Conflict Between Maori and Western Concepts of Intellectual Property

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I: INTRODUCTION

Maori achievements of the intellectual kind are not afforded adequate protection under present copyright laws. This paper presents the view that this is mainly due to the disparity between traditional Maori and conventional Western intellectual property systems. The development and application of legislation premised on Western concepts of possession have little or no regard for traditional Maori concepts, and a total disregard for fundamental ideas arising out of the Treaty of Waitangi.

My submissions involve a detailed discussion of: first, the Western perception of property and resources and how this compares to the Maori view of taonga; second, the Western intellectual property regime; third, traditional Maori intellectual protection; and fourth, conflict between the two regimes. In conclusion, the primary alternatives available for the adequate protection of Maori intellectual creations will be considered.

II: PROPERTY OR TAONGA

Maori have traditionally perceived themselves to be inter-connected to nature, and the environment in general. Hence, their relationship to resources differs significantly from associations envisaged by Western culture. Western ideals emphasise a decided anthropocentrism, while Maori beliefs stress a more holistic approach.

1. Owning the Resource

The European perception of relating to the environment and its resources is premised upon an anthropocentric view. At the risk of over-simplification, Western legal tradition and philosophy has historically placed fundamental importance on

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the exploitation of resources through an extraction of the benefits they contain. This necessitates division, distribution, and apportioning of "bundles of rights" in relation to the resources. In conjunction with this is the fundamental proposition that property must be compartmentalised into separate physical components to further facilitate the allotment of appropriate rights and interests. Williams suggests:[1]

> [that] the genius of the Western legal tradition is its ability to deconstruct resources whether they be land or other resources, to separate them, subdivide them and apportion rights or interest in the parts ... [r]ights to certain resources within the land are divided as between the State and the landowner or third party transferees.

As a consequence of such a view, knowledge of what is actually incorporated in the concept of ownership becomes vital. Western discourse argues that this notion involves "[t]he exclusive right to use, possess, and dispose of property...".[2] Resources are attributed economic value only. They are "things" to be owned, exploited and eventually exhausted. Undoubtedly, the current Western intellectual property regime conforms with such ideals. Compartmentalisation and distribution of rights in the intellectual property realm is common place. The traditional Maori method of relating to resources contrasts significantly with established Western legal notions as Maori arguably treat all resources in the environment as taonga.

2. The Concept of Taonga

Taonga is a concept that, like many other Maori terms, cannot be attributed one specific definition. It has many meanings, the most popular one being that it embodies all things highly valued and prized. Angelo suggests three possibilities when attempting to extricate an English translation. First, he proposes that on an analysis of the definition in Williams' *A Dictionary of the Maori Language*,[3] taonga in its most general form can be translated as "property".[4] Second, Angelo submits that Williams' definition suggests that taonga can be "anything highly prized"; saying that this can be evidenced from the fact that taonga is often translated as treasures or prized possessions. He then suggests that a third significant aspect of taonga is that it can be a "possession of influence, sometimes mental".[5] This suggestion would be consistent with the holistic Maori view that taonga have a spirit and therefore an influence over people.[6] It can

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1 Williams, "Maori Claims to Energy Resources" (1992) *Paper to the Energy and Natural Law Association Conference on Maori Claims and Rights to Natural Resources* 3.

2 Martin (ed), *A Dictionary of Law* (3rd ed) 281.

3 Ibid. See also Angelo & Williams, *A Dictionary of the Maori Language* (7th ed, 1992) 381.

4 Angelo, "Personality and Legal Culture" (1996) 26 VUWLR 395, 396.

5 Ibid. See also Tregear, *The Maori-Polynesian Comparative Dictionary* (1897) 468.

6 See Mead, "The Nature of Taonga" *Taonga Maori Conference Proceedings* (1990); *Waitangi Tribunal Mohaka River Report* (1992). The strength of that influence is dependent upon the degree to which the individual taonga has been invested with spiritual power. The suggestion is made that not all taonga have the same amount of spiritual power, but that it (spiritual power) occurs in individual taonga in varying degrees.

thus be seen as something that "allows [a person] to gain the influence he desires".[7]

3. Use of the Term

The use of the word "taonga" in the Maori version of the Treaty of Waitangi has contributed to an increasing emphasis upon understanding the actual characteristics of the term.[8] Article II of the English version of the Treaty states that Maori are guaranteed full rights as owners "[to] their Lands and Estates Forests Fisheries and other properties". These "other properties" are expressed in the Maori version as "o ratou taonga katoa". The translation of this phrase has been construed as meaning "all their valued possessions and customs",[9] or "all things highly prized".[10] Another translation suggests that the Second Article is a guarantee of "full rights of ownership of their lands, forests, fisheries and other prized possessions".[11] Consequently, the lands, forests, rivers and fisheries referred to are deemed to be taonga themselves, while "o ratou taonga katoa" is treated as a general phrase which serves to encompass what the actual guarantee to Maori is meant to include, but which has not been specifically listed. In other words, the phrase is of a kind similar to those general terms subject to the *ejusdem generis* rule in statutory interpretation.

