the objection has been proven. If it has, the commission can prohibit the offending use. If this prohibition was breached, sanctions would be available through the courts. The Tribunal does not expand on the nature of such sanctions. In relation to objections about non-derogatory and non-offensive commercial uses of works, in examining whether an objection has merit, the commission must first decide if the objection concerns mātauranga Māori or a taonga work, and secondly, if the objector has a kaitiaki relationship. If both these requirements are met, the commission could order the respondent to consult with kaitiaki, in order to gain their consent for the commercial use.<sup>91</sup> The commission would also be able to make declaratory rulings that a use of a taonga work is permissible, in order to avoid situations where a person does not know if a work is taonga or a use would be objectionable.<sup>92</sup> It is important to note, however, that the Tribunal makes it clear that

this approach is not intended to create a new category of proprietary right, but is rather a way of recognising the relationship of kaitiaki with taonga works and some aspects of mātauranga Māori where it is proposed to exploit those things commercially. ... Rather it would be

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<sup>91</sup> Ibid, at 94

<sup>92</sup> Ibid, at 93

a statutory participatory right in respect of decisions around proposals to exploit taonga works or mātauranga commercially.<sup>93</sup>

From this, it appears the Tribunal is suggesting that any rights granted under this regime would be personal rights vested in a community, rather than a property right in the traditional sense.

Turning to the second recommended change, the Tribunal suggested that a commission be established to perform a number of functions. The new commission would administer the objection processes; the maintenance of a register of kaitiaki and their mātauranga Māori or taonga works; and the publication of best practice guidelines. The register would allow iwi, hapu, whanau or individuals to register kaitiaki in relation to mātauranga Māori and taonga works, which would act as fair warning of their interest in a work. Such registration would not be compulsory, but would assist a claim against derogatory treatment or commercial exploitation.<sup>94</sup> The best practice guidelines would provide practical advice for the use, care, protection and custody of mātauranga Māori, taonga works and taonga-derived works, and would assist users with developing culturally appropriate practices.<sup>95</sup>

#### 4.2 Discussion of the Waitangi Tribunal's recommendations

The Waitangi Tribunal's recommendations in respect of intellectual property and taonga works raise some interesting considerations. Parts of the Tribunal's recommendations make a positive and valuable contribution to the dialogue surrounding how best to provide adequate and appropriate protection for Indigenous cultural expressions, while other aspects are open to criticism. Looking first to the constructive aspects of the Tribunal's recommendations, the recognition of the need for a commission to oversee any approach to protection is positive. Creating a new approach to the protection of Indigenous cultural expressions would be difficult to maintain or manage without a commission with appropriate cultural knowledge and skill to oversee it. This is supported by the important role played by

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<sup>93</sup> Ibid, at 92

<sup>94</sup> Ibid, at 95

<sup>95</sup> Ibid, at 95

commissions in both Panama's Law No. 20 and the Pacific nations' Model Law. Further, the recommendation of a system of registration shows the beginnings of a positive protection mechanism. While the system sits somewhat awkwardly within the context of the Tribunal's other recommendations, as will be discussed, the acknowledgement of the benefits of registration is a positive sign. Finally, the recognition of dual rights to objection, one to protect against derogatory or offensive treatment, and one to protect against commercial exploitation, shows a much more balanced approach than either Law No. 20 or the Model Law. The suggested breadth of protection covers the dual desires of Indigenous communities, while still not extending protection so far as to encroach on the public domain and innovation, as the Model Law could be seen as doing.

Despite these positive aspects of the Tribunal's recommendations, there are a number of other observations that can be made. First and foremost, the Tribunal's assertion that they do not intend to recommend the creation of a new proprietary right sits at odds with other parts of their recommendations. At first sight, it seems peculiar that one could gain a remedy in a court for derogatory or offensive treatment of a taonga work without actually having gained any proprietary right in that work. On consideration, the insistence of the Tribunal that any rights created under a new regime will not be property rights could be linked to the political debate that would surround the introduction of additional protection for Māori. Politically, restricting new rights to being personal rights vested in communities, rather than granting property rights, may be less likely to attract significant opposition. In the past, the granting of new property rights to Māori has been something governments have been hesitant to do, fearing public backlash.<sup>96</sup> As such, the recommendation of the Tribunal that any new rights be personal in nature may be implicitly acknowledging that any new protection given to Māori is likely to inflame opposition, and personal rights may be more palatable to the general public. While, on this level, the suggestion of personal rights is understandable, the lack of

