WHITI TE RĀ!

DOES THE HAKA KA MATE ATTRIBUTION ACT 2014 SIGNIFY A STEP INTO THE LIGHT FOR THE PROTECTION OF MĀORI CULTURAL EXPRESSIONS?

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Ko Whakapiki te maunga, ko Hokianga te moana, ko Ngāpuhi, ko Te Rarawa ngā iwi, ko Kupe te tupuna, ko Ngātokimatahourua te waka, ko Te Ihutai te hapū

CONTENTS

GLOSSARY OF MĀORI TERMS

The definitions for the following terms have been taken from *The Raupō Dictionary of Modern Māori*.[1] They provide a reference point for the reader. Some may be elaborated on in the main text.

haka	fierce rhythmical dance
hapū	extended kinship group, subtribe
iwi	tribe
kaitiaki	guardian, caretaker, manager
karakia	prayer, incantation
kaitiakitanga	guardianship
kūmara	sweet potato
mana	integrity, charisma, prestige, status, power, control
mātauranga Māori	Māori information, knowledge, education – both what is known and the way of knowing
mauri	life force, the spark of life, the essential quality and vitality of a being or entity
noa	free from the restrictions of tapu, ordinary, unrestricted, void.
rangatira	chief, noble
taonga	property, treasure
tapu	sacred, forbidden, taboo
Te Ao Māori	the Māori world or worldview
tikanga Māori	Māori custom or law
tino rangatiratanga	Māori constitutional authority; self-government
tohunga	skilled person, chosen expert, priest, healer
waiata	song

[1] P.M. Ryan *The Raupō Dictionary of Modern Māori* (3rd ed, Penguin Books, Auckland, 2008)

waka	canoe
whakapapa	genealogy, genealogical table, lineage, descent
whānau	extended family, family group

INTRODUCTION

Ka Mate! Ka Mate!
Ka Ora! Ka Ora!
Ka Mate! Ka Mate!
Ka Ora! Ka Ora!
Tēnei te tangata
Pūhuruhuru nāna nei i tiki mai
Whakawhiti te rā!
Upane, ka Upane
Upane, ka Upane
Whiti te ra![2]

In 1820 Ngāti Toa Rangatira were at war with neighbouring Waikato and Ngāti Maniapoto. Not only were they at risk of defeat, the iwi (tribe) had been so depleted in numbers that it was nearing extermination. Although not born of the highest rank, a young and fearless rangatira (chief) had stepped up to lead his iwi through this time of conflict and uncertainty. This rangatira was Te Rauparaha, descendent of Hoturoa of the Tainui waka (canoe), born at Kawhia, died 1849 at Otaki.

Seeking an allegiance with Ngāti Tuwharetoa, Te Rauparaha travelled from Kawhia, where Ngāti Toa Rangatira were then based, to Te Rapa in the Lake Taupo region. On this journey he was pursued by a war party who were guided by the incantations of a tohunga (priest). When Te Rauparaha arrived, the Paramount Chief of Tuwharetoa, Te Heuheu II Mananui, deemed it unsafe for Te Rauparaha to stay in Taupo and instead sent him to Lake Rotoaira, where he would be harboured by Te Heuheu's relative, Te Wharerangi.

Te Wharerangi consulted his own tohunga about how to protect Te Rauparaha. The tohunga instructed Te Rauparaha to climb into a kūmara (sweet potato) pit, then had Te Wharerangi's wife sit on top. Soon the war party approached, and their tohunga attempted to locate Te Rauparaha. However, the noa emanating from the wife and the

[2] Haka Ka Mate Attribution Act 2014, Schedule 1

food inhibited the effectiveness of the karakia (prayer) uttered by the tohunga.[3] Nervously, Te Rauparaha waited. He muttered to himself, "Ka Mate! Ka Mate!" (will I die) and "Ka Ora! Ka Ora" (or will I live). As he muttered he could sense the power of the tohunga waxing and waning. Eventually, the war party assumed that Te Rauparaha had evaded them once again, and continued on their search.

As they left, Te Rauparaha leapt from the kūmara pit and exclaimed:[4]

Ka Ora! Ka Ora!	I live! I live!
Tēnei te tangata	For it was indeed the
Pūhuruhuru nāna nei i tiki mai	wondrous power of a woman
Whakawhiti te rā!	that fetched the sun and caused it to shine again!

His utterance concluded with "Upane, ka Upane / Whiti te ra." "Upane" was an ancient battle command meaning "to advance", and "whiti te ra" means "into the sunlight", describing his victorious emergence from the kūmara pit into the bright of day.

The constant war with Waikato, Ngāti Maniapoto and other neighbouring tribes eventually rendered Ngāti Toa Rangatira's presence in the region untenable. It was because of this Te Rauparaha instigated the iwi's migration to Kapiti Island in the Cook Strait, where Ngāti Toa Rangatira flourished and was restored to its former glory. Te Rauparaha is recognised a leader of great mana (power), who took Ngāti Toa Rangatira from defeat at Kawhia to successfully conquer new territories in central New Zealand. Ka Mate is a legacy left behind by Te Rauparaha that marks a time of momentous change in iwi history. The triumph of life over death told in the haka does not only apply to Te Rauparaha; it also speaks to the story of the Ngāti Toa Rangatira. The haka has survived for hundreds of years and remains a taonga (treasure) and source of pride for the people of Ngāti Toa Rangatira.

[3] "Noa" can only be understood in opposition to "tapu". Tapu refers to holy, sacred things, such as the karakia uttered by the tohunga in search of Te Rauparaha. Noa refers to things free of tapu. In the Māori world, tapu and noa things must be kept separate.
[4] Haka Ka Mate Attribution Act 2014, Schedule 1

It was not until 1888 that Ka Mate began to take on a new meaning, and for many this meaning would ultimately supercede its original significance to Ngāti Toa Rangatira. The first performance of Ka Mate before a rugby game was by the "New Zealand Natives" in Surrey, and it was met with ridicule by the British press.[5] The "Original" All Blacks performed it in 1905, after which it was only used on tour. The All Blacks performance of Ka Mate was reinvigorated in 1985 and subsequently reintroduced to New Zealand spectators, and it has been a hallmark of New Zealand rugby ever since. Just like Ngāti Toa Rangatira, New Zealand is a small country. When the All Blacks go out and face these countries that are many times larger than us, they draw on the mana and mauri (life force) of Ka Mate. Ka Mate stands for strength and courage: the performer either achieves their goal, or dies trying.

Inevitably, the unique nature of Ka Mate has caught the eye of many, not least those looking for fresh and innovative marketing tools. Most recently, in late September 2015, Heineken released an advertisement featuring a former Irish rugby union player approaching unsuspecting men and women in a liquor store in Ireland and requesting they perform their best improptu haka to win a trip to the Rugby World Cup. The advertisement was met with opposition by Māori, who labelled it "offensive" and "another example of organisations trying to benefit from the reputation New Zealand has in the haka."[6]

International media had reported similar reactions just a week earlier, when Jacamo men's clothing released a video featuring former English rugby captain Matt Dawson performing the "Hakarena", a parody combining the actions of Ka Mate with the words and movements of the song Macarena.[7] Sir Pita Sharples, former leader of the Māori Party, described the video to English newspaper *The Times* as "insulting".[8] Sir Pita explained that the haka is a way of honouring the enemy: "By doing the haka as the All Blacks do, it's recognising the worth of the other side. So if they're doing

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[5] Malcolm Mulholland *Beneath the Māori Moon: an Illustrated History of* Māori *Rugby* (Huia Publishers, Wellington, 2009) at 18

[6] Lynell Tuffery Huria, in Katie Kenny "Heineken the latest company to mock the haka for profits" *Stuff.co.nz* (24 September 2015) <www.stuff.co.nz/business/better-business/72373708/heineken-the-latest-company-to-mock-the-haka-for-profits>

[7] Jacamo "Do the #Hakarena" (17 September 2015) YouTube <www.youtube.com/watch?v=ZlHS_Mn7nWE>

[8] Matt Dickinson "Matt Dawson's 'Hakarena' video draws All Blacks ire" *The Times* (16 September 2015) <www.thetimes.co.uk/tto/sport/rugbyunion/article4558698.ece>

something to mock the haka, I think that's pretty shameful." Ngāti Toa Rangatira representative Matiu Rei stated the Hakarena was "disrespectful" and criticised Dawson for "belittling our cultural performance, the All Blacks, and the Māori people."[9]

Heineken and the Hakarena provide the most recent examples of Ka Mate in popular media. Despite opposition from the people to which the haka belongs, the number and frequency of profit-motivated and offensive uses continue to grow. From baking competitions, to advertising for sports gear, to Coca-Cola; from alcohol, to cars, to tea towels, commercial entities from a multitude of sectors have shamelessly capitalised on Ka Mate and the marketability of Māori culture. As Metiria Turei MP put it:[10]

> … our taonga become mere baubles for exploitation and commodification, for entertainment and consumption, while the deeper significance of those taonga are lost, and, even worse, denigrated.

And at present, there is little Māori can do to stop it.

But what is the importance of protecting ancient taonga such as Ka Mate? Are taonga like Ka Mate really so different to other legally protected creations of the mind? Is the law as it stands in this area adequate?

The recent enactment of the Haka Ka Mate Attribution Act 2014 provides an important opportunity to reflect on New Zealand's approach to protecting cultural expressions. A lacuna has existed in the law around the use of Māori cultural expressions.[11] Particularly, the area of intellectual property law has proven incapable of providing adequate protection. This lacuna has led to a "gold rush mentality" for

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[9] Wepiha Te Kanawa "Ngāti Toa Rangatira insulted by Hakarena" *Māori Television* (16 September 2015) <www.maoritelevision.com/news/national/ngati-toa-rangatira-insulted-hakarena>

[10] (19 November 2002) 311 NZPD 2277

[11] "Cultural expressions" include both tangible and intangible creative expressions, including stories, songs, instrumental music, dances, plays, rituals, drawing, paintings, sculptures, textiles, pottery, handicrafts and architectural forms. Their key characteristics are that they are "integral to the cultural and social identities of indigenous and local communities, they embody know-how and skils, and they transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage." World Intellectual Property Organization "Traditional Cultural Expressions (Folklore)" <www.wipo.int/tk/en/folklore/>

commercial use of these precious expressions of culture and identity.[12] The new Act, which covers just one cultural expression, is a small bandage on a very large wound.

The ultimate responsibility to resolve the problem lies with the Crown. In Article 2, of the Treaty of Waitangi, the Crown guarantees the protection of Māori tino rangatiratanga of iwi and hapū over their 'taonga katoa' – "the highest chieftainship over their treasured things." As such, the Crown has an obligation to ensure Māori their continuing ownership of cultural properties, including cultural expressions like Ka Mate.

This dissertation argues that New Zealand's current legal paradigm is inadequate to protect Māori cultural expressions, and any protection directly derived from that paradigm, such as the Haka Ka Mate Attribution Act 2014, is inadequate too. Rather, the Crown's Treaty obligations necessitate the adoption of two-pronged international and domestic approach to protection that places kaitiaki (traditional guardians of cultural expressions) at the centre of specially-formulated frameworks.

Chapter One first takes a step back and examines cultural expressions and protection in two legal paradigms. First, it looks at how cultural expressions were protected in the legal system of tikanga Māori. It is only after looking at cultural expressions within their own conceptual framework, free of values and assumptions of the West, that we can develop an effective approach to protecting them. Against that background, Chapter One goes on to explores the numerous shortfallings of New Zealand intellectual property law in dealing with Māori cultural expressions.

Chapter Two provides a critical analysis Haka Ka Mate Attribution Act 2014, the Government's first attempt at providing protection for Māori cultural expressions. While the Act signifies a significant step toward protection of Māori cultural expressions, it does not go nearly far enough. Chapter Two assesses the legislation section-by-section, and proposes some possible amendments to make it more effective. Ultimately, this chapter concludes that the Act is not a viable model for future protection, and more exhaustive reform of the law in this area is required.

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[12] Maui Solomon "The Wai 262 Claim: A Claim by Māori to Indigenous Flora and Fauna: *Me o Rātou Taonga Katoa*" in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treay of Waitangi* in (Oxford University Press, New York, 2005) 213 at 229

Chapter Three scrutinises the case for more exhaustive reform in two parts. The first part looks at why the Crown should extend protection to Māori cultural expressions, with particular reference to the Treaty of Waitangi and international developments. The second part of Chapter Three looks at the most compelling models for protection domestically and internationally. Generally, sui generis schemes that operate outside (but in tandem with) intellectual property law are the best approach.[14] In regards a domestic scheme for protection, Chapter Three proposes the adoption of the recommendations of the Waitangi Tribunal in *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* ("WAI 262").[15] Chapter Three finally points to the necessity of participating in international discussions around developing a transnational legal instrument to protect Māori cultural expressions in an increasingly globalised world.

The findings of this dissertation are timely with the Haka Ka Mate Attribution Act 2014 set for compulsory review in 2019. Further, the Government is yet to formally respond to the recommendations of the Waitangi Tribunal in WAI 262. The combination of these factors means New Zealand is at a crucial juncture in its dealings with Māori cultural expressions.

[14] Sui generis means "of its own kind". It is a term used to describe a type of legal protection that lies outside existing legal protections.

[15] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* WAI 262, 2011), vol 1

CHAPTER ONE

MĀORI CULTURAL EXPRESSIONS IN TWO PARADIGMS

In early Māori society, cultural expressions were preserved and protected through uniform adherence to a number of interlocking values. The same degree of protection is not present in New Zealand's formal legal framework, which was inherited from English social, political and economic history. Even though intellectual property instruments have been formulated to cope with similar subject matter, such as dance, designs, literature and song, the specific characteristics of these instruments render them incapable of offering adequate protection for Māori cultural expressions. There is a significant gap between the intellectual property framework and the protection required by Māori cultural expressions.