Modern use of the term suggests that taonga can manifest itself either tangibly as physical objects of artistic or cultural value,[12] such as forests, rivers,[13] land, trees, weapons, and people;[14] or intangibly, in the form of language,[15] customs, traditions, rituals, and songs,[16] as well as knowledge and ideas.[17] Traditional intellectual endeavours fit comfortably within this structure.

In a broad sense, taonga are identifiable because of the nature of their relationship to people, their connections to, and duration of, their history and generally, because of their importance to a culture. Lenihan perhaps best elucidates the concept of taonga by suggesting that "the concept [of taonga] relates to real, personal, tangible, intangible, cultural, and intellectual property .... It encompasses both the physical and metaphysical, perceiving each to be interdependent on, and therefore inseparable

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7 Supra note 3 at 397. Angelo suggests that an example of this is the possession of a taonga like money or wealth which can allow a person to influence others.

8 See the Treaty of Waitangi Act 1975, Schedule 1. The relevant article of *Te Tiriti o Waitangi* is Article II.

9 A translation afforded to the phrase by Mead in *Report of the Waitangi Tribunal on the Te Reo Maori Claim* "Wai 11" (1993) 20.

10 See the *Report of the Waitangi Tribunal on the Kaituna River Claim* "Wai 4" at 13, where the Waitangi Tribunal accepted that the phrase could be interpreted as having this meaning.

11 See Orange, *The Treaty of Waitangi* (1992) 1-2, cited in Angelo, supra note 4 at 397.

12 See *Taonga Maori* (1989) cited in Angelo, supra note 4 at 397.

13 See the *Mohaka River Report*, supra note 6 at 78.

14 Mead, *Nga Pepeha a Nga Tupuna* (1994) Department of Maori Studies 159.

15 Supra note 9 at 20.

16 See Kaeppler, "Taonga Maori and the Evolution of the Representation of 'other'"(1990) *Taonga Maori Conference Proceedings* 12.

17 Note the significant discourse that has arisen out of the "Flora and Fauna" Waitangi Tribunal claim ("Wai 262").

from, one another".[18] This naturally serves to reinforce the holistic nature of taonga.

4. The Importance of Association

This holistic view that Maori have necessitates the existence of interconnections, links and special relationships between objects, people and places. Generally, the nature of the association something has with a person or a place dictates whether that thing is viewed as having taonga status. For example, a song may be regarded as a taonga if it refers to a person of great mana. A connection to an important place may result in an object being viewed as a taonga. Land, forests, rivers and other environmental or physical entities may also be regarded as taonga if they possess an historical association to a tribe, or if they are deemed necessary to human survival.[19] Angelo reiterates this and adds "[that] the prestige a taonga possesses, strengthens with its age and the amount of history it [contains]...".[20]

A specific example is land, which is without question one of the most highly prized taonga. One view suggests that land derives validity as a taonga because of its history (all Maori tribes are able to derive historical connections with areas of land), and the genealogical link that Maori have with the land through Tane.[21] Another, not necessarily unrelated view is that a taonga can in part be attributed to the holistic nature of Maori. The traditional Maori belief is that humans and nature are spiritually connected. Often this manifests itself in a feeling of responsibility to the environment.

The value of a taonga increases with the strengthening of mana. Conversely, where one's mana decreases, objects associated with that person suffer a similar decrease in value as a taonga. Additionally, where the historical content of a taonga was lost, taonga status itself was prejudicially affected. Consequently, if an item of value were removed from a tribal region and no adequate records maintained, the prestige of that item would suffer. Thus, it is feasible to argue that the oral nature of the recording of Maori history contributed in some part to the decrease in prestige or value of various taonga.

5. Identifying Taonga

The identification of taonga is of primary importance in the modern era. It is of particular relevance when defining the nature of the guarantee in Article II of the Treaty of Waitangi. In some cases taonga are relatively easy to discern. However, in the case of geographical features such as rivers, lakes and land, the precise parameters of the taonga are not so certain. They may be settled through Maori processes in a manner that is foreign to known concepts of English law.

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18 Lenihan, "Whaia kia tata, Whakamaua kia tina: A Time For Change: Intellectual Property Law and Maori" (1996) 8(1) Auckland U L Rev 211.