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<sup>96</sup> For example, the rapid legislative response of the then Labour Government to the decision in *Attorney General v Ngati Apa* [2003] 3 NZLR 643, which suggested that Māori might have customary land rights to foreshore and seabed.

explanation as to this choice on the part of the Tribunal makes it difficult to be sure of their actual intentions. Further, the suggested automatic vesting of rights seems to counter the purpose of having a system of registration. A system of registration takes a significant amount of administration and is costly to maintain. Given that the Tribunal recommends that registration would only act as fair warning of an interest in the work, without actually granting the applicants any rights, it appears that it would be a significant administrative task for little practical result.

Finally, the definitions for works falling under this protection approach could be seen as inadequate. The definitions are complex and include many abstract concepts that would be alien to many people. The Tribunal did not provide definitions of some of the key words that appear in the definitions, as the Tribunal itself notes that they are not directly translatable into English.<sup>97</sup> This does not seem practicable, as the main purpose of creating a new approach to protection is to protect taonga and taonga-derived works from those without any connection to them from using them in an offensive way or exploiting them commercially, without consent. Those who would use works in these ways are likely to be from the Pakeha population. It therefore seems impractical to suggest the use of definitions that many members of the population cannot interpret. Such definitions seem to create a barrier to the certain and effective operation of such a regime.

### 4.3 Conclusion

The overview of foreign approaches in Chapter three to providing adequate and appropriate protection for Indigenous cultural expressions, and the recommendations of the Waitangi Tribunal outlined in this chapter are beneficial in providing a foundation to draw inspiration from in assessing how best to provide protection for Māori cultural expressions in New Zealand. The Tribunal's approach, and the approaches discussed in the preceding chapter each demonstrate some positive and valuable ideas, as well as showing areas for improvement. In conclusion, it can be argued that from these differing approaches a number of essential

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<sup>97</sup> Waitangi Tribunal, above n 9, at 96

elements for protection can be identified. First, any protection afforded must be vested in communal groups. Secondly, *sui generis* legislation provides the most comprehensive means of protection. While courts have been able to provide limited protection where none is afforded by traditional copyright law, they do not provide a comprehensive or long-term solution. Thirdly, in order to provide adequate protection and remedies, new rights providing additional protection need to vest in the Indigenous community associated with a cultural expression. Without the vesting of such rights, it is possible that the level of protection provided would not be adequate and the interests of the community, and the remedies available to them, would not be sufficiently transparent. Finally, a system of registration is a more appropriate method of attributing such rights to cultural expressions, rather than automatic attachment. This ensures the integrity of the system, as only works that meet minimum standards would receive the additional protection afforded. It also ensures that protected works can be identified by the broader population, adding certainty to the protection regime.

## **Chapter five: The way forward in New Zealand**

### **– a suggested regime**

From the preceding chapters, it is possible to draw a few crucial conclusions. First, the current copyright regime in New Zealand does not adequately or appropriately meet the legitimate concerns of Māori to protect cultural expressions from misuse and misappropriation. Secondly, there have been different approaches suggested in other jurisdictions, and by the Waitangi Tribunal here in New Zealand, on how best to afford appropriate protection to Indigenous groups and their cultural expressions. A sui generis legislative approach would appear to be the most suitable and sustainable way of providing such protection. It is important, however, that such legislation incorporates the dual concerns of Māori in protecting their cultural expressions – those being protection of material of cultural and spiritual significance from inappropriate use, while still being able to benefit economically from appropriate commercial use. Existing models demonstrate that it is difficult to find a satisfactory balance between these two concerns, so that both are adequately addressed without impacting unduly on the public domain and inhibiting innovation. Finally, for any solution to be feasible, it must be comprehensive, clear, certain and accessible to those who will be working within the system. Without clarity, the aims of any new regime will be undermined from the outset.