Using Ka Mate as a touchstone, this chapter compares cultural expressions in tikanga Māori and the New Zealand legal framework to explore how the present legal lacuna arose and provide background for the forthcoming discussion on the Haka Ka Mate Attribution Act 2014.

I Cultural Expressions in Tikanga Māori (the Māori legal system)

Whether it is a haka, a waiata, or a place name, or the work of weavers, carvers, tā moko artists, writers, or musicians, cultural expressions bear special qualities and stories that make them indispensible in Te Ao Māori (the Māori world/worldview). This is reflected by the way they have been and continue to to be protected under tikanga Māori.

A Tikanga Māori Generally

Cultural expressions have been protected in tikanga Māori, or, as Ani Mikaere calls it in her essay *Treaty of Waitangi and Recognition of Tikanga Māori*, the "first law" of Aotearoa New Zealand.[16] Professor Sir Hirini Moko Mead describes tikanga as "a set of beliefs and practices associated with procedures to be followed in conducting the

[16] Ani Mikaere 'The Treaty of Waitangi and Recognition of Tikanga Māori' in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) at 330

affairs of a group or individuals."[17] Tikanga is not so much considered legal rules as opposed to "culturally sponsored habits."[18] Though there are numerous beliefs and practices that comprise tikanga Māori, whanaungatanga is the source of rights and obligations of kinship. It is "the glue that held, and still holds, the system together."[19] Cultural expressions are defined by the relationships surrounding it and within it – it has no meaning outside that relationship.

B Cultural Expressions as Taonga

This dissertation focuses on cultural expressions that are considered by Māori to be taonga. Taonga broadly translates to "treasures," and can include anything from a word, to a memory, to a natural resource. This broad term has been specifically considered in the context of intellectual property law by the Waitangi Tribunal in WAI 262.[20] Intellectual property law commonly deals with "works". To better fit the language of intellectual property law, the Tribunal reconceptualised the traditional notion of taonga and coined the phrase "taonga work", which is:[21]

> … a work… that is in its entirety an expression of *mātauranga Māori*; it will relate to or invoke *ancestral connections*, and contain or reflect traditional narratives or stories. A taonga work will possess *mauri* and have living *kaitiaki* in accordance with tikanga Māori.

The italicised words and phrases are integral to the significance of cultural expressions in Te Ao Māori.

First, cultural expressions are vehicles for mātauranga Māori. Mātauranga derives from the verb "mātau" (to know). Mātauranga Māori has been variously described as

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[17] Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, 11-13 August 2000) at 3-4 as cited in Law Commission *Maori Customs and Values in New Zealand Law* (NZLC SP9, 2001) at 72

[18] Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" 21 Waikato L. Rev. 1 at 4

[19] At 4

[20] WAI 262, above n 15, at 80. The WAI 262 report is one of the most complex and far-reaching in the Tribunal's history. Released almost 20 years after the claim began, this report recommended a wide range of reforms to laws and policies affecting Māori culture and identity. WAI 262 recommends reforms of laws relating to health, education, science, intellectual property, indigenous flora and fauna, resource management, conservation, the Māori language, arts and culture, heritage, and the involvement of Māori in the development of New Zealand's positions on international instruments affecting indigenous rights.

[21] At 80 (emphasis added)

"a cultural system of knowledge about everything that is important in the lives of the people"[22] and the "knowledge, comprehension, or understanding of everything visible or invisbible that exists across the universe."[23] In creating Ka Mate, Te Rauparaha drew upon knowledge, values and iwi history recognised by Ngāti Toa Rangatira as mātauranga Māori.[24] Mātauranga Māori is not only knowledge, but also a way of knowing.

Second, cultural expressions are linked to whakapapa. The Waitangi Tribunal states that taonga works "invoke ancestral connections".[25] This is the most accurate English equivalent of whakapapa. In Te Ao Māori whakapapa refers to the connection between people and all living things, past and present. Ka Mate is linked to whakapapa in that it connects Ngāti Toa Rangatira to their ancestors.[26] The haka brings Te Rauparaha to life. As Hohepa Potini, a Ngāti Toa Rangatira kaumātua (elder), put it: "To understand Ka Mate is to know and understand its composer, Te Rauparaha."[27] A composition does not "belong" to the composer, but is a taonga of the iwi to which the composer affiliates. It is they who give life and form to the words.[28]

Ngāti Toa Rangatira also consider that Ka Mate has a kōrero (story) embedded within it. This kōrero relates not only to the survival of Te Rauparaha but, as part of the iwi's collective identity, the re-establishment and revitalisation of the Ngāti Toa Rangatira people as a result of the vision and leadership of Te Rauparaha. The combination of whakapapa and kōrero in taonga give it mauri. Mauri is the spark of life.[29]

C Kaitiakitanga

In tikanga Māori, taonga are guarded by way of kaitiakitanga. Kaitiakitanga is the responsibility for maintaining resources, including cultural expressions. Justice

[22] New Zealand Qualifications Authority *Conversations on Mātauranga Māori* (Ministry of Education, July 2012) at 13
[23] "What is Mātauranga Māori?" (2011) Library and Information Association of NewZealand <http://www.lianza.org.nz/what-m%C4%81tauranga-m%C4%81ori>
[24] Haka Ka Mate Attribution Act 2014, Schedule 1
[25] WAI 262, above n 15, at 80
[26] Haka Ka Mate Attribution Act 2014, Schedule 1
[27] AIG 'Haka – History" (6 October 2014) YouTube <hwww.youtube.com/watch?v=AnlFocaA64M>
[28] Haka Ka Mate Attribution Act 2014, Schedule 1
[29] Hirini Moko Mead *Tikanga Māori: Living By Māori Values* (Huia Publishers, Wellington, 2003) at 53

Joseph Williams in *Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law* reinforced that kaitiakitanga is a legal obligation that stems from whanaungatanga in that, at the same time as it provides a right in something, it also carries with it reciprocal obligations to care for that thing's spiritual welfare.[30]

The kaitiaki may be an individual, a whānau, a hapū or an iwi. By virtue of whakapapa, Ngāti Toa Rangatira are the kaitiaki of Ka Mate.[31] The kaitiaki relationship between Ngāti Toa Rangatira and Ka Mate is perpetual. They have an ongoing obligation to nurture and care for Ka Mate, and to safeguard its mauri. The same responsibility applies to all taonga with living kaitiaki.

D Summary

Māori cultural expressions are much more than entertaining dances or visually stunning pieces of artwork. They are vital storytelling devices and the depositories of iwi and hapū history. Traditionally, kaitiakitanga in the context of tikanga Māori served as an adequate measure for protection. However, in the modern social and legal structures brought to New Zealand as a result of colonisation (the "second law" of New Zealand)[32] the ability of the kaitiaki to perform their obligations is diminished, necessitating additional protection.

II Cultural Expressions in New Zealand's Modern Intellectual Property Framework

At first glance, New Zealand's intellectual property framework appears to offer a logical form of protection for Māori cultural expressions. However, intellectual property theory and the current legal instruments it is embedded in are ultimately unsuitable to deal with Māori cultural expressions for a number of reasons.

A Theory of Intellectual Property Law

In the Western intellectual property tradition, there are two main schools of thought: Continental European, and Anglo-American. New Zealand sits predominantly in the

[30] Justice Joseph Williams, above n 18, at 4
[31] Haka Ka Mate Attribution Act 2014, Schedule
[32] Justice Joseph Williams, above n 18, at 6

latter camp, but possesses certain attributes derived from the former. Across both systems there are three main justifications for intellectual property law: natural rights, utilitarianism, and personality rights.[33] The ultimate goal for lawmakers is to strike a balance between the exclusive rights granted to the creator, and the promotion of widespread public enjoyment of those creations.[34] In this way, there is a common interest shared by intellectual property law and tikanga Māori: both value the growth of culture and identity.[35] Aside from this, the differences in the two conceptions are stark.

The natural rights approach arises out of the Lockean idea that a person has a right over labour and products produced by his or her body.[36] The person takes raw materials (in the case of intellectual property, facts and concepts) that are "held in common" and, through labour, creates a finished product. Immediately it is clear the natural rights theory fails to account for the dynamic role played by cultural expressions in Te Ao Māori. Specifically, the focus on intellectual property as something that accrues to an individual only is problematic. Cultural expressions in Te Ao Māori are collectively held, where the natural rights theory is staunchly individualistic.

The utilitarian approach is perhaps the most incompatible with the role of cultural expressions in Te Ao Māori. This approach relies on the assumption that a society that promotes the development of intellectual property is more advanced than a society that does not. Accordingly, it is assumed that individuals will only engage in the creation of intellectual property if there is the potential to economically exploit the work.[37] This does not speak to the motivations for the creation of Māori cultural expressions. Ka Mate was a spontaneous and spiritual utterance. Another important illustration of this idea is waiata: "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

[33] William Fisher "Theories of Intellectual Property" in Stephen R. Muntzer *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 170 at 170
[34] At 170
[35] WAI 262, above n 15, at 47
[36] Fisher, above n 33, at 172
[37] Fisher, above n 33, at 172

ancestors pass dimly before our eyes."[38] Māori cultural expressions are produced with no economic incentive, and their significance is much greater than any dollar value. As Maui Solomon put it in his essay *Indigenous peoples Rights Versus Intellectual Property Rights*:[39]

> [Intellectual property rights] evolved out of the Industrial Revolution to recognise and protect the legal and economic interests of private enterpise. [Indigenous rights have] evolved over many millennia as a result of the collective and individual efforts of closely connected kinship groups.

This clash between individual and collective rights, and economic and spiritual interests, are the primary reasons why intellectual property law is unsuitable for indigenous interests.

The personality rights approach recognises that works are a fusion of the personality of the author with the object.[40] Personality theorists posit that individuals have moral claims to their own talents, feelings, character traits, and experiences.[41] Control over intellectual objects is crucial for self-actualisation. By expanding our selves outside the confines of our own minds and combining these selves with tangible and intangible objects, we define ourselves. On the face of it, the metaphysical aspect to the personality rights theory seems to better fit cultural expressions in Te Ao Māori. Nevertheless, the continued individualistic focus fails to take account of the communal aspects of Māori cultural expressions and their link to the spiritual world.

All three theories vest a right of property in the creator over the thing that has been created. This is in stark contrast to kaitiakitanga which places obligations on the kin group in relation to the creation.

The three dominant theories of intellectual property law are embedded in intellectual property instruments. These instruments have been developed in such a way that has

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[38] Marian de Beer "Protecting echoes of the past: intellectual property and expressions of culture" (2006) 12 Canterbury L. Rev 95 at 96

[39] Maui Solomon "Indigenous Peoples Rights versus Intellectual Property Rights" *Collective Human Rights of Pacific Peoples* ed. Nin Thomas (International Reseach Unit for Maori and Indigenous Education, University of Auckland, 1998) 61 at 63

[40] Fisher, above n 33, at 171

[41] Adam Moore and Ken Himma "Intellectual Property" in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition, 8 March 2011) <http://plato.stanford.edu/archives/win2014/entries/intellectual-property/>

rendered them inadequate to cope with Māori cultural expressions. In this specific context, only copyright and trademark are directly relevant.[42]

B Copyright Act 1994

Copyright has been rejected as "the most unpalatable form of protection" for cultural expressions.[43] Though it covers subject matter that is quite similar in form to Māori cultural expressions, is the intellectual property instrument that least accommodates Māori interests.

The law of copyright protects a wide range of "original forms of expression," including dances,[44] literary works, and musical compositions. Copyright vests automatically in the author. The fundamental right granted prevents others from copying the work. Copyright also includes the rights to perform the work in public, play the work in public, communicate the work to the public and make an adaptation of the work.[45] In relation to literary, dramatic, musical and artistic works, the rights exist for the lifetime of the author plus 50 years.[46] Additionally, copyright confers "moral rights" derived from the personality theory of intellectual property law.[47]

There are four key aspects of New Zealand copyright law that pose difficulties for Māori seeking to protect their cultural expressions: authorship, originality, fixation in material form and duration.

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[42] Trade mark and copyright are the only relevant instruments to protecting intellectual properties with an artistic element to them. Patent law deals with new inventions. Similarly, the law around registered designs, trade secrets and plant variety rights is not central to this discussion and will not be addressed.

[43] Peter Shand "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion" (2002) 3 Cultural Analysis 47 at 61

[44] A dance may qualify for copyright protection provided it is original and in material form, whether that be by video recording or dance notation

[45] Copyright Act 1994, s 16

[46] Section 22

[47] Copyright Act 1994, Part Four. The moral rights of copyright are actually of potential use to indigenous communities, as recognised by Dr Jane Anderson in "Indigenous Traditional Knowledge & Intellectual Property" Issues Paper, Center for the Public Domain, (Durham, North Carolina, Duke University Law School, 2010) at 21. This will be discussed in greater detail in Chapter Two. For now, it is sufficient to say that moral rights are ineffective when the subject matter is incapable of qualifying for copyright, which is the focus of Chapter One.

1 Authorship

First, the Copyright Act 1994 requires an identifiable author. There are two forms of authorship under the Act: joint and individual. For an individual to be recognised as an author, they must be the creator.[48] Joint authorship requires that the work be producted through collaboration of two or more authors, and the contribution of each author must not be separate.[49]

Ka Mate is a rare example of a case where an individual identifiable author can be located. Many taonga works are collectively created by iwi, hapū and whānau and thus are not entitled to protection under the Copyright Act 1994.[50]

On a more conceptual level, attributing work to one identifiable author is difficult in the context of why and how Māori cultural expressions are created. Māori creators draw on the mātauranga Māori to preserve and transmit that knowledge on behalf of the community. On the other hand, the authorship requirement of copyright derives from the "Romantic" image of the writer where everything in the world is "accessible as an idea and can be transformed into his 'expression' which then becomes his 'work'."[51] The possessive individualism that defines the authorship requirements of copyright fails to cater to Māori cultural expressions.