19 Supra note 12.

20 Supra note 4 at 398.

21 Ibid.

As previously mentioned, Maori regard themselves as having spiritual links to the land. They see themselves as "kaitiaki",[22] or guardians of the land. Concepts of "individuality" and "separation" are irreconcilable with this guardianship role. Land as a taonga is viewed as incorporating the plants that grow on it. Similarly, rivers as taonga are said to include the actual water as well as the fish and the river bed. In the Mohaka River Report the river (as a taonga) was seen as "a whole and indivisible entity, not [to be] separated into bed, banks, and waters".[23]

There are certain characteristics that taonga may possess which can be useful in helping to identify them as valued items or objects:

(i) Taonga needs to be passed down from generation to generation.[24] This is expressed in Maori as "taonga tuku iho". The presence of this characteristic can enable the development of relationships with humans who are charged with the responsibility of caring for the taonga as it is passed down. Essentially, taonga is strengthened by inheritance; "Taonga carry with them the mana of the old people"[25] and consequently, "[t]he more generations involved in the handing down the greater the mana of the object".[26] As the taonga is passed down it gathers mana (prestige) and therefore strength.

(ii) Historically, a characteristic of taonga has been its symbolic or representative function. That is, taonga such as carvings or artistic objects often contain symbols that relate to events, places or people and, consequently, play an important role in enabling Maori history to be remembered and passed on. For example, history is related to the environment by what happened "on that mountain" or "in that river".[27] In some cases, taonga are seen to represent ancestors,[28] while in others they are used to identify a tribe.[29] The Mohaka River, for instance, is viewed as being a source from which the Ngati Pahauwera tribe derives its identity and its mana.[30]

(iii) Taonga can also be vested with both personality and spirituality. The presence of personal qualities in taonga increases the mana of the taonga. This is affirmed by Angelo who states "[that if] a taonga is given a name, and thus its own personal identity, it gains more prestige".[31] For example, wharenui[32]

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22 Translated as meaning "protector, caretaker, trustee" in Ryan, *The Revised Dictionary of Modern Maori* (3rd ed, 1989) 18.

23 See the *Mohaka River Report*, supra note 6 at 36.

24 Ibid 10. Here it is described as an essential characteristic.

25 Supra note 4 at 400.

26 Mead, supra note 6 at 166.

27 "Tribal history is written over the hills and valleys, the rivers, streams, and lakes, and upon the cliffs, rocks and shores". See *Taonga Maori* (1989) 38.

28 Ibid.

29 Ibid.

30 See the *Mohaka River Report*, supra note 6 at 10, 18-21.

31 Supra note 4 at 401.

32 A literal translation would produce the meaning "big house". In Maori communities the wharenui is the place where meetings are held. Consequently, wharenui has come to mean "meeting house".

are symbolically crafted to consist of a head and a body and are endowed with a name. They become known by their given names and not just thought of as the "meeting house". The fact that they depict revered predecessors can also add to their personality. As Mauss remarks, " the taonga or its spirit is a kind of individual". [33]

(iv) Finally, other writers have stressed the view that spirituality is the vital ingredient that determines whether an object is afforded taonga status.[34] That is, it is the spiritual dimensions vested in the wharenui that set it apart from other building structures "...it is the spirit of the taonga that is the major difference between 'artefact' and 'taonga'...".[35]

6. Resource Ownership and the Maori World View

Western possession is founded on "absolute control" and the right of "individual exclusivity". Contention surrounds whether these concepts form part of the view of the Maori world. Essentially, Maori did not think of themselves as superior to nature to the extent that they were able to exercise rights of total control. One suggestion is that they took the view that it was impossible to own either the land or the sea.[36] An alternate view exists in the Orakei Report of the Waitangi Tribunal.[37] It is suggested that in 1840 Maori claimed ownership of "the whole islands of New Zealand". These disparate views can be reconciled by acknowledging that Western ownership does not correspond with Maori ownership.

In Acheson J's decision in the *Lake Omapere* case (heard before the Native Land Court) Maori ownership was said to contain elements of "continuity, unrestrictedness, and exclusivity".[38] The supreme test for ownership in relation to Maori custom and usage had to be "possession, occupation, and the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed".[39]

The notions of "exclusivity" and "possession", as they are used in this case, require further definition in order to clarify confusion that is caused through their use in a Western context. The right to possess was not a right afforded to Maori on an individual basis, as traditional society was organised communally, based on the whanau-hapu-iwi structure. Generally, the group as a whole had such rights, and individuals were simply given a right to identify with the respective resources, as a

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33 Mauss, *The Gift* (1970) 9.
34 See the writings of Kaeppler & Mead.
35 Mead, supra note 6 at 166.
36 Watkins, "Setting the Earoph Agenda" (1996) 121 Planning Quarterly: Journal of the NZ Planning Institute 10, for support of this proposition.
37 *Waitangi Tribunal Report on the Orakei Claim* "Wai 9" (1987) 145.
38 [1929] NLC 10-11.
39 Ibid 11.

consequence of being a member of the particular group.[40] Although this differs significantly from English legal culture, where individuals are afforded the right of exclusive possession, it coincides with the holistic prescription with which Maori define their role in relation to resources.