Drawing on the shortcomings of the Copyright Act and the experiences and recommendations of other bodies, it is possible, therefore, to present a suggested model of protection for Māori cultural expressions in New Zealand. This chapter will explore a suggested sui generis rights regime, its requirements, subject matter, rights and administration. By way of summary, this suggested regime would incorporate a register of cultural expressions, and a commission to oversee this register. Registration would vest commercial and non-commercial rights in Māori communities. People wishing to use certain works would negotiate authorised use agreements, and remedies would also be available from the courts for breaches of these rights. In this chapter, the key elements of a sui generis regime, as suggested by the World Intellectual Property Organisation Intergovernmental Committee on

Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore<sup>98</sup> will be used as a structure. These key elements are:

- What is the policy objective of protection?
- What is the subject matter?
- What criteria should this subject matter meet to be protected?
- What are the rights?
- Who owns the rights?
- How are the rights acquired?
- How are the rights administered and enforced?
- How are the rights lost or how do they expire?<sup>99</sup>

### 5.1 What is the policy objective of protection?

The objective of protection is two-fold, with the aim of providing adequate and appropriate protection for the dual needs of Māori. The first objective is to give Māori control of the use and dissemination of their cultural expressions to protect against culturally offensive use. The second is to give Māori control of commercial uses of their cultural expressions. These policy objectives recognise that Māori have a special connection with certain artistic, musical and other works due to the cultural, spiritual and historical knowledge that is embedded in them, and that the relationship between an author of such a work, the work and the community of the author is a unique relationship governed by a set of obligations not recognised by the Copyright Act. The objectives also recognise that while these works do hold cultural and spiritual significance, they are economically valuable, and when utilised in an appropriate manner some cultural expressions can be used commercially.

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<sup>98</sup> World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Elements of a sui generis system for the protection of traditional knowledge* Third Session, Geneva, 13 – 21 June 2002

<sup>99</sup> *Ibid*, at [34]

## 5.2 What is the subject matter?

The subject matter of the legislation is Māori cultural expressions. As will be discussed in the next element, certain criteria must be met for a work to be considered a Māori cultural expression. Broadly speaking, however, the term covers works that have an identifiable cultural and spiritual link to a Māori group. This requires more than just Māori authorship of a work, and more than there being some cultural element, or a 'Māori flavour', to a work that does not hold any spiritual or cultural significance to any group. For example, this would exclude works such as the stylised koru used as the Air New Zealand logo from falling within the ambit of the regime, even if its author were Māori, as it has no specific connection to a Māori group.

## 5.3 What criteria should this subject matter meet to be protected?

In order to achieve a workable and certain regime, the subject matter of 'Māori cultural expressions' needs to be defined in a sufficiently clear way, with specific criteria that must be met for the regime to apply to an expression. As discussed in Chapter two, there are different approaches to defining which works are covered for protection. The Pacific nations' Model Law takes the approach of a non-exhaustive list of expressions that fall under the Model Law if they contain 'traditional knowledge', which is separately defined in the Model Law in a very broad and quite ambiguous manner. The Waitangi Tribunal recommended a more abstract approach to defining works, creating two categories of works: taonga works, and taonga-derived works. As previously noted, these definitions are more specific than those in the Model Law, but are not very accessible given that they contain a number of untranslatable Māori concepts. As such, it would seem that determining a balance that sits between these two types of definitions would be the optimal way to approach the criteria requirements for 'Māori cultural expressions.'

Such a definition needs to convey the cultural and spiritual material and connection that are required in a work for it to be worthy of additional protection, whilst still providing identifiable parameters within which the regime operates. Without such a

definition, the scope of the regime becomes too broad, as with the Model Law, or too abstract for people to effectively work within, thus undermining the aims of the legislation. How can this be achieved?