2 Originality

A work must be "original" to quality for copyright protection.[52] An original copyright work is one where sufficient skill, labour and judgment has been applied in its creation.[53] While the precise scope of originality is undefined, courts have considered the threshold for originality be very low.[54]

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[48] Copyright Act 1994, s 5(1)
[49] Section 6(1)
[50] Terri Janke "Indigenous Cultural and Intellectual Property Rights" *Collective Human Rights of Pacific Peoples* ed. Nin Thomas (International Research Unit for Maori and Indigenous Education, University of Auckland, 1998) 45 at 54
[51] Rosemary Coombe "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 Can. J. L & Jurisprudence 249 at 251
[52] Copyright Act 1994, s 14
[53] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL), adopted in *Wham-O Manufacturing v Lincoln Industries Ltd* [1984] 1 NZLR 641
[54] WAI 262, above n 15, at 68

The low threshold is of little assistance to Māori. Many cultural expressions are passed down from generation to generation, and any notion of individual creation would destroy the value of the property by disregarding its cosmological signifcance: "Knowledge is revealed, not individually created. It is passed down, not passed up."[55] The value of many cultural expressions derives from the fact they are of ancient origin, handed down from the gods or an ancestor.[56]

To some extent, this concern has been alleviated in the Federal Court of Australia cases of *Bulun Bulun v Nejlam Investments Pty Ltd* and *Milpurrurru v Indofurn*,[57] where the Court held in both instances that there was scope for individual artistic interpretation, despite the fact the Indigenous artworks were inspired by existing traditional designs. The issue of originality in Māori cultural expressions is yet to be addressed by New Zealand courts, but on the right facts, it is likely a similar conclusion would be reached.

Even so, the mauri of Māori cultural expressions is preserved through accurate reproduction. The emphasis on copying places a limit on the amount of innovation and creativity that can be applied to pre-existing works, meaning it is difficult for much individual artistic interpretation to occur.[58]

This problem is compounded by that fact that many Māori cultural expressions are already in the public domain because they have never been protected by copyright.[59] This presents something of a conundrum: when Māori cultural expressions were initially created they did not satisfy the requirements for copyright protection, even if they were original, meaning they were released into the public domain. Once something is in the public domain, it is no longer considered original and cannot be protected.

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[55] Lamont Lindstrom *Knowledge and Power in a South Pacific Society* (Smithsonian Institute Press, University of Virginia, 1990) at 43

[56] Terri Janke, above n 50, at 54

[57] *Bulun Bulun v Nejlam Pty Ld* [1988] FCA 1082; *Milpurrurru v Indofurn Pty Ltd* [1994] FCA 1544. The Federal Court of Australia is an Australian superior court of record which has jurisdiction to deal with most civil disputes governed by federal law. The Court includes an appeal division referred to as the Full Court comprising three Judges, the only avenue of appeal from which lies to the High Court of Australia.

[58] Jordanna Bowman "Coping with culture: Copyright, cultural expression and inadequacy of protection for Māori" (LLB (Hons) Dissertation, University of Otago, 2011) at 12

[59] WAI 262, above n 15, at 55

3 Fixation in material form

To obtain copyright protection, a work must be recorded or written down in some permanent tangible form. Copyright does not provide protection to the idea behind the expression.[60] Impermanent forms of expression such as performances of stories, songs and dances will not meet this requirement because they are passed down orally.[61] As Māori culture is orally passed down, this is problematic.

Mātauranga Māori would not qualify for copyright, but particular expressions of mātauranga Māori might when recorded, such as the lyrics and movement of Ka Mate. It is questionable whether recording such knowledge and expressions is a good practice, as it may lead to the devaluing of the oral traditions that define Māori culture.

4 Duration

Finally, under the Copyright Act 1994, artistic and musical works are granted protection for the lifetime of the author plus fifty years.[62] The limitation on copyright balances the author's interest in the work, and the desirability of releasing work into the public domain in order to promote innovation.[63] The balance prevents the copyright owner having a permanent monopoly on the work.

Even if copyright had been available at the time Te Rauparaha composed Ka Mate, it would have lapsed long ago and the haka would have entered the public domain. The same problems resulting from commercial and offensive use would be present.[64] Releasing works into the public domain allows users to appropriate the work in whatever ways they choose, acting as a shield for those parties who wish to exploit them. The fact this has been able to occur has put the mātauranga behind Māori cultural expressions at risk, and diluted the ability of kaitiaki to perform their role.

Copyright protects creative expressions analogous to Māori cultural expressions. However, it has developed in such a way that does not take account of the collectivist

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[60] *Walter v Lane* [1900] AC 539
[61] Terri Janke, above n 50, at 55
[62] Copyright Act 1994, s 22(1)
[63] WAI 262, above n 15, at 56
[64] WAI 262, above n 15, at 56

and spiritual aspects that give Māori cultural expressions their place in Te Ao Māori, thus rendering it an unsuitable tool for protecting them.

C Trade Marks Act 2002

Trade mark law in New Zealand is at a crossroads in its dealings with Māori cultural expressions. While the legislation takes steps to curb the commercial exploitation of Māori imagery, Māori cannot pre-emptively use this instrument to protect their expressions.

Trade mark law grants exclusive rights to use a particular mark in relation to the sale of goods or services of a particular kind.[65] It enables businesses to distinguish their products or services from those offered by competitors through the exclusive use of words, logos, colours, shapes, signs, smells, or any combination of these.

Like copyright, Māori cannot rely on trade mark law to protect their cultural expressions. Trade mark is ill-suited to this purpose on a fundamental level because it protects commercial interests, and the interests of Māori in their cultural expressions are not usually commercial.[66]

Ka Mate is the only cultural expression that has attracted the attention of the Intellectual Property Office of New Zealand (IPONZ) in regards to eligibility for trade mark registration. From 1998 to 2006, the mandated authority for Ngāti Toa Rangatira, Te Runānga O Toa Rangatira Inc (the Runānga), ran an unsuccessful bid to win trade mark registration for the full text of Ka Mate. IPONZ rejected the application because it considered that the words were in the public domain and could not be monopolised as no one particular organisation could be identified as the trade source of goods or services promoted in conjunction with this haka.[67]

In response, Ngāti Toa Rangatira submitted four separate phrases ("KA MATE", "UPANE KAUPANE", "WHITI TE RA", and "KA ORA") to IPONZ as distinct trade mark applications. They were accepted for registration in March 2010. The marks were then opposed by Prokiwi International Ltd, a New Zealand souvenir

[65] Trade Marks Act 2002, s 18

[66] Peter W Jones "Indigenous peoples and Intellectual Property Rights" (1996) 4 Waikato L. Rev. 117 at 129

[67] Patrick Crewdson "Iwi claim to All Black haka turned down" *The New Zealand Herald* (26 July 2006) <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10389347>

supplier that printed the words of the haka onto tea towels.[68] After hearing from both Prokiwi and representatives of Ngāti Toa Rangatira, the Assistant Commissioner of Trade Marks directed that the phrases must not be registered. The principal reason for the decision was that the haka "is an important part of New Zealand's heritage, a New Zealand icon, and is a powerful reference to New Zealand, which appears to be largely attributable to its performance by the All Blacks Rugby Team since 1905."[69] This decision captures the mainstream attitude towards Ka Mate: it is seen as belonging to the All Black's first, then to Māori.[70] Such a claim is highly problematic when we consider the kaitiaki relationship Ngāti Toa Rangatira have with Ka Mate, and the various complexities stemming from that relationship.

Despite Māori being precluded from using trade mark law to prevent commercial exploitation of their expressions, the Trade Marks Act 2002 does go some way in providing a mechanism for Māori to object to proposed registrations of marks they may consider offensive. Section 17(c) provides some absolute grounds precluding registration of a trade mark. The section reads:[71]

> 17 The Commissioner *must not* register as a trade mark or part of a trade mark any matter –
>
> (a)…
>
> (b)…
>
> (c) the use or registration of which would, in the opinion of the Commissioner, be *likely to offend* a significant section of the community, including *Māori*

To give effect to s 17(c), the Act establishes a committee that must "advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori."[72] The Commissioner appoints Committee on the basis of a

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[68] *Te Runanga O Toa Rangatira Incorporated v Prokiwi International Limited* [2012] NZIPOTM 14 (1 June 2012)

[69] At [49]

[70] (6 April 2014) 698 NZPD 17389; as described by the Hon Chris Finlayson MP at the Second Reading of the Haka Ka Mate Attribution Bill.

[71] Trade Marks Act 2002, s 17(1)(c) (emphasis added)

[72] Trade Marks Act 2002, s 178

"person's knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture)."[73]

As the wording of s 17(c) suggests, the recommendations of the Māori Advisory Committee are not binding, and the ultimate discretion as to whether something should be registered lies with the Commissioner.[74] The Committee is active in the operations of IPONZ.[75] However, the practical influence of the Committee is questionable, with the chair of the Committee, Karen Te o Kahurangi Waaka-Tribble, admitting its authority is limited.[76]

This provision is relatively weak. Even so, it is a "small inroad" into a private law area "previously untrammelled by tikanga Māori."[77]

III Conclusion

Cultural expressions play a crucial role in Māori society. Kaitiaki have traditionally been tasked with preserving this role. However, the clash of worldviews and subsequent privileging of the Western paradigm of intellectual property law has hindered the ability of kaitiaki to perform their obligations.[78] The theory of intellectual property law is misaligned with the Māori worldview, meaning the intellectual property instruments derived from this theory in New Zealand are inadequate. Copyright is imbued with notions of possessive individualism. The authorship, originality and duration aspects of copyright preclude Māori cultural expressions from protection. Similarly, trade mark law cannot be used to protect Māori cultural expressions. While there is a limited mechanism in place to prevent the commercial appropriation of Māori imagery and words, this mechanism is

[73] Trade Marks Act 2002, s 179
[74] Section 178
[75] Justice Joseph Williams, above n 18, at 31
[76] Karen Te o Kahurangi Waaka-Tribble, in "Maori Trademark Advisory Committee Has Limited Powers" *Newstalk ZB* (23 November 2011) < www.radionz.co.nz/news/te-manu-korihi/91912/maori-trademark-advisory-committee-has-limited-powers>
[77] Justice Joseph Williams, above n 18, at 31
[78] This privileging was part of a bigger colonial project to assimilate a "lost race". An important example of New Zealand's privileging of Western ways of thinking over Māori is the Tohunga Suppression Act 1907. Tohunga were the holders of most knowledge and rites in Māori society. Their practices were banned in order to hasten assimilation, and had an extremely destablising effect on Māori lifestyles and knowledge.

insufficient. Both instruments prioritise economic interests, which do not speak to Māori concerns.

The shorfallings of the current intellectual property system and its inability to deal with Māori cultural expressions are crucial background to Chapter Two, which looks at the first legislative attempt to protect a cultural expression: the Haka Ka Mate Attribution Act 2014.

CHAPTER TWO

THE HAKA KA MATE ATTRIBUTION ACT 2014

The Haka Ka Mate Attribution Act 2014 ("the Act") is New Zealand's first step into the previously unchartered waters of legal protection for Māori cultural expressions. The Act only protects one cultural expression but provides some insight into the Government's current attitude towards protection.

The Act is inspired by the moral rights framework of copyright law.[79] As explored in Chapter One, copyright is not a suitable candidate for the protection of Māori cultural expressions. The discussion in that chapter remains firmly in the background of the ensuing analysis. However, some of the amendments suggested in this Chapter pragmatically and necessarily draw on aspects of copyright law in order to keep with the Act's current format.

Chapter Two first describes the Act's operation section-by-section. It then analyses the Act's particular provisions and looks at potential amendments that would increase its effectiveness and better give effect to the kaitiaki relationship. The Chapter concludes with proposed draft provisions.

Appendix A reproduces the Haka Ka Mate Attribution Act 2014 in full and provides a useful reference point for readers.

I Background

In 2005 Ngāti Toa Rangatira gave Te Runānga o Toa Rangatira ("the Runānga") the mandate to negotiate with the Crown to settle the iwi's historical Treaty of Waitangi claims. One aspect of the negotiations was to settle on a way of protecting the integrity of Ka Mate and the values underlying it. As part of the cultural redress package,[80] the 2012 Deed of Settlement specifically acknowledged the significance of

[79] Ngati Toa Rangatira and Trustee of the Toa Rangatira Trust and the Crown, "Deed of Settlement of Historical Claims" (initialed 7 December 2012), at cl 5.104

[80] The cultural redress package recognises Ngati Toa's traditional, historical, cultural and spiritual associations with places and sites within their area of interest, and makes special provision for Ka Mate

Ka Mate.[81] The Crown agreed to pass separate legislation providing a right of attribution, requiring that commercial users acknowledge Te Rauparaha as the composer and Ngāti Toa Rangatira as kaitiaki of the haka. The draft of that legislation was agreed to in the settlement package.[82]

Honouring the settlement agreement, Parliament enacted the Haka Ka Mate Attribution Act 2014 without dissent at the same time as the Ngāti Toa Rangatira Claims Settlement Act 2014. It was a Government Bill put forward by the Hon Chris Finlayson MP QC (Mr Finlayson on subsequent references), who described it as "the very first tentative step by the Crown towards recognition of traditional cultural expressions".[83] The Act was met with considerable praise from across the political spectrum. Labour's Shane Jones MP, who has since left Parliament, highlighted that providing stewardship of the haka is "reflective of how far we have come in terms of biculturalism", and the then Māori Party co-leader Sir Pita Sharples expressed his pride at being part of a Government that "honours, respects, and recognises the whakapapa of Ka Mate".[84]

II The Scheme of the Act

The Haka Ka Mate Attribution Act 2014 mandates that any commercial use of Ka Mate must properly acknowledge the haka's whakapapa and kaitiaki. It also formalises the acknowledgements by the Crown as to the significance of Ka Mate to Ngāti Toa Rangatira. In the Act, Ngāti Toa Rangatira has the meaning given by s 14(1) Ngāti Toa Rangatira Claims Settlement Act 2014: the "collective group composed of individuals who are descended from Toa Rangatira" and "any other recognised ancestor of Ngāti Toa Rangatira who migrated permanently to the area of interest of Ngāti Toa Rangatira in the nineteenth century and who exercised customary rights predominantly within that area". The Act recognises Ngāti Toa Rangatira as dynamic and flexible group determined by their whakapapa.