Maori belief regarding their obligations in respect of the environment and its resources are manifest in the notion of "kaitiakitanga". This idea presupposes that humans "[b]ecome one with the environment, through love, respect and understanding".[41] Watkins states that "[k]aitiakitanga is concerned with spiritual power rather than controlling power".[42] This seems to advance the aforementioned point that Maori did not regard themselves as having the right to exercise control over the environment.

The concept of kaitiakitanga requires the undertaking by Maori of a type of caretaker role in relation to resources. This does not, however, strictly equate with a stewardship or a guardianship relationship. It is said that those concepts ostensibly derive from "positions of power".[43] Another suggestion is that stewardship and guardianship wrongly assume that humans have the right to control, and control is in fact possible.[44] Similarly, Maori environmental actions were based upon "[an] intimate possession of the environment obtained [only] through a deeper understanding of its needs and characteristics...".[45] It is valid to argue that this "intimate" form of possession is the closest that Maori have ever come to "owning" resources in a strict sense.

Maori traditionally endorsed a holistic view of the world. Involved in this concept is the belief that the entire natural world is interrelated through a web of physical and spiritual relationships called "whakapapa" (genealogy). Maori saw themselves as connected to nature and its resources through such relationships. For example, Harris expresses it in relation to land as the acceptance that "[h]umans are related to [the] land and are nurtured by it."[46] Accordingly, the Maori perception of resources overall contrasts significantly with that of the Western tradition. The land, the forests, and the various bodies of water are all personified. They are seen as living entities in themselves, not to be taken advantage of or exhausted. Maori belief invests them with a "wairua" (spirit); they become more than just an economic source of wealth and exploitation. These notions were evident in traditional Maori systems of intellectual property protection.

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40 Maori identify with an area and a people through associating with the surrounding physical entities that are known to be connected in some way to their iwi or hapu. For example, the author identifies with Ngati Hamua as his hapu, and Ngai Tuhoe and Ngati Awa as his iwi, through association with Mt Edgecumbe and the Rangitaiki River. "...Ko Putauaki te maunga, Ko Rangitaiki te awa...".

41 Supra note 36.

42 Ibid.

43 Ibid.

44 Ibid.

45 Supra note 18 at 214.

46 Harris, "Full and Final Settlement of Treaty Grievances: The Crown's Constitutional Agenda" (1996) 8(1) Auckland U L Rev 205.

III: WESTERN INTELLECTUAL PROPERTY REGIME

The nature and extent of intellectual property rights is influenced to a large extent by common notions inherent in our adopted legal system. That legal system has defined intellectual property rights as owning "intellectual creations" or "ideas". The term "intellectual property" most commonly refers to things that are intangible such as knowledge, secrets and ideas. This can be contrasted with "cultural property" which in Western tradition has come to mean "physical evidence of a certain stage of culture's development, such as works of art or archaeological and historical objects".[47] This should be compared with the argument that Maori do not distinguish between intellectual and cultural property in this manner.[48]

1. Intellectual Property Laws in New Zealand

Society has recognised the need to foster social and economic development by encouraging innovation. This has led to the intellectual property rights protection system that has developed in Western culture and is present in New Zealand. The main laws relating to the protection of intellectual property:

(i) The Copyright Act 1994 affords protection to "original works". This includes protection of a wide variety of items such as "computer programs, books, photographs, songs, plays, films, stories, craft works, and industrial design".[49] Generally, copyright lasts for the life of the originator plus 50 years.[50]

(ii) The Patents Act 1953 serves to protect new inventions. Patents currently last for a term of 20 years.[51]

(iii) The Designs Act 1953 protects the original aspects of the appearance of industrial designs, such as designs produced on a large scale for items like furniture and machinery. A copyright in a registered design is obtainable for a period of five, and up to 15 years.[52]

(iv) The Trade Marks Act 1953 affords protection of distinctive marks used by traders to distinguish their goods from goods of other traders. Trademark registration is able to be renewed indefinitely.[53]

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47 Ministry of Commerce, *Intellectual Property Law Reform Bill: Maori Consultation Paper* (1994) 5.