First, the benchmark of what degree of cultural and spiritual importance an expression must have needs to be set. It is suggested that in order to create a workable definition, the definition should incorporate significant Māori concepts in a tangible manner, which the Waitangi Tribunal failed to do, and also include a non-exhaustive list of possible works that would fall under the regime to act as a guide. The definition should also include a required link to a particular Māori community or group within New Zealand, but arguably it is not necessary for a kaitiaki relationship to exist, as required by the Waitangi Tribunal. To require such a relationship to exist would go against the purposes of such a regime. Arguably, granting special rights to works only where such a relationship exists would exclude many works that are worthy of protection. For example, an author could be inspired by cultural and spiritual material to which they have a community link, but use that material as a large element of the work rather than as the whole work. The work still contains cultural and spiritual knowledge of significance to the Māori group and the author, but no kaitiaki relationship would exist. The material in such a work, however, is no less worthy of protection in the sense that if misappropriated or misused, it could still cause great offence. Further, commercial uses of such works should still be able to be controlled by the relevant Māori community, for their own benefit, and to ensure that any use is in line with the values embodied in the work. This seems to align more effectively with the purposes of the regime.

In addition to this community link, the expression must contain a certain level of cultural and spiritual material. This would require a work to contain economic, spiritual, ritual or narrative knowledge pertaining to the Māori environment, ties with ancestors, connections and obligations to other people, and animate and inanimate objects; this knowledge should be such that it is passed from generation to generation. These requirements are not so broad as to allow a multitude of Māori-inspired works to gain additional protection under the regime, but would ensure that those works that do contain such material, even if it only constitutes

part of the work, gain appropriate protection. Finally, the issue of how intangible works, or works that are not fixed, fit within the regime would need to be established. Given that the system would be based on registration, the idea of registering an intangible work seems quite difficult. However, given the oral nature of much Māori culture and knowledge, to exclude such works would go against the purposes of the regime. So, the definition of subject matter would include both tangible and intangible matter, and a system for dealing with the registration of intangible works will be outlined.

The following definition of protected 'Māori cultural expressions' is proposed:

Māori cultural expressions are those works, either tangible or intangible, that convey or depict

- (a) some spiritual, ritual, economic or narrative knowledge pertaining to the Māori environment, which is transmitted from generation to generation; and
- (b) ties with ancestors, connections and obligations to other people, and animate and inanimate objects;

and have an identifiable link to a Māori group.

Such works can be expressed in any form, including, but not limited to:

- (i) painting, craft, sculpture, carving, jewellery, weaving, shell work, costumes and textiles; and
- (ii) songs, oral narratives, music, dances, and ceremonies; and
- (iii) architectural forms.

#### 5.4 What are the rights?

This element concerns what rights are afforded to a work once it falls within the definition of protected subject matter. The Waitangi Tribunal did not deem it necessary to grant any additional property rights to Māori cultural expressions. While

at first glance, it could be argued that without granting property rights under this suggested regime, Māori cultural expressions would not be granted a strong level of protection. Given that copyright is a property right, arguably any new rights under this regime would also need to be, in order to grant an equivalent level of protection. On further consideration, however, there are a number of valid reasons for granting personal rights as a more effective means of protection. First, as discussed in Chapter three, the granting of new property rights to Māori for their cultural expressions may attract significant opposition, both politically and within the general public. Personal rights are less inflammatory, and may be less likely to draw criticism, thus aiding the implementation of a new rights regime for Māori cultural expressions. Secondly, personal rights provide protection for individuals in a number of areas of the law, and their effectiveness is not undermined by their nature as personal rights. A key example of this is section 9 of the Fair Trading Act 1986, which prohibits “conduct which is misleading or deceptive or is likely to mislead or deceive.” This section is regularly used to effectively protect the rights of consumers in respect of such conduct. A further example of the effective protection provided by personal rights is defamation law. Finally, the use of personal rights takes the protection of Māori cultural expressions out of the realm of property rights. Māori concepts related to property and ownership generally do not align with Anglo-American concepts of property and ownership. Therefore, the granting of personal rights is symbolically more in line with the objectives and subject matter of this suggested regime.