[81] Deed of Settlement of Historical Claims, above n 79, at cl 5.105
[82] At cls 5.105-5.112
[83] (16 April 2014) 698 NZPD 17389
[84] At 17390

A Acknowledgements by the Crown

In s 8(1) of the Act, the Crown acknowledges the significance of Ka Mate as a taonga of Ngāti Toa Rangatira and as an integral part of the history, culture and identity of Ngāti Toa Rangatira. In s 8(2) the Crown acknowledges the statement made by Ngāti Toa Rangatira set out in Schedule One clarifying the association of Ngāti Toa Rangatira with Ka Mate as kaitiaki, and the values of Ngāti Toa Rangatira concerning the use and performance of Ka Mate. Section 8(2) also acknowledges Te Rauparaha as the "composer" of Ka Mate, and s 8(3) recognises that Ngāti Toa Rangatira have a right of attribution.

B The Right of Attribution

Section 9 of the Act grants Ngāti Toa Rangatira a perpetual right of attribution. This requires a statement that Te Rauparaha was the composer of Ka Mate and a chief of Ngāti Toa Rangatira. That statement must be "clear and reasonably prominent" and must be likely to bring the attribution to the attention of the viewer or listener.[85]

The first known statement of attribution made to comply with the Act was in the Sol3 Mio rendition of Ed Sheeran's "I See Fire" for the All Blacks' Rugby World Cup campaign. The track featured overdubbing of Ka Mate. For the last ten seconds of the four and a half minute music video, the following text appeared on the screen:[86]

> This haka was composed by Te Rauparaha, a chief of the iwi/tribe Ngāti Toa Rangatira and has been used with the permission of Te Runanga o Toa Rangatira.

While permission is not mandated under the Act, the attribution statement is. The statement given by Sol3 Mio appears to be enough to satisfy the requirements of s 9.

Importantly, the right of attribution only applies to commercial contexts.[87] As per s 10(2), the right of attribution does not apply to:

(a) any performance of Ka Mate, including by a kapa haka group:

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[85] Haka Ka Mate Attribution Act 2014, s 9(4)

[86] "Sol3 Mio release All Blacks Rugby World Cup song" *3 News* (4 September 2015) <www.3news.co.nz/sport/video-sol3-mio-release-all-blacks-rugby-world-cup-song-2015090412#axzz3n7fS1ydA>

[87] Haka Ka Mate Attribution Act 2013, s 10(1)

(b) any use for educational purposes of anything that includes Ka Mate:

(c) anything made for the purpose of criticism, review, or reporting current events:

(d) any communication to the public of anything described by paragraph (a) or (c) for a purpose that is not commercial.

As such, the Act does not stop performances by school groups, kapa haka gropus, sports teams, or non-commercial groups. Further, contrary to some public confusion on the matter, the Act does not prevent performance of Ka Mate by the All Blacks, who have an agreement with Ngāti Toa Rangatira around their performance of the haka. The agreement reinforces mutual respect both parties have for the work and its unique characteristics. Under s 9(5) of the Act, other parties are open to enter into similar agreements with Ngāti Toa Rangatira.

C Enforcement

Enforcement of the Act rests with the rights representative of Ngāti Toa Rangatira, mandated iwi authority Te Rūnanga o Toa Rangatira Incorporated.[88] This is a non-profit incorporated society with charitable status and the administrative body responsible for Ngāti Toa Rangatira estates and assets, including Ka Mate.[89] Since Parliament has not specified how much of the haka must be used to require attribution, the issue will be determined at the discretion of Ngāti Toa Rangatira. It is possible Ngāti Toa Rangatira may respond with action under the Act if any of "KA MATE", "UPANE KAUPANE", "WHITI TE RA", or "KA ORA" are used as the iwi has already sought trade mark protection for these particular phrases.[90] As well as this, any part of the choreography that is recognisable as being from Ka Mate may result in enforcement.

D Remedy for Breach

The sole remedy for breach is a declaratory judgment against the person or entity in

[88] Haka Ka Mate Attribution Act 2014, s 7

[89] Ministry of Business, Innovation and Employment "Haka Ka Mate Attribution Act 2014 Guidelines" <www.ngatitoa.iwi.nz/wp-content/uploads/PhotoGallery/2010/09/Haka-Ka-Mate-Guidelines_Final2.pdf>

[90] *Te Runanga O Toa Rangatira Incorporated v Prokiwi International Limited*, above n 67

breach of the right.[91] Section 11 has been specifically worded to exclude all other remedies, including injunction, damages and any kind of royalties. The suggested wording for the judgment includes a statement that a right of attribution applies, and that the person must comply with the Act. Costs may be awarded under the Declaratory Judgments Act 1908.

E Compulsory Review

Section 12 provides for compulsory review of the Act by the Ministry of Business, Innovation and Employment (MBIE) in five years time. This provision reflects the novel nature of the legislation. The purpose of the review is to consider whether the interests of Ngāti Toa Rangatira relating to Ka Mate are sufficiently protected by the Act and any other relevant enactment, and to consider additional protection for those interests.[92] The compulsory review section seems to anticipate further protection for cultural expressions in the near future.

III Analysis

A Significance of the Crown Acknowledgments

Of all things coming out of the Act, the acknowledgements have been considered most likely to have the greatest long-term significance to the iwi.[93] The Deed of Settlement states that the Crown is committed to involving Ngāti Toa Rangatira in future consultation regarding policy developments in relation to the protection and preservation of cultural expressions.[94]

The acknowledgements are likely to place Ngāti Toa Rangatira in a strong position for the formulation of future protection models, particularly when the Government responds to the recommendations in the WAI 262 decision. This is discussed in greater detail in Chapter Three.

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[91] Haka Ka Mate Attribution Act 2014, s 11

[92] (16 April 2014) 698 NZPD 17395

[93] Lynell Tuffery Huria "The Haka Ka Mate Attribution Act: What does this right of attribution really mean for Ngāti Toa?" (13 May 2014) AJ Park Intellectual Property Lawyers <http://www.ajpark.com/ip-central/news-articles/2014/05/the-haka-ka-mate-attribution-act-what-does-this-right-of-attribution-really-mean-for-ng%C4%81ti-toa/>

[94] Deed of Settlement of Historical Claims, above n 79, at cl 5.104

B Individual Author Identified

Section 9(3) notes that Te Rauparaha is the composer of Ka Mate. Ka Mate is unique among taonga in that it can be traced back to a single individual author, making it well suited to an application of the principles of copyright on which the Act is built. Most taonga are collectively held and cannot be so specifically attributed to one particular author. The fact the Act centers upon attribution to a single author sets a concerning precedent for future protection.

C Limitations of the Right of Attribution

In short, allocating a right of attribution does nothing to prevent commercial exploitation or offensive use of Ka Mate.

The right of attribution is a moral right under copyright. It derives from the Continental European legal tradition and is concerned with protecting the personality of the author. Attribution prevents others from claiming to fraudulently own the work and safeguards the author's reputation.[95] Historically, the purpose of the right of attribution has been to ensure the author is accorded the appropropriate "glory" and recognition emanating from publication of their work.[96] It recognises the bond between the author and the work, and the harm that misrepresentation of that bond can result in. The right of attribution does not give the author any power to suppress unwanted uses of the work. Once the user has provided an adequate attributing statement, they are open to proceed with any chosen use.

The effect of the right of attribution conferred under the Haka Ka Mate Attribution Act 2014 is that users must ensure the relationship between the kaitiaki, Ngāti Toa Rangatira, and the cultural expression, Ka Mate, is made known. It also ensures that the the composer, Te Rauparaha, is identified. Raising public awareness of the relationship between kaitiaki and taonga is an important outcome of the Act.[97] As mentioned previously, many associate Ka Mate first with the All Blacks, then with

[95] Elizabeth Adeney, *The moral rights of authors and performers: an international and comparative analysis* (Oxford University Press, New York, 2006) at 179
[96] At 197
[97] Deed of Settlement, above n 79, at cls 5.112-5.113

Māori. Wider recognition of the kaitiaki relationship may have positive flow-on effects for the treatment of Ka Mate, as well as other cultural expressions.[98]

Nevertheless, the limitations of allocating an isolated right of attribution are concerning. Once a user has attributed the haka, they will be entitled to use Ka Mate in whatever offensive way they choose. Parliament has uniquely cleaved off the right of attribution from the moral right against derogatory or offensive treatment. These rights traditionally act together to preserve the corresponding concerns of the integrity of the work and the honour of the author. Further, any offensive uses that comply with the Act will now feature the names of Te Rauparaha and Ngāti Toa Rangatira, which may imply some level of endorsement from Ngāti Toa Rangatira.

D Act Not Internationally Enforceable

The national significance of Ka Mate means the New Zealand public is likely to hold entities accountable for any exploitative or offensive use of Ka Mate, whether or not specific protective legislation is in place.

The worst abuses of Ka Mate have occurred overseas, where the Act carries no weight, and there is currently no international framework in place to guide usage of cultural expressions.

One might expect that the existence of the Act would have some moral suasion on such commercial parties, but the recent uses by Jacamo and Heineken indicate that this is not the case. As such, moral impact of the Act on international corporations seeking to exploit the haka is expected to be minimal. The only way the New Zealand Government can grapple with this issue (not only is respect of Ka Mate but all Māori cultural expressions) is to enter into an international agreement on the use of traditional knowledge and cultural expressions. Chapter Three touches on the sort of international agreement required.

E Inadequate Remedy

The Act confers a legal right of attribution upon Ngāti Toa Rangatira, but narrows the scope of the right by limiting enforcement to a declaratory judgment.[99] The wording

[98] Lynell Tuffery Huria, above n 93
[99] Haka Ka Mate Attribution Act 2014, s 11(1)

precludes Ngāti Toa Rangatira from resting on their legal right of attribution to seek damages or an injunction for breach.

Declaratory judgments usually resolve a legal issue at some stage before formal proceedings are filed.[100] The remedy is often referred to as an alternative to the "strong medicine" of the injunction. The declaratory judgment lacks a number of devices for managing the parties. Even if a declaration of breach has been made, the party is under no legal obligation to attribute. In such cases, an injunction would have been a useful tool.

By the time the rights representative of Ngāti Toa Rangatira chooses to take legal action, the damage has been done because the haka has already been performed without attribution. There is no requirement that the text of the declaratory judgment be made publicly known by the erring party, so the party is not likely to be held publicly accountable for their actions.

Ngāti Toa Rangatira can obtain costs under the Declaratory Judgments Act 1908 if it is successful in its court action.[101] Costs orders are calculated based on the conduct of the litigation, as opposed to the merits of the case and the seriousness of any breach of rights.[102] Costs awards are at the discretion of the court and usually do not cover a party's actual costs in New Zealand.[103] Ngāti Toa Rangatira may actually lose money by enforcing their rights under the Act.

F Summary

Over the last two decades, efforts by Ngāti Toa Rangatira to protect Ka Mate have been guided by a desire to protect the haka's integrity. The Haka Ka Mate Act 2014 falls short of achieving this aim. As the legislation currently stands, there is little to be gained by Ngāti Toa Rangatira bringing a claim under the Act, and little to be lost by commercial parties if they fail to attribute.

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[100] Peter Blanchard and Andrew Scott Barker *Civil Remedies in New Zealand* (Wellington, Brookers, 2011) at 577

[101] Haka Ma Mate Attribution Act 2014, s 11

[102] Blanchard and Barker, above n 100, at 793

[103] Declaratory Judgments Act 1908, s 13

IV Suggested Amendments

The Act's narrow focus on attribution and inadequate remedies are the source of its weakness. The overall impression gleaned from the legislation is that Ngāti Toa Rangatira wishes to be associated with Ka Mate. Though widespread awareness of the relationship between Ngāti Toa Rangatira and Ka Mate is a positive outcome, the Government should take the need to impose meaningful protective mechanisms more seriously. Some specific amendments to the rights granted and remedies available would go a long way in granting the haka more comprehensive protection. These amendments can be implemented when MBIE revisits the Act in 2019.

A Consultation

The only way to make the Act truly effective is to mandate consultation with Ngāti Toa Rangatira for uses listed in s 10. Practically, it is unlikely the Government would agree to requiring full consent.[104] However, the Deed of Settlement of Historical Claims states that users are encouraged to consult with Ngāti Toa Rangatira as a matter of courtesy,[105] meaning there is already some basis to have it included in the Act itself. Imposing consultation between private parties is a signficant step away from the Act's present moral rights inspired scheme but its addition is necessary to give the Act real substance.