48 Ibid 5.

49 Copyright Act 1994, s 2.

50 Copyright Act 1994, s 22.

51 Section 4(1) Patents Amendment Act 1994 which repealed s 3 of the original Act (s 3 Patents Act 1953 stated that a patent had a duration of 16 years).

52 See s 12 Designs Act 1953.

53 Supra note 47 at 5.

(v) The Plant Variety Rights Act 1987 has a specific function of protecting new varieties of plants that are developed. The Act states that a "plant variety right lasts for a period of 20 or 23 years depending on whether the plant is woody or non-woody".[54]

These Acts result in legislative protection of most aspects of intellectual property. They encourage innovation and creativity by removing the threat of unfettered copying, stealing, and modification of the originator's work. This encourages such things as the writing of books, the strengthening of trade marks for various products, and most importantly, the creation of new inventions. Thus, the technological development facet to intellectual property protection is very important.

2. The Ideas Underpinning the System

The Western legal system of intellectual property protection is founded on the assumption that society benefits from the efforts of intellectual creation. This provides a justification for the awarding of intellectual property rights and the exclusivity that accompanies them. This exclusivity typifies the Western system's preference for notions of individuality and singular ownership. It is obvious that principles that are common to Western ownership of resources are prevalent and influence the intellectual property regime.

The intellectual property system is premised upon the natural law right to the "fruit of one's labour". Expressed another way, the notion of fairness suggests that "[one should not] reap where they have not sown".[55] Accordingly, the prevailing system advances modes of protection for originators of intellectual creations. This prohibits others from profiting from the creator's efforts. This has an important function in that without this protection there is likely to be no incentive to innovate - though it is feasible that personal satisfaction could have a limited role to play as an incentive.

The granting of these rights is balanced to a certain extent against matters of public interest and, as a consequence, their duration and scope are subject to legislative limitations. For example, protection is only given for a restricted period of time. Accordingly, intellectual property laws generally only protect new or original creations, as "there is no need to protect that which already exists".[56]

Limiting monopolies also encourages the fixing of the time period over which an intellectual property right will subsist. A monopoly situation occurs in the sense that by allowing an exclusive right to particular property, others are necessarily prohibited from using it.

It is argued that allowing such a right to exist indefinitely would in fact restrict

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54 Ibid.

55 *Millar v Taylor* (1796) 98 ER 201, cited in Coppins, *Pakeha Citation of Maori Motifs, Symbols and Imagery* (1997) 18.

56 Supra note 47 at 6.

innovation and impose costs upon the community.[57] This is due to the fact that there is an incentive to continue to innovate. Following that, there is also the likelihood of a "flow-on" effect, in that the likely decrease in innovation that would occur would lead to a reduction in competition for that particular product.

The Western legal system of protecting intellectual property rights places great emphasis on individual rights. There is arguably an anthropocentric basis to Western intellectual property law. At the centre of this anthropocentrism is an accentuation of economic interests that is typical of most aspects of the legal framework prevailing in developed nations. It is clear that what is emphasised is, in fact, a package of economic rights rather than a package of relationships.

IV: TRADITIONAL MAORI INTELLECTUAL PROPERTY

Many indigenous cultures offer alternatives to Western methods of protecting intellectual property rights. Indigenous intellectual property regimes have foundations that have been developed over many centuries. They emphasise a more holistic approach towards intellectual property management than the approach advocated by Western cultures. One expression of this idea suggests that "indigenous people tend to regard all products of the mind and heart as interconnected and flowing from their relationships and [association] with land, with living creatures, and with ancestral and spiritual beings".[58] This holistic approach, however, has not given rise to a universally accepted definition of what indigenous intellectual property actually is. Notwithstanding this, the right to define what "indigenous intellectual property" means has in fact been claimed by indigenous cultures throughout the world. Justification for the right to make this determination stems, arguably, from the right of self-determination by aboriginal people as being distinct from traditional Western society.

The establishment of the Working Group on Indigenous Peoples ("WGIP") by the United Nations in 1982 represented an attempt by the international community to define the meaning of indigenous intellectual property. The United Nations Draft Declaration on the Rights of Indigenous Peoples, resulting from the work of WGIP, noted the distinction between cultural and intellectual property.[59] Tangible and intangible aspects of property were distinguished as separate entities. Erica Irene Daes (WGIP Chairperson) suggests that the distinction is artificial. She forwards the proposition that to indigenous people, both concepts (cultural and intellectual property) are encapsulated within the notion of "heritage":[60]

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57 Ibid.