As such, under the suggested regime, there would be two personal rights available to Māori communities once works are registered. These rights would be communal rights, in that they vest in the community that is linked to the particular cultural expression. These would be the right to give prior and informed consent for uses of works by third parties and the right to object to derogatory and offensive treatment. First, the right to give prior and informed consent for use of Māori cultural expressions by third parties grants Māori an important method of controlling use of works outside of their own use. The scope of the right essentially protects the right of Māori to commercially exploit their own works where they deem it to be appropriate, while also allowing third parties to access the works and use them with the

permission of the relevant community. This is important, as it ensures that Māori cultural expressions will not be removed entirely from the grasp of the public, but Māori will be able to closely control if works can be used, how works are used and by whom. This right, therefore, effectively promotes the dual objectives of this regime. By requiring prior and informed consent for use of cultural expressions by third parties, it allows Māori communities to benefit economically from works by commercially exploiting the works themselves, or through royalties and other benefits linked to allowing third parties to use works commercially. It also means that Māori communities can vet all proposed commercial uses to ensure that they are appropriate and inoffensive, in relation to the spiritual and cultural material embedded in the work. In this way, any legal uses of registered Māori cultural expressions will not be offensive to Māori.

When parties have reached an agreement on whether a cultural expression can be used and how, this would be drawn into a contract, which stipulates the terms and conditions of use. While this agreement could take any form, the proposed commission could provide a standard authorised use agreement for Māori communities to use if they so desired. Through this contractual arrangement, Māori retain some control over the work even when use has been authorised, as if the contracting party breaches the conditions of use, a remedy for breach of contract can be sought, in addition to gaining remedy for breaches under the regime.

This right to prior and informed consent for use of Māori cultural expressions should also cover the import and export of works to and from New Zealand. Evidently, the regime would not be applicable in foreign jurisdictions, and thus would not apply to those who breached the provisions abroad. The applicability of the regime to import and export, however, would provide an avenue to address the trade of works purporting to be Māori cultural expressions abroad. This is particularly important in regulating authenticity, and ensuring that third parties cannot import or export works purporting to be Māori cultural expressions that are in fact in breach of a community's right to prior and informed consent. This is of particular concern at present, with the advent of the Rugby World Cup. It has been reported that there has been a flood of works into New Zealand for sale during the Rugby World Cup that

purport to be ‘Māori’, and artists are concerned that such works are derived from original Māori cultural expressions, as they contain traditional elements.<sup>100</sup>

Secondly, the other right under the regime, the right to object to derogatory and offensive use, would be granted to provide an additional layer of protection for works. While any derogatory or offensive treatment of a work would also be a breach of the right to prior and informed consent for uses of Māori cultural expressions by third parties, the inclusion of this right in the regime acknowledges that some uses can cause significant offence to Māori communities. To gain a remedy for a breach of this right, the requirement would be different to proving derogatory treatment under the Copyright Act. Rather than demonstrating that the treatment has caused prejudice to the honour or reputation of the artist, the Māori community would be required to show that the work had been blatantly altered, mutilated or otherwise distorted in a way that was highly offensive to members of the community. Whether this standard had been met would be determined through reference to the community’s customs and beliefs, and how the treatment of the work flagrantly disregarded or disrespected them. Using *Ka Mate* as an example, if a community were to object to a television commercial featuring women performing ‘the haka’, the community would be required to demonstrate that their belief and custom is that women are not permitted to perform the haka as a challenge to an opponent, and that the advertisement flagrantly disregarded this custom by doing so.

As under the Copyright Act, there would be a limited class of permitted acts in relation to Māori cultural expressions under the regime. The permitted uses under the Model Law provide a suitable guide as to what acts should be allowed. As such, under this suggested regime, permitted acts would be: use for criticism, review and news reporting; research or private study; educational purposes, such as face-to-face teaching; judicial proceedings; and incidental use.<sup>101</sup> As a final note, it is important to stipulate that these rights would not interfere with any rights in Māori cultural expressions that existed prior to the regime being implemented. This would protect

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<sup>100</sup> Michelle Duff “Maori resent knock-off souvenirs” *The Press* (New Zealand, 6 August 2011) at 16

<sup>101</sup> Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples 2002, s7(4)(a) – (e)

any rights of third parties arising from copyright assignment, contracts or other agreements, ensuring that the regime would not be acting retrospectively to negatively impact interested parties.