Both Sol3 Mio and the All Blacks have entered into discussions with Ngāti Toa Rangatira around use of Ka Mate. This is a good indication that New Zealand users of Ka Mate appear to be open to consultation. In the MBIE Guidelines for use of Ka Mate, the Runānga has made itself available to assist parties seeking guidance on their use of Ka Mate.[106]

The benefits of a consultation process are significant. Consultation would provide an interface between commercial users and Ngāti Toa Rangatira that would raise awareness of the spiritual value imbued in Ka Mate and the importance of respectful use. Consultation would reduce the likelihood of offensive uses, thus mitigating the

[104] Letter of Agreement, Hon Chris Finlayson (Minister for Treaty Settlement Negotiations) to Matiu Rei (Te Kaha, Ngāti Toa Rangatira Negotiating Team) regarding the Ngāti Toa Rangatira Treaty Settlement Negotiations (signed at Parliament 11 February 2009), at para 41.b
[105] Deed of Settlement of Historical Claims, above n 79, at cl 5.112
[106] Haka Ka Mate Attribution Act 2014 Guidelines, above n 89

harm done, and promote more culturally and socially responsible commercial practice. At the same time, it would give effect to the kaitiaki role by allowing Ngāti Toa Rangatira to ensure uses are respectful and abide by the relevant tikanga.

B Right to Object

Even if consultation is mandated, there needs to be a mechanism by which Ngāti Toa Rangatira can object to offensive uses if they arise. The right of attribution does nothing to protect the haka against offensive use. The Crown originally made it explicit that they would not grant Ngāti Toa Rangatira a right to veto certain performances.[107] Realistically, such a right is necessary to truly protect the mauri of Ka Mate. In its current form, the Act merely acknowledges Ngāti Toa Rangatira as kaitiaki. To grant them a right to object to offensive uses would go some way in restoring their authority as kaitiaki.[108]

Of the existing legal rights in relation to creative expressions, the right to object to derogatory or offensive use would be the most obvious candidate for inclusion in the Act. The right is enshrined in Article 6bis of the Berne Convention,[109] to which New Zealand acceded in 1928. Article 6bis recognises the moral rights of copyright. It specifically refers to the right to object to certain modifications and other derogatory actions that damage the "honour and reputation" of the author, and states that this remains with the author once economic rights have been alienated.

The Copyright Act 1994 is modeled on the Berne Convention. In New Zealand, derogatory treatment occurs where an addition to, deletion from, alteration to, or adaptation of a work involves a distortion or mutilation or otherwise that harms the "honour or reputation" of the author.[110] As opposed to protecting the integrity of the work itself, the right is centered on the author. New Zealand courts have not yet fully engaged with s 98, which deals with derogatory and offensive uses.[111] Judge Roderick

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[107] Letter of Agreement, above n 104, at para 40

[108] Earl Gray and Raymond Scott "Rights of Attribution for Ka Mate Haka" (2013) 8(3) Jnl of Intellectual Property Law & Pract 200 at 202

[109] Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 30 (opened for signature 9 September 1886, came into force 24 April 1928) at 6bis

[110] Copyright Act 1994, s 98(1)

[111] The most in-depth discussion in a higher court to date has been in *Benchmark Building Supplies Ltd v Mitre 10 (New Zealand) Ltd* [2004] 1 NZLR 26. In that case, Mitre 10 had produced brochures

Joyce QC in the District Court case of *Radford v Hallensteins Bros* ventured that the right to object to offensive or derogatory uses could be analogous to defamation, but was reluctant to come to a decisive conclusion on this point, stating: "a case or two should be left to fully play out before our courts opt for a particular approach."[112] An author-centric approach such as this would be problematic in the context of cultural expressions, because it is not the reputation of the kaitiaki we seek to protect; it is the mātauranga and mauri in Ka Mate itself. In order to avoid any conflation with the copyright right to object to derogatory treatment, a new right would need to be formulated.

France steps away from the honour and reputation of the author, making the French approach to moral rights particularly helpful for formulating a more nuanced right to object. Unlike other signatories to the Berne Convention, French law eschews reference to the honour or reputation of the author and instead states that the author "enjoys the right to respect for his… work."[113] This right is known as "the right of integrity". The open texture of the right has provided much more flexibility in application. Courts have given two limbs to the right: the first is to have the work maintained in an undistorted form; and the second is not to have the spirit of the work impaired.[114] The second limb comes close to what the Haka Ka Mate Attribution Act 2014 should aspire to achieve. The French Tribunal de Grande Instance de Paris case of *Lindon et SACD* ("the Beckett case") helpfully illustrates judicial interpretation of the right.[115] In that case, the Tribunal de Grande Instance held that the use of female actors in a play instead of male actors expressly desired by the author, Samuel Beckett, was a breach of the right of integrity. Another useful example is the Court d'Appel decision in *Societe le Chant du Monde v Societe Fox Europe and Societe Fox Americaine Twentieth Century*,[116] which shows that the spirit of the work can be

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advertising their products. BBS had taken those brochures and superimposed their own prices. Mitre 10 was not considered to be the author of the brochure, so their moral claim could not succeed.

[112] *Roderick v Hallensteins Brothers Ltd* [2009] DCR 907 at [29]

[113] Intellectual Property Code (France), at L 121-1

[114] Adeney, above n 95, at 182

[115] *Linton et SACD c La Compagnie Brut de Beton et Boussagol* (Tribunal de Grande Instance de Paris, 15 October 1992) RIDA 1993, 155 ["the Beckett case"] at 224. The Tribunal de Grande Instance is an inferior judicial court of the first instance.

[116] *Societe Le Chant du Monde v. Societe Fox Europe and Societe Fox Americaine Twentieth Century* (Court d'Appel de Paris, 13 January 1953) RIDA 1954, 16 at 80. The Court d'Appel is the second highest court in the French hierarchy.

impaired by uses in particular contexts. In that case, four Russian composer successfully restrained use of their music in an anti-Soviet film. Rather than focusing on the effect on the author, the French approach to moral rights focus on the author's intentions behind the work. Protection against the types of infringement in *Chant du Monde* and the Beckett case directly speak to the sorts of abuses complained about by Ngāti Toa Rangatira, such as Heineken's use of Ka Mate in a liquor store performed by women. Kaitiaki are more interested in the particular ways in which their taonga are used than the ways in which they affect their own reputation.

Taking the nature of the French approach to moral rights into consideration, it is proposed that MBIE should look at granting Ngāti Toa Rangatira a sui generis "right to object to uses that undermine the integrity of Ka Mate". Offensive use and commercial exploitation of cultural expressions would be clear infringements on the integrity of the work, which is of utmost importance to kaitiaki.[118] Such a right would be legally distinct from the right to object to derogatory or offensive use, thus distancing protection of cultural expressions from protection of authorial personality. The right would apply to the things currently described in s 10 of the Act. The right would be exercised at the discretion of Ngāti Toa Rangatira. It is likely that "uses that undermine the integrity of Ka Mate" would be given a subjective test, as the analogous right is in France.[119] Such a test would promote and protect the kaitaki role of Ngāti Toa Rangatira and their unique connection and responsibilities for Ka Mate. It would also encourage potential users to engage in consultation in order to avoid causing offense to the kaitiaki.

C New Remedies: Injunction, Exemplary Damages and Statutory Pecuniary Penalty

In addition to altering the rights granted, MBIE should also reconsider the remedies available under the Act. As stated above, a stand alone declaratory judgment does not provide adequate deterrence for parties wishing to use Ka Mate, nor does it provide an effective outcome for Ngāti Toa Rangatira. It is proposed that an injunction should be the first port of call for failure to consult and for breaches of the right of attribution and the right to object. Risk of financial loss would act as an effective deterrent, but the appropriateness of damages in the context of cultural expressions is dubious. The

[118] Terri Janke, above n 50, at 57
[119] Adeney, above n 95, at 183

possiblity of imposing pecuniary statutory penalties is discussed as an alternative.

Interim and permanent statutory injunctions would be the first port of call. An injunction is a discretionary remedy that either restrains a party from doing something or requires a party to do something.[120] An interim injunction would permit the court to stop the use until the matter goes to trial. Interim injunctions would be appropriate where a party has failed to consult. Courts could use the opportunity to order the parties to engage in consultation. Both interim and permanent injunctions would be appropriate for uses that undermine the integrity of Ka Mate and for breaches of the right to attribution. Granting of an injunction would rest on a finding that a breach of one of the rights granted to Ngāti Toa Rangatira had been proven, and would ultimately be awarded if required by justice.[121]

One of the matters taken into consideration when determining whether to grant an injunction is whether damages would be an appropriate remedy.[122] The Crown made it clear in the Deed of Settlement of Historical Claims that any resulting legislation around Ka Mate would not provide financial benefit to Ngāti Toa Rangatira.[123] This makes sense, as there is no commercial gain to be made by use of Ka Mate by the kaitiaki.[124] The lack of a causal link between the use and a financial loss suffered by Ngāti Toa Rangatira means compensatory damages are not appropriate.

There may be some scope for statutory exemplary damages. Exemplary damages are reserved for exceptional circumstances.[125] As such, they would be only suited to situations where the user was aware of the right of attribution or the importance of the integrity of the work, and went on to breach it anyway. Section 121(2) Copyright Act 1994 allows for "additional damages" for flagrant breaches of copyright. This has been held to amount to exemplary damages.[126] A similar provision could be added to the Haka Ka Mate Attribution Act 2014. However, it is highly unlikely the Government would agree to allow for exemplary damages, especially after being so

[120] Blanchard and Barker, above n 100, at 227
[121] *TV3 Network Ltd v Eveready NZ Ltd* [1993] 3 NZLR 435, (1993) 6 PRNZ 430 (CA)
[122] Blanchard and Barker, above n 100, at 239
[123] Letter of Agreement, above n 104, at para 41
[124] For this same reason, the remedy of account of profits is also inappropriate. See *Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46, [1966] UKHL 2
[125] Blanchard and Barker, above n 100, at 521
[126] *Tiny Intelligence Ltd v Resport Ltd* [2009] NZSC 55, [2009] 2 NZLR 581

clear about its hesitance to provide a financial benefit to the iwi.

It may be possible to meet the need for deterrence by imposing statutory pecuniary penalties. These would apply in particularly serious situations, where there is a flagrant breach of one of the rights, or a complete disregard for the Act as a whole, including the requirement to consult. Such penalties currently appear in 15 Acts of Parliament including the Commerce Act 1986, Securities Act 1978, Anti-Money Laundering and Countering Financing of Terrorism Act 2009, and Unsolicited Electronic Messages Act 2007. Pecuniary penalties are monetary penalties payable to the Crown. There may be some discomfort with the Crown making a fiscal benefit from flagrant breaches of the rights of Ngāti Toa Rangatira. To mitigate this discomfort, penalties could be payable to Te Puni Kokiri (New Zealand Ministry of Māori Development) so that the funds are applied to relevant areas.

Pecuniary penalties are considered somewhat controversial as they are a way of pursuing criminal goals without affording those involved the protections which are usual in the criminal context.[127] Nevertheless, the "dominant imperative" of pecuniary penalties is the deterrence of non-compliance.[128] This is the precise purpose for which it would be employed in relation to Ka Mate. Pecuniary penalties primarily operate in a commercial context to punish certain behaviours. It would be rare to extend the remedy to cover breaches of private rights. Nevertheless, it provides a safe middle ground that avoids providing a financial benefit to the iwi while at the same time ensuring deterrence, and there is no good reason the remedy should not be extended beyond its current bounds.

D Summary of Amendments

The suggested amendments would require the inclusion of two new sections and the rewriting of s 11, which deals with remedies. The Act would also need to be renamed to reflect its wider scope. Most sections would remain unchanged. The following sections would need to be amended or added:

1 Title

This Act is the Haka Ka Mate Protection Act 2014

[127] Law Commission *Civil Pecuniary Penalties* (NZLC IP 33, 2012) at 7.33
[128] At 7.34

9A Right to object

(1) Ngāti Toa Rangatira have a right to object to uses that undermine the integrity of Ka Mate.

(2) The right to object applies to the things described in section 10.

9B Compulsory Consultation

(1) Parties responsible for uses to which section 10 applies must engage in prior consultation with the rights representative of Ngāti Toa Rangatira.

10 Right of attribution, right to object and compulsory consultation apply to certain things[129]

(1) The right of attribution, right to object and compulsory consultation applies in relation to—

(a) …

(b) …

(c) …

(2) However, the right of attribution, right to object and compulsory consultation does not apply to—

(a)…

(b) …

(c) …

(d) …

(3) …

11 Remedies and Penalties

(1) In proceedings for failure to consult or attribute or for uses that undermine the integrity of Ka Mate, injunctive relief will be available.

(2) If the court is satisifed on the application of the rights representative of that a flagrant breach of sections 9, 9A and/or 9B has occurred, the court may

[129] The things to which the Act applies (and the things to which it does not apply) as listed in s 10 remain unchanged

order the person or party to pay the Crown any pecuniary penalty that the court determines to be appropriate.

When considered holistically the proposed amendments would result in a scheme where potential users seeking compliance with the Act would engage in consultation with Ngāti Toa Rangatira. If users properly participate in the consultation process, it is highly unlikely they will produce offensive works. However, it is inevitable there will be some users who participate in consultation to "tick the box" and ultimately do produce an offensive use of Ka Mate. At this stage, Ngāti Toa Rangatira will be able to object. The court may impose a statutory pecuniary, which would be particularly severe considering the party would have been made aware of the special characteristics of Ka Mate and went on to undermine them anyway.

Failure to consult in the first place would result in an interim injunction and direction to engage in consultation. The offending use would be stopped until meaningful consultation with Ngāti Toa Rangatira has taken place. If the use that was created without consultation also happened to be offensive, the party may be subjected to a pecuniary penalty.