58 Supra note 55 at 6.

59 Article 29 of the United Nations Draft Declaration on the Rights of Indigenous Peoples.

60 Daes, *Study of the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Item 14 of the Forty-fifth session of the UN Sub-Committee of the Prevention of Discrimination

> [H]eritage is everything that belongs to the distinct identification of a people which is theirs to share, if they wish, with other peoples. Heritage includes all expressions of the relationship between the people, their land and other living beings which share the land. Heritage is the basis for maintaining social, economic and diplomatic relationships [through sharing] with other peoples.

Indigenous legal academics in New Zealand have found favour with Daes' opinions. Aroha Te Pareake Mead equates "heritage" with "taonga".[61] Lenihan, as previously mentioned,[62] emphasises concepts of "inter-dependence" and "inseparability" in defining taonga, and this also accords with Daes' view.[63]

1. Traditional Maori Knowledge

The material expression of traditional Maori knowledge is articulated through a variety of different mediums. These include songs, art, genealogy, the deriving and application of medicine, the practice of religion, the telling of stories, and the carving of images on pieces of wood, bone and greenstone. In addition, the art of moko (tattooing) also had, and still has to a degree, major implications in the expression of traditional Maori knowledge.

2. Pre-European Intellectual Property

In traditional times, taonga were protected by the principles of "tapu" and "noa". These principles derived validity through being sourced in Maori origin. Taonga was a fundamental by-product of the Creation legends. In Maori belief, Creation consisted of three major phases:

(i) Te Kore the void, where nothingness prevailed, and where the seed of the universe is said to have originated, to create the entities known as Ranginui and Papatuanuku.

(ii) Te Po the darkness, caused by the embrace of Ranginui and Papatuanuku, which was so hard that no light persisted, and which caused their children to rebel and eventually separate them.

(iii) Te Ao Marama the world of light, or more specifically, the world we live in today.

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and Protection of Minorities (E/CN.4/Sub 2/ 1993/ 28). See also supra note 18 at 212.

61 Mead, "Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation" (1994) 3(1) Otago Bioethics Report.

62 Supra note 18 at 212.

63 Ibid.

The numerous children produced by Rangi and Papa were each entrusted with the duty of caring for the various parts of nature which they had obtained. They created and controlled all things within that particular domain. As all things in nature were created by the Gods, everything in nature has a deity component to it. This is the principle of tapu, and it regulated all aspects of life in traditional Maori society.

The concept of noa also derives from the Creation myths. One of the sons of Rangi and Papa was Tu-matauenga (commonly known as the "God of War" or the "God of Man"). Legend suggests that he had a disagreement with his brothers. He sought revenge through the use of incantations to convert their "tapu" creations (each child of Rangi and Papa had a responsibility over various aspects of nature), into items of every-day use. That is, Tu-matauenga made them "noa".

Tapu explains that humankind is basically incompatible with nature. Traditional Maori society made nature compatible by making things "noa" (through the recital of appropriate incantations) to allow themselves to gather food from the forest, fish from the sea, and to cultivate and harvest various crops.

3. Traditional Methods of Using Tapu and Noa

The tapu and noa concepts regulated all aspects of the traditional Maori legal system. If an item or an action was deemed to be tapu, a prohibition was instigated over the use of the item or the performance of the action. Any breach of this prohibition constituted a "hara" - the equivalent to "sin". Falling into such a category would require the performance of certain ceremonies to cleanse you of the "hara", in order to make you "noa". These concepts can be illustrated through the events that surrounded "tangi" (burial or funeral). For example, if someone died and a song had previously been composed for that particular person, that song became tapu. This meant that the song could not be performed other than by the relatives of the deceased. They became the kaitiaki (guardians or trustees) of that song.

The nature of tapu is that it occurs in differing degrees of strength, dependent upon the subject in question. This essentially means that tapu as a concept does not subsist for a fixed period of time. Protection over Maori aspects of knowledge did not last for a pre-determined duration. This uncertain duration is both complemented and contrasted with kaitiakitanga.

"Kaitiakitanga" supplements tapu and noa because it also derives from the holistic nature of traditional Maori society. Not only did the idea of a "caretaker" extend beyond the protection of knowledge, it pervaded all facets of life. Through this notion Maori were charged with an obligation to protect. There was a profound recognition of the needs of future generations.