### 5.5 Who owns the rights?

Given that many of the issues arising from the Copyright Act concern the inability of Māori groups to gain redress or acquire rights under the Copyright Act, it is therefore logical that the rights in a new regime for the protection of Māori cultural expressions would be communal rights. Communal rights provide recognition that a Māori cultural expression is not just the work of one author, but embodies the knowledge, culture and spirituality of a group, and that each person within that group has an interest in, and link with, that expression. For the purposes of the regime, the group in which the communal rights would vest would evidently be that with the identifiable link to the expression, as required by the subject matter definition. In theory, the idea of rights being communally held is straight forward – rather than rights vesting in one person, they vest in a number of people. In practice, however, having rights vested in many people makes such rights difficult to effectively utilise or benefit from. In New Zealand, the structure of Māori communities is such that there are a number of identifiable communal groups that rights could vest in, such as whanau, iwi and hapu. Due to land settlements, and the nature of the Māori land system in New Zealand, many of these groups have incorporations or trusts established to hold and administer their assets, and each member of a group is a shareholder or beneficiary of that incorporation or trust. It would seem superfluous to create a new system of vesting for communal rights, when many groups have a communal body already in place that could effectively be granted any communal rights that vested in a cultural expression linked to that community. As such, under this suggested regime, when a Māori group – be it whanau, iwi or hapu – apply for additional protection for a cultural expression under the regime, the rights that may be granted in that work vest in the nominated communal body of that group, which could be an incorporation, trust or other existing body. In the event that such a group does not have a communal body in place, before rights can attach to their cultural expressions, one must be created.

This vesting in a communal body is important for two reasons. First, it ensures that the rights will generally be dealt with in a way that is in the best interests of the associated Māori group, given the accountability of bodies such as incorporations and trusts to those who they are designed to benefit. Secondly, it is important that all members of the group are able to benefit equitably from the proceeds of any authorised use agreement made under the regime, or any damages that may arise from breaches of the regime's rights. It is suggested that the regime make it a condition of the rights that the incorporation, trust or other body use any economic benefits deriving from the regime for community purposes, similar to whanau trust requirements under section 214(3) of the Te Ture Whenua Māori Act 1993, which dictates that any proceeds shall be held for the purposes of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in life of any shareholders or beneficiaries. While the scope of such a condition is wide, it does provide another level of assurance that all members of a community with rights in a cultural expression will benefit from the additional protection provided by the suggested regime.

A final key point in relation to who owns the rights to a Māori cultural expression under the regime is the issue of how these communal rights interact with rights such as individual copyright in the work. Evidently, individual copyright in a work could not effectively co-exist with the communal rights in a work. Once communal rights are acquired in a Māori cultural expression, the communal rights would supersede the individual rights of the author in that work. Whether or not the community or group provide any compensation to the individual author for the loss of those rights would be determined between each group and author prior to applying for registration. It is important to note, however, that until a cultural expression is registered, it legally remains the work of the individual author. The author must give permission to the Māori community to register the work, thus voiding the author's individual rights. This provides the author with a bargaining position if he or she wishes to be compensated for the loss of his or her individual rights. While such concerns are beyond the scope of the suggested regime, this will be an important factor for communities to deliberate over when considering registering a cultural expression.

## 5.6 How are the rights acquired?

The rights are acquired by registration of a Māori cultural expression on a register of works, which is overseen by a specially established commission. This commission would be similar in nature to the Māori Trademarks Advisory Committee, where the members of the Committee are required to have “knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture).”<sup>102</sup> In terms of the Commission for Māori Cultural Expressions, knowledge relating to expressions of culture, involvement in Māori art, or other relevant experience would also be beneficial. In order to acquire rights in a cultural expression, a Māori incorporation or trust, as previously discussed, would apply to the commission to have their work registered under the regime. In order to be efficient and cost-effective, the application process should be accessible to lay people, and not require the involvement of legal representatives, unless the community so desire. The application documentation should be sufficiently straightforward, and the commission’s role would include the provision of resources such as application guidelines, and a staff member to advise communities as required. Once an application has been lodged, the members of the commission, using their relevant knowledge and skills, would determine whether the proposed work meets the criteria set out in the subject matter definition. If the commission determines that the work does meet the required standard, that Māori cultural expression is then entered on the register of works; the rights then vest in the relevant Māori group. In order to prove that a work meets the required criteria set out in the subject matter definition, there are various types of evidence that could be put forward. Appropriate evidence could include historical evidence surrounding the applicable group; evidence of other similar cultural expressions or works in order to show the cultural and spiritual connection of the group; or oral evidence by members of the group on the importance of the work and its meaning to the group in order to depict context. At this point, the commission would also confirm that the registration of the cultural expression had the consent of the original author of the work. Generally,