Where the 2014 Act merely results in association of Ngāti Toa Rangatira with Ka Mate, the proposed provisions would empower kaitiaki to perform their obligations and prevent offensive use, while promoting healthy cultural exchange through consultation. It also provides adequate deterrence for parties seeking to make a commercial benefit off Ka Mate without giving sufficient thought to its cultural value.

V Conclusion

The Haka Ka Mate Attribution Act 2014 is an important development in the dialogue around legal protection for cultural expressions in New Zealand. Legislative acknowledgment of Ka Mate may increase awareness of iwi rights in cultural expressions and cause more commercial entities to consider whether their use of these expressions is appropriate.

In reality, however, the softness of the right granted and the remedy made available make the legislation more symbolic than anything. A number of amendments would go a long way to increasing the effectiveness of the Act.

Even then, the Act and suggested amendments applies to just one cultural expression. There are many other kaitiaki that continue to have their precious taonga subjected to exploitative uses with no legal remedy. Ultimately, the Act draws attention to the need for a general scheme dealing with protecting Māori cultural expressions in New Zealand. This is the focus of Chapter Three.

CHAPTER THREE

THE CASE FOR MORE EXHAUSTIVE PROTECTION

As the Waitangi Tribunal pointed out, "[i]n the field of indigenous rights, New Zealand should be an enthusiastic and fair-minded leader, not a reluctant follower."[130] At present, a number of other countries are outpacing New Zealand in their protection of indigenous cultural expressions,[131] and discussions around developing an international instrument for protection are well underway.[132]

In New Zealand, the Treaty of Waitangi imposes a duty upon the Crown to ensure Māori retain tino rangatiratanga over taonga. This means the Government has a responsibility to develop protective measures.

But what form should this protection take? Though this dissertation uses Ka Mate as a touchstone throughout, it is not just about protecting one haka. It is about protecting Māori cultural expressions (and culture) more generally. Māori culture is created, passed down and guarded in such a way that the protection for it must be special, targeted and operate more broadly than a single Act that covers a single work. As Chapter One shows, intellectual property law is not the appropriate site for that protection. The situation calls for a sui generis scheme that operates both outside and in harmony with intellectual property law.

Chapter Three looks briefly at justifications for New Zealand to extend more exhaustive protection to Māori cultural expressions, and how exhaustive that protection should be, before scrutinising the most compelling models for protection currently available.

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[130] WAI 262, above n 15, at 91

[131] For example, see the Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific peoples 2002; 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 (Panama)

[132] World Intellectual Property Office "Intergovernmental Committee" <www.wipo.int/tk/en/igc/>

I Justifications to extend more exhaustive protection

A Te Tiriti o Waitangi/The Treaty of Waitangi

This issue of extending greater protection for Māori cultural expressions is inextricably linked to the Treaty's guarantee of tino rangatiratanga over taonga, which is a clear justification for more extensive protection. It is a "constitutional guarantee of the highest order."[133]

What is in contention is the extent of authority conferred by tino rangatiratanga. In his essay titled *Tino Rangatiratanga*, Mason Durie considered that "self-determination" conveys the essential meaning of tino rangatiratanga.[134] "Self-determination" in the context of indigenous rights refers to the right to be in control one's own destiny, including one's cultural identity.[135] Quite often, the phrase is given a slight gloss depending on the context in which it is being discussed.

The Waitangi Tribunal in WAI 262 took a practical approach to its meaning in the context of protecting cultural expressions. After 170 years during which Māori have been "socially, culturally, and economically swamped" the ability to retain full authority has been diminished.[136] This view has been supported by other writers in this area such as Roger Maaka and Agie Fleras, who acknowledged that if rangatiratanga is the authority for Māori to make decisions for Māori, they have lost much of that since 1840.[137] The reality is that full authority is no longer a viable option. This is especially true when considering how far cultural expressions have been released into the public domain. It is unlikely Māori would be able to suddenly reclaim and assert full authority. A scheme built on such a premise would be impracticable. For the Tribunal in WAI 262, the optimum middle ground would focus

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[133] WAI 262, above n 15, at 12

[134] Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi"* (Oxford University Press, New York, 2005) 3 at 5

[135] Anna Cowan "UN, UNDRIP And The Intervention: Indigenous Self-Determination, Participation, And Racial Discrimination In The Northern Territory Of Australia" (2013) 22 Pacific Rim Law and Policy Journal 247 at 257

[136] WAI 262, above n 15, at 11

[137] Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, Dunedin, 2005) at 100

on the partnership relationship between the Crown and Māori.[138] Such a relationship would call for greater consultation and opportunities for Māori input.

The conclusions of the Tribunal were challenged by Professor David Williams, who considered that the Tribunal had been excessively pragmatic, and placed a concerning limit on tino rangatiratanga.[139] These concerns have been echoed by Ani Mikaere, who argues certain interpretations "[limit] and [constrain] tino rangatiratanga so that it fits somebody else's agenda."[140] The refusal to grant full authority arguably sets a dangerous precedent.

However, as acknowledged by the then President of the Court of Appeal Sir Robin Cooke in the *Lands Case*, the Treaty of Waitangi is a living document.[141] It must be adapted to new circumstances provided there is a measure of consent and adherence to broad principles. Provided Māori are placed able to practice self-determination by being placed at the centre of the formulation of a new means of protection, the guarantee of tino rangatiratanga will be satisfied in a practical manner. Furthermore, as a vast number of writers have agreed, piecemeal steps are not controversial but they are gains nonetheless.[142] There is a degree of urgency behind the need for protection of cultural expressions. Putting at least some decision-making power back in the hands of Māori in this regard is a small but important step, and paves the way for a rich dialogue around potentially granting greater authority in future.

B The International Dimension

1 The United Nations Declaration on the Rights of Indigenous Peoples

United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration") is a international human rights source of relevance for intellectual property claims.[143]

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[138] WAI 262, above n 15, at 17

[139] David Williams "Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity" 20(3) Internationl Journal of Cultural Property 311 at 319

[140] Ani Mikaere, in Laura Bootham "Crown twists Maori concepts say academics" *Newstalk ZB* (8 April 2015) <www.radionz.co.nz/news/te-manu-korihi/270691/crown-twists-maori-concepts-say-academics>

[141] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) at 715 ["Lands Case"]

[142] Michael Belgrave "Introduction" in Michael Belgrave, Mehata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treay of Waitangi* in (Oxford University Press, New York, 2005) at xx

[143] UN Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res 61/295 A/61/L.67 and ADD.1 (2007)

New Zealand became a signatory to the Declaration in 2010. While the Declaration is not currently legally binding on States and does not impose legal obligations on governments, it carries considerable moral force.[144]

Two Articles of the Declaration refer specifically to Indigenous intellectual properties. The first is Article 11, which reads:

> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

The second, and more important of the two, is Article 31, which reads:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions

Article 31 speaks directly to the aims of indigenous peoples. Obtaining some protection for traditional cultural expressions has been a live issue for indigenous peoples for a number of decades.[145] Even though the Declaration does not offer any

[144] Karolina Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (Springer International Publishing, New York, 2013) at 76

[145] Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, Whakatane, 12-18 June 1993); the Mataatua Declaration is the earliest formal resolution by indigenous peoples to collectively pursue protection of their expressions, though discourse around the matter began much earlier.

final answers in itself, it is a step in the right direction, and an important justification for New Zealand to extend greater protection to Māori cultural expressions.

Ii The Draft Provisions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

New Zealand is a party to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"), which was established by the World Intellectual Property Office ("WIPO") in 2000. It serves as a forum where member states can discuss, among other things, intellectual property issues pertaining to the protection of traditional cultural expressions.

In 2009 WIPO resolved for the IGC to begin formulating a sui generis international legal instrument that would provide protection for traditional cultural expressions.[146] The instrument was initially set for completion in 2011, but to date discussions are still in progress. The IGC is restrained by the presence of many different stakeholders with often conflicting objectives, reaching from indigenous peoples of diverse backgrounds, to multinational corporations.[147]

The latest draft provisions for the protection of traditional cultural expressions were released in June 2014.[148] In their present form they provide minimum standards for states to implement domestic protection mechanisms. They speak at a highly general level as to account for the interests of the plethora of indigenous groups involved. States are open to offer more exhaustive protection schemes that serve local needs and indigenous communities. There are some provisions that New Zealand should take special notice of when formulating a domestic scheme. The first is the objectives, which are:[149]

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[146] World Intellectual Property Office "Background of Brief No. 2" <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_brief2.pdf>

[147] Christoph Antons "Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies" in Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds) *International trade in indigenous and cultural heritage* (Edward Elgar, Cheltenham, England, 2012) 144 at 157

[148] World Intellectual Property Office, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore "Draft Provisions for the Protection of Traditional Cultural Expressions" (28/62, June 2014) ("IGC Draft Provisions")

[149] IGC Draft Provisions, at page 4

- to provide indigenous peoples with the means to prevent misappropriation, misuse and derogatory use of their traditional cultural expressions;
- to allow give communities the ability to control the way cultural expressions are used beyond the traditional context;
- to prevent intellectual property rights being acquired over traditional cultural expressions by other parties;
- to encourage tradition-based creation and innovation;
- to promote cultural exchange on mutually agreed terms that are fair and equitable, and potentially subject to prior consent.
- and to preserve the importance of a rich and accessible public domain.

The IGC clearly delineates the scope of protection to be made available.[150] It provides graded levels of protection for cultural expressions depending upon the extent to which the expression has been released into the public domain. The IGC also suggests that Member States should establish an authority to administer the rights and interests of the holders of cultural expressions.

Although the draft provisions are soft law in character they provide a useful reference for national legislation in this area.[151] Whether the IGC will reach agreement on these provisions remains to be seen, but they provide another important international justification for the government to begin formulating our own system of protection. New Zealand should lead the way in protecting cultural expressions, rather than wait for a slow-moving IGC to reach conclusions.

C Summary

If tino rangatiratanga is given the practical definition discussed above, any protective measures would at least require Māori consultation and input in decision-making. This would be necessary both in the formulation of the scheme and in its application. The UNDRIP reinforces the importance of self-determination in the context of

[150] IGC Draft Provisions at Art 3

[151] Kuei-Jung Ni "Traditional Knowledge and Global Lawmaking" (2011) 10 Nw. J. Int'l Hum. Rts. 85 at 87

mechanisms for protecting traditional cultural expressions. The IGC provides more precise ways in which self-determination can be observed. All of these factors should be taken into account when designing New Zealand's mechanism for protection.

II What form should protection take?

A two-pronged international and domestic approach that places indigenous worldviews at the centre of specially-formulated frameworks is the only viable option to provide adequate protection for Māori cultural expressions. Chapter Three turns to look at the most compelling model for protection suggested in the New Zealand context – the recommendations in WAI 262 – before touching on what sort of international action is required to ensure meaningful protection.

In order to have a credible voice overseas New Zealand should first seek to resolve the issue here. Because of this, this dissertation places greater emphasis on implementing a domestic model.

A Domestic Protection: The Recommendations in WAI 262

WAI 262 provides a set of methods for protecting Māori cultural expressions. This dissertation has dealt solely with taonga works, which are expressions of mātauranga Māori that invoke whakapapa and have living kaitiaki. The Tribunal also discussed and provided limited protection for a category of "taonga-derived works". Taonga-derived works are inspired by mātauranga Māori but do not invoke ancestral connections and have no kaitiaki.[152] These two divisions, and the particular protections given to them, abide by the graded levels of protection suggested by the IGC.

With these two categories in mind, the Tribunal proposed two recommendations: 1) New Standards of Legal Protection; and 2) an expert commission with functions in relation to taonga works, taonga-derived works, and mātauranga Māori.[153]

[152] WAI 262, above n 15, at 99
[153] At 92-93

1 New Standards of Legal Protection

The first of the recommendations, "New Standards of Legal Protection", involves the introduction of two objection mechanisms.

The first mechanism is a "general objection mechanism" to prohibit the derogatory or offensive public use of taonga works, taonga-derived works or mātauranga Māori. Any person would be able to object to such uses. The Tribunal justifies this on the basis that protection of cultural expressions should necessarily be left to kaitiaki, or even Māori, alone.[154] As we have seen with the response to commercial exploitations of Ka Mate, the general public, Māori and non-Māori, take pride in Māori culture and often take offence at such uses. The Waitangi Tribunal therefore provides a way for all those aggrieved by an offensive use to object.

Whether such a mechanism is a political possibility is dubious. It seems strange to provide an objection mechanism for those with no connection to the work. Particularly, that someone with no connection to a taonga-derived work, which lacks the depth of spiritual qualities found in taonga works, could have its use discontinued is an ambitious recommendation. Given the political sensitivity of this issue, it is unlikely a government would go so far as to enact such a broad mechanism.

The second objection mechanism makes much more sense. It would allow kaitiaki to object to commercial exploitation of taonga works. These uses need not be offensive, but they may in fact be. This mechanism seems a much more likely candidate for selection due to its relative narrowness. It serves to protect taonga works which are rich in cultural value, and gives effect to the kaitiaki role.

The objection-based approach was considered preferrable to placing a general obligation on the community to abide by abstract standards of behaviour in relation to cultural expressions. By this point it should be clear that this is a sensitive area involving substantial ambiguity and multiple perspectives, so it would be "impractical to impose a prior abstract standard of general application that unknowing members of the public might breach innocently."[155]

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[154] WAI 262, above n 15, at 92

[155] At 92

Notably, the Tribunal did not grant kaitiaki proprietary rights in cultural expressions. Some commentators have speculated that the Tribunal's decision not to grant proprietary rights to kaitiaki was a politically motivated compromise.[156] They have argued that the grant of proprietary rights is necessary but the Waitangi Tribunal shied away from this out of fear of public backlash. While this may be true to some extent, it is not likely this is the ultimate factor. As Michael F. Brown argued in *Who Owns Native Culture:* [157]

> If we turn culture into property, its uses will be defined and directed by law, the instrument by which states impose order on an untidy world. Culture stands to become the focus of litigation, legislation, and other forms of bureaucratic control.