Kaitiakitanga also acts as a balance on the indeterminate duration through which tapu exists because it recognises that Maori knowledge cannot be alienated indefinitely. It is not in the best interests of Maori for knowledge to die with the person holding it. Thus, a major aspect of the role of being a trustee of traditional knowledge is the requirement that the information be passed down through the appropriate channels. It

was of benefit to society if the particular knowledge was not monopolised and utilised by merely one person from one generation. For example, hapu had carvings depicting ancestors. This depiction of ancestral connections necessitated the carvings being afforded a tapu status. The ancestors were sacred. Therefore carvings of ancestors, and the knowledge required to create them would be tapu. As kaitiaki of the knowledge, the carver was under a duty to ensure his skills survived his death. In respect to this, it has been noted that:[64]

> [The] passage of taonga from generation to generation enhance[d] its strength. The responsibility to care for taonga is passed down [and its] relationship to humanity develops in this way. Taonga play an important role in Maori history by enabling it to be ... expressed, conveyed and transmitted. Taonga are a part of a lineage which stretches from the furthermost past into the distant future. Living descendants are trustees of taonga by right of ... genealogical descent.

The idea that information had to be protected and passed down also persisted in regard to the lore of tribal religions. This area in traditional Maori society was exceedingly tapu because of its immediate connection with the Gods. Responsibility for religious activities resided in the "tohunga" (high priest) of the tribe. He was the possessor of the knowledge surrounding the exercise of tribal religion and it was under his careful protection. The knowledge of a tohunga was extremely sacred and this meant that its use was heavily restricted.

In contrast to the individualistic approach that Western intellectual property law has taken, the Maori intellectual property regime emphasises collective ownership. Ownership occurred communally through an iwi (tribe) / hapu (sub-tribe) structural framework. Individual ownership was generally a foreign concept. For example, even though an individual composed a battle song, it belonged to the whole tribe.

Prima facie, this concept of collective ownership appears to be inconsistent with the notion of a tohunga, where knowledge is attributed to an individual. A tohunga is not, however, the actual owner of that knowledge, rather he is the protector of the knowledge of tribal religion. The knowledge comes from the Gods and is, therefore, owned by them.

V: CONFLICT BETWEEN THE TWO SYSTEMS

New Zealand's intellectual property regime reflects traditional Western legal methods of knowledge protection. The type of incongruity that exists between Western and Maori systems is evident on a global scale. Throughout the world, indigenous cultures are often challenged with the unenviable task of having to establish protection of their traditional knowledge in regimes usually incompatible with their own culture. As current New Zealand law tends to exclude traditional Maori knowledge from

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[64] Supra note 55 at 8.

protection it is vulnerable to exploitation by outsiders. Dissatisfaction and conflict has occurred for two main reasons:

(i) Legislation has been ineffective in protecting Maori knowledge;
(ii) the guarantees afforded by the Treaty of Waitangi have been given little consideration in the legislative drafting process.

These two issues will be addressed in turn and will be followed by a discussion of the implications they have for the protection of Maori intellectual property.

1. Ineffectual Legislation

New Zealand's intellectual property legislation is largely ineffective in protecting Maori knowledge. I shall focus on the inadequate protection for Maori taonga that is afforded by the Copyright Act 1994 ("the Act"). Conflict between the Western and the Maori regimes occurs on three major fronts within the Act.

(a) Individual Rights

The Copyright Act protects the interests of individual authors,[65] and does not recognise the concept of collective ownership. Maori culture dictates that there is no one person who can - within the terms of the Act - claim authorship in respect of, for example, knowledge of the medicinal uses of indigenous plants.

(b) Length of Protection

The Act sets out finite periods over which protection exists.[66] The protection afforded to literary, dramatic, musical and artistic works expires after fifty years.[67] This contrasts with "cultural rights which Maori regarded as perpetual".[68] As previously mentioned, the nature of tapu is that it does not have a definite lifespan. This demonstrates the incompatibility of the two regimes. It has been suggested that:[69]

> The [idea] that Maori should be subject to a limited monopoly right after which it would be available for exploitation by outside parties, would be to misunderstand the role that cultural knowledge plays in Maori society. The imposition of such a regime on Maori knowledge is consequently an affront to Maori culture.
> The indication is that traditional Maori knowledge protection regimes do not easily fit into the fixed time periods advocated by current legislation.

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65 Copyright Act 1994, ss 5-8, 18 and 21.
66 Sections 22-25.
67 Section 22.
68 Supra note 55 at 20.
69 Supra note 18 at 213.

(c) Originality

"Originality" is one of the criteria in s 14 that must be met before the Act will protect the intellectual property at issue. This has been interpreted as meaning the work in question must originate from the author.[70] However, taonga does not seem to generally fit into this category. For example, knowledge of traditional medicine; because it has developed over many centuries it does not come within the terms of the Act. The non-conformity of taonga is due mainly to the fact that it derives from communities, and their creation originates from collective input gathered from generation to generation. This implies that taonga possess characteristics of continual change and the ability to evolve.