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<sup>102</sup> Trade Marks Act 2002, s177

this would be achieved by confirming that written consent accompanied the initial application.

In order to effectively meet the dual aims of the suggested regime, it is proposed that the Māori group applying for registration would have the ability to nominate which rights they were applying for, at the time of application. This would allow groups to distinguish between those works that are suitable for any commercial use, and those that are not. What would the effect of this be? Essentially, it would provide notice that a certain work has been deemed inappropriate for commercial use due to its cultural and spiritual significance, and as such, permission for its use will not be granted. Further, it would assist a Māori community if they were to assert their right to object to derogatory or offensive treatment of a Māori cultural expression, as its registration status identifies that it should not be used commercially, implying that any such use would be particularly offensive.

The register of works, therefore, would contain information about the Māori cultural expression, which could be either a photograph, sketch or description of the work; who holds the rights to that work; whether the Māori community has deemed the work appropriate for commercial use, or not; and the contact details of the rights holder.

The system of registration as a method for granting rights has a number of advantages over the automatic vesting of rights, as under the Copyright Act. If the application process is simple and accessible, there is less need for the involvement of a lawyer in this proposed process. This would result in the Māori community achieving registration, while incurring minimal expense. In the event a community did wish to utilise a lawyer in their application, many Māori incorporations and larger iwis retain legal advisers. Further, given that in 2006 approximately 87% of the Māori population identified with one of the ten largest iwi,<sup>103</sup> it is likely that the majority of registrations would be from these groups. Therefore, after a period of time these

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<sup>103</sup> Statistics New Zealand "Quick Stats about Māori" (2006)  
<http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/Māori.aspx>

communities would become well versed in the application process, limiting the assistance that may be required from lawyers or commission staff. Moreover, this cost-effectiveness follows through if a community was to seek a remedy for a breach of their rights in the courts. Given that the community has already proved their cultural expression meets the required threshold for subject matter under the regime, the court proceedings could be much shorter than if the registration system was not in place. For example, in order to prove a breach of the right to prior and informed consent for use, a community would merely be required to show that their work was registered, and that the defendant did not have prior and informed consent to use that registered work. On the other hand, without registration, in order to prove a breach the community would first need to prove that their work met the required subject matter threshold, and then prove a breach had occurred. This would require additional expense, as court proceedings would be more protracted, and expert witnesses (such as members of the commission) would be required to testify as to the validity of a community's claim. As a final point, the system of registration is a beneficial, practical tool for interested parties; the register provides a comprehensive resource for those wishing to locate and utilise Māori cultural expressions. It also facilitates appropriate commercial use and partnerships in a way that is more efficient and legitimate than rights vested without registration. In this way, a system of registration provides communities with a number of legal and economic advantages.

### 5.7 How are the rights administered and enforced?

The key body overseeing and administering the rights would be the aforementioned commission, while some parts of the regime would be self-sufficient. In the early stages of the process, the commission would be the body responsible for determining applications for registration, as well as maintaining the register of works. In relation to the creation of authorised use agreements under the regime, it is anticipated that this process would be self-sufficient, and rarely require the assistance of the commission. Given that the register contains the contact details of rights holders in a work, any third party wishing to use a registered work could contact the rights holder directly to arrange negotiations or discussion on the topic.