The decision not to grant proprietary rights comes partly from the Tribunal's narrow interpretation of tino rangatiratanga, as discussed earlier. Also, throughout the report the Tribunal emphasised the inappropriateness of Western property rights for Māori interests. Not granting proprietary rights shows a reluctance to abide by Western structures, and a desire to create a sui generis scheme especially targeted at Māori cultural expressions.

The Waitangi Tribunal made a point of highlighting that these recommendations do not threaten our current system of intellectual property law. They are a sui generis in that they would operate outside existing Acts dealing with intellectual property, and would have independent legal enforceability in their own right.

2 The Commission

The new standards would be toothless without a body to interpret and enforce them. This Commission would be New Zealand's equivalent of the "authority" recommended under the IGC provisions. The Commission proposed by the Tribunal would have multi-disciplinary expertise stretching from mātauranga Māori to intellectual property law, commerce and science.

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[156] See, for example, Jordanna Bowman, above n 58, at 30

[157] Michael F. Brown, *Who Owns Native Culture?* (Harvard University Press, Cambridge Massachusetts, 2004) at 8

The Commission's functions would cover three broad categories.[158] The first function would be adjudicative. This would include hearing complaints by individuals in response to offensive or derogatory public use of taonga works. The Commission would also hear the complaints by kaitiaki about the commercial use of taonga works without their prior involvement. In considering claims by kaitiaki, the Commission would need to establish that the kaitiaki has an obligation of kaitiakitanga in relation to the taonga work. It would consider whether consultation between the kaitiaki and the user would be enough, or whether consent should precede future use. In this way, the Commission is able to cater the degree of tino rangatiratanga to the particular situation at hand, ranging from a moderate application of the concept (consultation) to a rather more blunt application (consent). The Commission would also need to be able to determine whether something is a taonga work, a taonga-derived work, or neither, as well as who is kaitiaki if there are competing claims.

The Tribunal recommends a process where parties who wish to use the taonga work must apply to the Commission for a declaratory ruling that the proposed use is permissible. This would give guidance to those wishing to use taonga works on whether kaitiaki interests might be infringed. The process would be quick and inexpensive.

The Commission would also perform a facilitative function. Primarly this would involve the publication of best practice guidelines. Most objectionable uses of cultural expressions are done out of ignorance as opposed to malice.[159] The provision of guidelines would provide such access, thus helping to prevent offensive use and reduce the number of objectionable uses.

Finally, the Commission would perform an important administrative duty in that it would operate a register of kaitiaki and their taonga works. Registration would be free, and whānau, hapū, iwi and individuals could seek registration. Because some cultural expressions have multiple kaitiaki, the Tribunal envisaged a public notification process to allow for any objections from others with an interest, which the Commission would then resolve. The Tribunal recognised that because some taonga

[158] WAI 262, above n 15, at 93-96

[159] Creative Commons "Update on the Indigenous Notice" (25 September 2015) Creative Commons NZ < http://creativecommons.org.nz/2015/09/update/>

works are secret, they would probably go unregistered. This is not problematic. The register is aimed at works that have entered the public domain, like Ka Mate, and would afford a practical form of protection. Some may argue that registration may in fact make the expression even more readily available to those who may wish to appropriate it. However, if the registry operates seamlessly with the new general standards, such an outcome can easily be avoided.

Another concern with the registry is that registration has been said to "freeze" the work in time and prevents its continued cultural growth.[160] Putting Māori cultural expressions into an official form may fail to account for the development and fluidity of culture over time. The Tribunal does not specifically address this problem. However, the general flexibility of the Commission in its proposed form indicates that, in its final form, it would be capable of providing the space for registered expressions to develop.

3 Compulsory Involvement of Kaitiaki in Commercial Use of Taonga Works

Once a work is determined to be a taonga work, the Tribunal recommends that users enter into compulsory consultation, or gain consent for use.[161] The Commission would decide which option is applicable, taking into account the nature of the proposed use and the effect on the user. While this is also mentioned as part of the New Standards of Legal Protection, the Tribunal makes a point of ensuring this is a standalone recommendation in itself.

4 Summary

The Waitangi Tribunal Report provides a welcome opportunity for the state to "take positive steps to assist cultural survival of Māori."[162] The most salient feature of the Waitangi Tribunal's proposals is the focus on the kaitiaki role. This dissertation has referred time and time again to the importance of putting Māori at the centre of decision-making processes in regards to the use of their cultural expressions. It is also

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[160] Benjamin AR Sullivan "Intangible Cultural Heritage in New Zealand/Aotearoa: A National Perspective" (6 June 2012) Baldwins Intellectual Property <www.baldwins.com/intangible-cultural-heritage-in-new-zealand-aotearoa-a-national-perspective>

[161] WAI262, above n 15, at 100

[162] David V. Williams "Unique Treaty-Based Relationships Remain Elusive" *Waitangi Revisited: Perspectives on the Treay of Waitangi* in (Oxford University Press, New York, 2005) 366 at 376

notable the the Tribunal straddles conflicting values in Māori and Western worldviews by putting forward a scheme that does not affect current intellectual property law, but at the same time does not in any way force Māori cultural expressions into that box. Overall, the Tribunal's suggestions provide a "framework and process in which these issues can be handled with efficiency and sensitivity."[163]

It must be noted that, even if the Government does adopt the recommendations in WAI 262, the Government will probably not adopt to the recommendations in full. In particular, granting a right to object to offensive uses of taonga-derived works to the public at large is unlikely to gain much traction.

Many of the Tribunal's suggestions fit comfortably with the current draft provisions of the IGC. However, no domestic proposal can cope with international abuses. It can only work in tandem with international instruments.

B A Note on International Protection: Full Engagement in the IGC

As it stands, the IGC is taking very cautious steps towards offering an international solution to the problem. The IGC appears to be in crisis as to whether it will defer to domestic solutions or create a stronger international system.[164]

Though the draft provisions for domestic protection that have currently been provided are useful in that they will promote a universal standard of protection for cultural expressions, they will have no effect in situations such as Heineken's use of Ka Mate to advertise beer in the United Kingdom. The abuse of traditional cultural expressions often involves transnational actions of foreign entities. As Alan Boyle and Christine Chinkin put it, "international law based upon the regulation of state behavior is ill-equipped to respond to corporate behavior, or that of other non-state actors."[165] In this respect, the outcomes achieved by the IGC can certainly be seen as "meagre".[166]

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[163] Maui Solomon, in *Waitangi Revisited*, above n 12, at 228

[164] Jo Recht "Hearing Indigenous Voices, Protecting Indigenous Knowledge" (2009) 16(3) International Journal of Cultural Property 233 at 257

[165] Alan Boyle and Christine Chinkin *The Making of International Law* (Oxford University Press, Foundations of Public International Law, 2007) at 21

[166] Martin Girsberger and Benny Muller "An IP Practitioner's perspective" *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* in Christoph B. Graber, Karolina Kuprecht and

A transnational problem requires a transnational solution. As Professor Dr. Erica-Irene Daes, Special Rapporteur, United Nations Working Group on Indigenous Populations, has argued:[167]

> The crucial missing elements, the challenges to which we should direct our creative energy as lawyers in our countries, *are strengthening the transboundary jurisdictions of national courts to enforce private international law* and ensuring international respect for the customary intellectual property laws of indigenous peoples as a matter of choice of law.

Transnational law is that which has the power to affect behaviours beyond a single state border.[168] Indigenous communities are hoping for a transnational approach, while states and corporations are extremely hesitant to engage in such an agreement.[169] A transnational approach would require states to enter into treaties whereby a uniform standard of behaviour in relation to cultural expressions is agreed upon. Administration and enforcement of this standard would rest upon the establishment of a tribunal or arbitration body.[170]

However, a transnational approach is both poltically and legally complex. The standard would only apply to states who were willing to put themselves under the authority of the tribunal, which are likely to be states whose domestic regimes already parallel the standard that is developed. Thus countries who are resistant to discussions around the protection of indigenous culture or with strict intellectual property regimes are unlikely to join a transnational agreement. Further, tribunals are notoriously expensive. [171] The financial burden of such a tribunal has potential to deter states from participation in a transnational approach.

Jessica C. Lai (eds) *International trade in indigenous and cultural heritage* (Edward Elgar, Cheltenham, England, 2012) at p 189

[167] Professor Dr. Erica-Irene A. Daes "The impact of globalization on Indigenous Intellectual Property" (paper presented at Museum of Sydney, Sydney, May 2004)

[168] Carrie Menkel-Meadow "Why and How to Study Transnational Law" 1 UC Irvine Law Rev. 97 at 103

[169] Kuei-Jung Ni "Traditional Knowledge and Global Lawmaking" (2011) 10 Nw. J. Int'l Hum. Rts. 85 at 88

[170] Philip C. Jessup *Transnational Law* (Yale University Press, New Haven, 1956) at 106

[171] Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54(3) Int'l Org 457 at 461

Even so, the risk to indigenous cultural expressions is a pressing issue for countries with responsibilities to their indigenous peoples that needs to be dealt with seriously and quickly. Therefore, these countries may exert pressure on more reluctant countries to get on board, and a norm may develop over time. This dissertation does not speculate on the content of any transnational agreement. It simply calls for New Zealand to engage meaningfully with developments at the IGC and to push for much more extensive international outcomes. The IGC is the best forum currently available to negotiate such an agreement. The IGC is a slow-moving organisation and the sooner dialogue around such an agreement begins, the better.

III Conclusion

Chapter Three has traversed quite expansive terrain. It has looked at reasons New Zealand should grant more extensive protection to Māori cultural expressions, and the extent and form of that protection.

Overall, this chapter has pushed towards New Zealand's adoption of a sui generis legislative scheme that puts the power firmly in the hands of kaitiaki to determine how their taonga should be used. The Government has a Treaty obligation to do so. Protection in the international sphere is a more vexed issue. The best New Zealand can do is to pursue an ambitious transnational solution. However, to affect change overseas New Zealand should begin by putting its own measures for protection in place.

CONCLUSIONS

For all its shortfallings, the enactment of the Haka Ka Mate Attribution Act 2014 provides a catalyst for deep reflection on New Zealand's current approach to protecting Māori cultural expressions.

As discussed in Chapter One, cultural expressions perform an indispensible role in the passing down of Māori culture and mātauranga Māori from generation to generation. However, their distinctiveness and instrumental value has meant they have been subjected to exploitation by corporations, and to other offensive uses.

The misappropriation of cultural expressions and indigenous knowledge has been labeled "the next wave of colonisation."[178] This new wave of colonisation leaves indigenous peoples and their knowledge vulnerable. The ever-increasing frequency of misuses of cultural expressions worldwide means many have been devalued or endangered. Some have questioned whether the cultural repertoire of indigenous cultural expressions, including those belonging to Māori, will survive the next generation.[179]

Concern over guarding these expressions has meant "intellectual property has come to the village."[180] Indigenous peoples have sought protection through intellectual property law instruments. Ngāti Toa Rangatira joined this movement in their application to IPONZ to register Ka Mate. Indigenous communities must be careful that "the cure is not more dangerous than the disease."[181] There are some irreconcilable differences between New Zealand intellectual property law and Māori paradigms of knowledge and property. Cultural expressions are fragile, and pushing them into ill-fitting intellectual property instruments is a risky move.

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[178] Aroha Te Pareake Mead "Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation" in *Nga Tikanga, Nga Taonga. Cultural and Intellectual Propert Rights – The Rights of Indigenous Peoples* (Research Unit for Maori Education, University of Auckland) at 2

[179] Richard Kurin "Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal" (2004) 56 Museum Int'l 66 at 68

[179] Maui Solomon, in *Waitangi Revisited,* above n 12, at 229

[180] Jo Recht, above n 164, at 297

[181] At 297

Because of this, it is necessary to create models that take into account the unique views of indigenous societies. Sui generis protection is the best option. Of course, as the highly-general IGC draft provisions for domestic protection reflect, there is no one-size-fits-all model. A specially designed model is required. The scheme put forward by the Waitangi Tribunal in WAI 262 is something for New Zealand to aspire to. This model reflects the "two streams" from which New Zealand law flows.[182] At the same time, New Zealand needs to push for transboundary protection for cultural expressions to counter the harmful effects of globalisation.

A final note to the Government: protecting Māori cultural expressions and culture in general is a matter of both moral and legal importance. Whenever legal standards are used to secure moral viewpoints, one can expect "an almost hysterical public reaction."[183] This has been the case when New Zealand has extended special protections to Māori in the past, either legislatively or judicially.[184] Nevertheless, fear of negative public reaction is no excuse for the Crown to shirk its constitutional responsibilites to Māori. Sui generis schemes, when properly formulated, do not pose a real threat to the public domain and intellectual property law as it stands.

New Zealand has a dark history in its relationship with Māori knowledge.[185] Just as Te Rauparaha did in 1820, New Zealand needs to step from the darkness and into the sunlight in its approach to protecting the culture of its Indigenous peoples. Fear of political unpopularity should not be the reason New Zealand allows the cultural expressions (and culture) of its Indigenous peoples to be denigrated, exploited, and, at worst, lost.

Te tiro atu tō kanohi ki tairāwhiti ana tērā whiti te rā kite ataata ka hinga ki muri ki a koe

Turn your face to the sun and let the shadows fall behind you

[182] Justice Eddie Durie 'Will the settlers settle? Cultural conciliation and law' (1996) 8(4) Otago Law Review 449 at 462
[183] Aroha Te Pareake Mead, above n 178, at 1
[184] For example, the controversy over the decision in *Ngati Apa v Attorney-General* [2004] 1 NZLR 26 and the subsequent Foreshore and Seabead Act 2004.
[185] Tohunga Suppression Act 1907, see above n 78

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APPENDIX A: THE HAKA KA MATE ATTRIBUTION ACT 2014

Public Act	2014 No 18
Date of assent	22 April 2014
Commencement	see section 2

Contents:

1 Title

This Act is the Haka Ka Mate Attribution Act 2014.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Purpose

The purpose of this Act is to give effect to certain provisions of the deed of settlement that settles the historical claims of Ngati Toa Rangatira. The provisions relate to the haka Ka Mate.

4 Provisions take effect on settlement date

The provisions of this Act take effect on the settlement date.

5 Act binds the Crown

This Act binds the Crown.

6 Interpretation of Act generally

It is the intention of Parliament that the provisions of this Act are interpreted in a manner that best furthers the agreements expressed in the deed of settlement.

7 Interpretation

In this Act, unless the context requires another meaning,—

communication has the meaning given by section 2(1) of the Copyright Act 1994 Crown has the meaning given by section 2(1) of the Public Finance Act 1989 deed of settlement means the deed of settlement for Ngati Toa Rangatira dated 7 December 2012, entered into by the Crown, Ngati Toa Rangatira, and the Toa Rangatira Trust, including any schedules or attachments and including any amendments

film has the meaning given by section 2(1) of the Copyright Act 1994

Ka Mate means the words and associated actions and choreography, whether in whole or part, of the haka known asKa Mate

Ngati Toa Rangatira has the meaning given by section 14(1) of the Ngati Toa Rangatira Claims Settlement Act 2014

publication means that something is—

(a) issued to the public; or

(b) made available to the public by means of an electronic retrieval system

right of attribution means the right of attribution conferred by section 9

rights representative means—

(a) Te Runanga o Toa Rangatira Incorporated; or

(b) the person to whom the right to enforce the right of attribution under section 11 has been assigned in accordance with the constitutional documents of Te Runanga o Toa Rangatira Incorporated or any other prior rights representative

settlement date means the date that is 70 working days after the date on which this Act comes into force.

8 Acknowledgements by the Crown

(1) The Crown acknowledges the significance of Ka Mate—

(a) as a taonga of Ngati Toa Rangatira; and

(b) as an integral part of the history, culture, and identity of Ngati Toa Rangatira.

(2) The Crown acknowledges the statement made by Ngati Toa Rangatira, and set out in the Schedule, relating to—

(a) Te Rauparaha, the composer of Ka Mate:

(b) the composition of Ka Mate:

(c) the association of Ngati Toa Rangatira with Ka Mate and their role as kaitiaki of Ka Mate:

(d) the values of Ngati Toa Rangatira concerning the use and performance of Ka Mate.

(3)The Crown recognises that Ngati Toa Rangatira hold the right of attribution.

9 Right of attribution

(1) Ngati Toa Rangatira have a right of attribution in relation to Ka Mate.

(2) The right of attribution applies to the things described in section 10.

(3) Anything to which the right of attribution applies must include a statement that Te Rauparaha was the composer ofKa Mate and a chief of Ngati Toa Rangatira.

(4) The statement must be—

(a)clear and reasonably prominent; and

(b)likely to bring Te Rauparaha's identity, as the composer of Ka Mate and a chief of Ngati Toa Rangatira, to the attention of a viewer or listener.

(5) However, the right of attribution is subject to any written waiver given, or written agreement entered into, by the rights representative.

10 Right of attribution applies to certain things

(1) The right of attribution applies to—

(a) any publication of Ka Mate for commercial purposes:

(b) any communication of Ka Mate to the public:

(c) any film that includes Ka Mate and is shown in public or is issued to the public.

(2) However, the right of attribution does not apply to—

(a) any performance of Ka Mate, including by a kapa haka group:

(b) any use for educational purposes of anything that includes Ka Mate:

(c) anything made for the purpose of criticism, review, or reporting current events:

(d) any communication to the public of anything described by

paragraph (a) or (c) for a purpose that is not commercial.

(3) In subsection (1), Ka Mate includes a performance or representation of Ka Mate (so that, for example, a communication of Ka Mate includes a communication of a performance or representation of Ka Mate).

11 Remedy for failure to attribute

(1) The right of attribution may be enforced only by obtaining a declaratory judgment or order against a person responsible for the thing to which the right applies.

(2) The right of attribution may be enforced only by the rights representative on behalf of Ngati Toa Rangatira.

(3) The Declaratory Judgments Act 1908 applies to proceedings for the declaratory judgment or order, despite anything to the contrary in any enactment or rule of law.

(4) The declaratory judgment or order may state that—

(a) the right of attribution applies to the thing for which the person is responsible; and

(b) the person must comply with this Act.

(5) To avoid doubt, the court may award costs under section 13 of the Declaratory Judgments Act 1908.

12 Review of this Act

(1) The Ministry of Business, Innovation, and Employment must review this Act after the fifth anniversary of its commencement.

(2) The purpose of the review is—

(a) to consider whether the interests of Ngati Toa Rangatira relating to Ka Mate are sufficiently protected by this Act and any other relevant enactment or policy of the Crown; and

(b) if the interests are not considered to be sufficiently protected, to consider additional protection for them.

Schedule
Statement Relating to Ka mate

1 Te Rauparaha—the creator (composer) of the haka Ka Mate

(1) Ka Mate was composed by the Ngati Toa Rangatira chief Te Rauparaha, a descendant of Hoturoa who was captain of the Tainui canoe. Te Rauparaha was born in the 1770s at Kawhia and he died in 1849 at Otaki. Te Rauparaha was a man of great mana; he was the instigator of the emigration of Ngati Toa Rangatira from Kawhia, their consequent conquest and settlement in Kapiti, Port Nicholson, and Te Tau Ihu, and their revitalisation as an iwi.

(2) Te Rauparaha was the product of an arranged marriage. Werawera (father-to-be of Te Rauparaha) heard of the beauty of Parekohatu, a younger daughter of the Ngati Raukawa/Ngati Huia chief Korouaputa. Werawera decided to approach Korouaputa and seek his consent to take Parekohatu as his wife. At Maungatautari, Werawera made the reason for his visit known. Addressing Korouaputa, he said, "I haere mai ahau ki a koe he wahine te take" (I come to you, a woman is the reason). Korouaputa replied, "Heoi ano ko te mea i mahue mai nei ki au, ko taku mokai, he mea hari wai maaku" (The only one I have left is my favourite, she brings me water). Werawera responded, "E pai ana tukuna mai" (It is well give her (to me)). Korouaputa, after giving the matter some thought, replied, "Heoi ano kaore e kore ki te whiwhi tamariki, tera ano he taniwha tetahi" (Nevertheless, yes, without a doubt, when children come there will be a taniwha). When Te Rauparaha was born in the 1770s at Kawhia, Werawera took him back to

Maungatautari so that his grandfather could see him. When the old man saw the baby, he stated, “Ae. Koia.”

(3) From that time he was spoken of as a chiefly child, and raised as a rangatira, until he grew old enough to again return to Maungatautari, this time to live with his mother’s people and to learn the art of weaponry, the flow of the taiaha, and the parry of the wahaika.

2 Composition of the haka Ka Mate

(1) The story of the composition of Ka Mate is well known within the oral histories of Ngati Toa Rangatira. The event took place while the iwi were still based in Kawhia and Te Rauparaha was gaining prominence as a leader.

(2) During this time, Ngati Toa Rangatira were faced with increasing pressure and ongoing hostilities from iwi based in the Waikato, who sought access and control over coastal resources such as the Kawhia Harbour and surrounding coast. A fragile peace had been made with the Waikato iwi, but Te Rauparaha and the other Ngati Toa Rangatira leaders were aware of the imminent conflict which could erupt at any time. Te Rauparaha journeyed from Kawhia to seek alliances with other tribal groups, one of those being Tuwharetoa who lived in the Lake Taupo region. Te Rauparaha was connected to Tuwharetoa and Te Heu Heu II Mananui, the Paramount Chief of Tuwharetoa.

(3) The relationship between Te Rauparaha and the Tuwharetoa chief Te Heu Heu II Mananui is shown by this whakapapa showing their respective mothers to be second cousins.

(4) Both also descend from Tupahau, ancestor of Toa Rangatira.

(5) When he arrived at Te Rapa, which is located near Tokaanu, Te Rauparaha was told by Te Heu Heu II Mananui that he was being pursued by a war party from Ngati Te Aho, who wanted revenge for a previous incident involving Ngati Toa Rangatira. Te Heu Heu directed Te Rauparaha to seek the protection of his relative Te Whareangi at his pa on Motu-o Puhi, an island in Lake Rotoaira.

(6) As the war party closed in on their quarry, guided by the incantations of their tohunga, Te Whareangi instructed Te Rauparaha to hide in a taewa pit and instructed his wife, Te Rangikoaea, to sit at the entrance. By doing this, Te Rauparaha was hidden and protected physically, but, more importantly, in a spiritual sense as well. As the Ngati Te Aho party entered the pa, their tohunga made incantations to locate Te Rauparaha, but the noa of Te Rangikoaea, who sat at the mouth of the pit, acted as an “arai” or barrier. The karakia was inhibited due to the woman's presence.

(7) Te Rauparaha could not be sure that his presence would not be revealed and could feel the power of the incantations. He is said to have muttered “Ka Mate! Ka Mate!” under his breath (Will I die!) and “Ka Ora! KaOra!” (or will I live!) when the Noa reduced the incantation’s effect. These lines were repeated many times, coinciding with the waxing and waning of the tohunga’s power, until eventually Ngati Te Aho were convinced that Te Rauparaha had escaped towards Taranaki. It was only then that he finally exclaimed “Ka Ora! Ka Ora! Tenei te tangata Puhuruhuru nana nei i tiki mai Whakawhiti te ra!” (I live! I live! For it was indeed the wondrous power of a woman (“the Noa”) that fetched the sun and caused it to shine again!).

(8)The word "Upane" is an ancient battle command meaning to advance or an order to advance en masse. The composer is likening his exit from the confines of the taewa pit to the advance of a party making an attack. The final exclamation "whiti te ra" means "into the sunlight" and obviously describes the situation and his survival from the threat of capture and possible death.

Kikiki kakaka kau ana!
Kei waniwania taku tara
Kei tarawahia, kei te rua i te kerokero!
He pounga rahui te uira ka rarapa;
Ketekete kau ana to peru koi riri
Mau au e koro e—Hi! Ha!
Ka wehi au a ka matakana,
Ko wai te tangata kia rere ure?
Tirohanga ngā rua rerarera
Ngā rua kuri kakamu i raro! Aha ha!
Ka Mate! Ka Mate!
Ka Ora! Ka Ora!
Ka Mate! Ka Mate!
Ka Ora! Ka Ora!
Tenei te tangata
Puhuruhuru nana nei i tiki mai
Whakawhiti te ra!
Upane, ka Upane
Upane, ka Upane
Whiti te ra!

3 Ngati Toa Rangatira association with Ka Mate, and their role as kaitiaki

(1) The haka Ka Mate is regarded by Ngati Toa Rangatira as one of the legacies of Te Rauparaha. Given the role of Te Rauparaha in Ngati Toa Rangatira history, the connection between Ngati Toa Rangatira and the haka Ka Mate is significant, and it forms an integral part of Ngati Toa Rangatira history, culture, and identity.

(2) The haka Ka Mate is a taonga of Ngati Toa Rangatira. While it is the intellectual creation of the Ngati Toa Rangatira chief Te Rauparaha, in creating it he drew upon the body of knowledge and values Ngati Toa Rangatira refer to as "matauranga Maori". In Maori thinking, such a composition does not "belong" to the composer per se, but instead is a taonga of the iwi to which the composer affiliates. It is they who give life and form to the words.

(3)By definition, Ngati Toa Rangatira believe it is a taonga because it has whakapapa and connects them to their ancestors. The existence of the haka Ka Mate brings the tupuna Te Rauparaha to life and tells an important story in the Ngati Toa Rangatira iwi history. Ngati Toa Rangatira believe it has a korero embedded within it. This korero relates not only to the survival of Te Rauparaha but, as part of the iwi's collective identity, the re-establishment and revitalisation of the Ngati Toa Rangatira people due to the vision and later actions of Te Rauparaha. Because of these characteristics, the haka Ka Mate has a mauri (a life force).

(4) Ka Mate also has kaitiaki. Ngati Toa Rangatira are the kaitiaki of Ka Mate and it is their lineage that creates this kaitiaki relationship. The primary obligation of kaitiaki is to protect and safeguard the mauri of the taonga as well as the matauranga that sits beneath it.

(5) As kaitiaki, the Ngati Toa Rangatira relationship with this taonga will be perpetual. As long as it continues to exist, Ngati Toa Rangatira obligations will continue. A large component of this will be protecting the mauri of the haka

Ka Mate from mistreatment such as offensive and derogatory use.

4 Values concerning use and performance of Ka Mate

Ngati Toa Rangatira seek to ensure that the interests of the iwi in the haka Ka Mate are appropriately recognised. Of particular concern is the appropriate use of the haka. It is of great significance to Ngati Toa Rangatira that the haka is treated with respect. The values which Ngati Toa Rangatira seek to uphold are the ihi, wehi, and wana—the ihi being the spiritual force and the wehi and wana being the emotions that emanate from understanding and performing correctly, inspiring emotional pride in the performer.

Legislative history

19 February 2014	Divided from Te Tau Ihu Claims Settlement Bill (Bill 123–2) by Clerk of the House as Bill 123–3D
16 April 2014	Third reading
22 April 2014	Royal assent