The commission would provide a standard authorised use agreement for parties to use as a basis for their negotiations, but would not generally play a role here. If necessary, the commission could provide alternative dispute resolution services if negotiations failed or an agreement could not be reached between the parties. This function would mainly be used where there is largely agreement between the parties but a key term cannot be agreed upon, for example, the amount of royalties to be paid. In this way, the commission would not be acting as an appeal tribunal where a rights holder has denied a request by a third party to use a work. This would mean the rights holders retain autonomy over decisions regarding their cultural expressions, which is important as it will be the rights holders who will determine whether a proposed use is appropriate or not. Finally, the commission would be responsible for receiving public objections to uses of Māori cultural expressions. While it will largely be the rights holders who are concerned with enforcing their rights in the courts, allowing members of the public, both Māori and Pakeha, to express concerns to commission over the use of a work, particularly when they believe a work has been used in a derogatory way, would be beneficial to the system. It would allow those who are interested in the area of Māori cultural expressions, or concerned members of the public, to play a role in policing the regime, with the aim of discouraging people from breaching the rights in cultural expressions. The commission could then refer the concern to the rights holders, who then have the opportunity to take action against the alleged infringer.

In regards to the enforceability of rights, under the regime a number of remedies would be available in the courts against those who infringed a community's rights. There would be only two remedies available for breaches of the right to object to derogatory and offensive treatment. The general remedies would be an injunction stopping the derogatory treatment of the Māori cultural expression, and monetary damages. While treatment must be highly offensive to the community to reach the standard of derogatory or offensive treatment, the circumstances of the breach will determine the level of damages. For example, in cases where the treatment of the work was malicious or the defendant is a repeat offender, additional damages could be awarded. When there has been an infringement of the right to prior and

informed consent, general remedies would be available to the rights holders. This would include damages, account of profits, injunction, and declaration.

### 5.8 How are the rights lost or how do they expire?

In order to effectively fulfil the purposes of the regime, any rights granted under it must exist in perpetuity. As such, the rights would not expire at any point, but a rights holder could de-register a work if they believed it was no longer necessary for that work to receive the protection of the regime.

### 5.9 Conclusion

In summary, this chapter has put forward a suggested regime for the protection of Māori cultural expressions that would exist in a sui generis legislative format. The regime would have a number of elements. It would vest in Māori groups communal rights that give additional protection to Māori cultural expressions in the form of the right to prior and informed consent of use by third parties, and the right to object to derogatory and offensive treatment. These rights would vest in a communal body such as an incorporation or trust representing the relevant Māori group. A commission would be established to oversee the register of works, to act as a dispute resolution mechanism when issues regarding authorised use agreements arise, and to maintain a complaints function. There would be a range of remedies available for breaches of rights under the regime, and the rights vested by the regime would exist in perpetuity. It can be argued that this suggested regime would provide adequate and appropriate protection for Māori cultural expressions. While the regime would only provide protection within New Zealand, as it would fall outside of reciprocal protection arrangements arising out of the Berne Convention, such protection would still be a critical first step in providing recognition of the need for greater protection of Māori cultural expressions. It rectifies the issues associated with the Copyright Act, in addition to balancing the dual interests of Māori in regards to their cultural expressions in a way that Panama's Law No. 20 and the Pacific nations' Model Law do not.

## **Chapter six: Conclusion**

In conclusion, it is clear that the current copyright regime in New Zealand does not provide adequate or appropriate protection for Māori cultural expressions. The Copyright Act 1994 does not address a number of key concerns of Māori, including communal ownership of works, duration of protection, and offensive treatment of cultural expressions. The issues arising from the Copyright Act, however, are not limited to the New Zealand context. Indigenous communities in other jurisdictions face similar barriers to protection, and there have been approaches to protection suggested abroad. These approaches, in addition to the recent recommendations of the Waitangi Tribunal in relation to intellectual property and taonga works, are of use in looking to how New Zealand can move forward in this area. Drawing on these approaches and recommendations, it is suggested that a sui generis regime providing special rights to Māori communities for their cultural expressions would adequately and appropriately protect such works. Such protection would ensure that Māori cultural expressions, which are a vital part of New Zealand's cultural tapestry, are protected for both their inherent cultural and spiritual worth, and the importance they hold to Māori, and their place in New Zealand's future as a learning tool and source of knowledge and pride.

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