6. The Treaty of Waitangi

As the Treaty of Waitangi is fundamental to the establishment of partnership between two differing cultures, it should play an important role in the creation of any intellectual property legislation that may effect either of these cultures. The promises contained within the Treaty should be guiding principles for persons involved in the drafting of such Acts. These provisions promise to Maori:[71]

(i) The "full, exclusive and undisturbed possession of their Lands and Estates, Forests, Lakes and other properties" [Article II];
(ii) the rights of general citizenship and equality [Article III];
(iii) an assurance to actively protect Maori rights and property [Preamble].

Despite these guarantees, intellectual property legislation has failed to reflect biculturalism, but rather favours a monocultural dependence on Western ideals. Coppins suggests that many Government officials are unable to relate to the Maori holistic view of the world.[72] This is illustrated by the fact that despite the many concerns expressed by Maori at the time of drafting, the Copyright Act makes no mention of Treaty obligations. The adoption of considerable portions of the United Kingdom Copyright, Designs and Patents Act 1988 is indicative of the tendency of law-makers to override any obligations the Treaty may impose. It also displays the government's neglect of its role as Treaty partner.

7. Implications for Maori Intellectual Property

Maori academic Moana Jackson has suggested that there are four areas of consternation to Maori:[73]

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70 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1984] 1 All ER 465.
71 Schedule 1 of the Treaty of Waitangi Act 1975.
72 Supra note 55 at 12.
73 Jackson, "Protection of the Treasures of the Ancestors: Te Pupuri I Nga Taonga Tuku Iho A Nga Tupuna" *The Definitions of, and Dangers to, the Concept of Indigenous Intellectual Property Conference* (1993) Nga Kaiwhakamarama I Nga Ture, 2.

(i) Defining intellectual property.
(ii) Balancing the power to define and the Western ethos of control.
(iii) The conflict existing between the two regimes.
(iv) The danger imposed by the practice of economic rationalism, to intellectual property.

These concerns have also been expressed generically as:[74] "Expropriation", the threat of conversion of Maori knowledge to persons other than the traditional owner(s); "Inappropriate Use", the threat that traditional Maori knowledge will be used in a manner offensive to Maori; and "Overprotection", the threat of financial suffering by Maori as a result of overprotection, which could lead to under-utilisation and underdevelopment.

The major concern surrounds expropriation. Maori taonga is often treated as if it is not owned in a legal sense, but rather that it exists in the public domain for anyone's use. An example of this is the All Black haka. The haka is often seen as belonging to New Zealand as a symbol of its identity and although this has some merit, it should be noted that little consideration was given to the original creators of the haka and the intellectual property rights they may or may not have. Similarly, the consistent use of well-known Maori songs in advertising, fails to consider any possible property rights that may reside in that song (such as "Po Karekare Ana").

Similarly, Maori moko appearing on faces and arms has become more prolific in contemporary times. Little thought is directed towards the intellectual property implications the particular designs may have.

4. Dissatisfaction with the Present System

The right of self-determination claimed by Maori also finds support amongst other indigenous cultures. Its validity has received international recognition. For example, WGIP has spoken out in favour of the need to protect indigenous intellectual property. They have suggested that control over all elements of heritage should remain with indigenous peoples.[75]

In 1993 the first International Conference on the Cultural and Intellectual Property Rights of Indigenous People was held in the Bay of Plenty. This resulted in the Mataatua Declaration, that was premised on the notion that self-determination dictated that indigenous peoples were to be recognised as the exclusive owners of their cultural and intellectual property. In addition, the Declaration recommended that:

(i) indigenous people maintain a guardianship role over customary knowledge;
(ii) existing methods of protection are insufficient;
(iii) States should co-operate in the development of an intellectual and cultural property rights regime;

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74 Te Puni Kokiri, *Nga Taonga Tuku Iho No Nga Tupuna Maori Genetic and Intellectual Property Rights* (1995) 5.

75 Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (1993). See also Coppins, supra note 55 at 23.

(iv) indigenous peoples should define for themselves their own cultural and intellectual property, as well as developing a code of effects;
(v) the commercialisation of most traditional plants and medicine managed by the indigenous people who have inherited such knowledge.

The outcome of the GATT Uruguay Round that included an agreement relating to intellectual property also had cause for concern. Known as the TRIPS agreement,[76] it recognised the importance of intellectual property protection to international trade. It obliged all parties to provide certain agreed minimum standards of protection and enforcement. Maori have found issue with the fact that New Zealand's domestic legislation is required to conform to international intellectual property law. New Zealand has amended legislation pursuant to the agreement,[77] which further entrenches a regime that has already failed to protect Maori knowledge.

Some of the stronger objectors to the TRIPS agreement have also taken issue with the fact that the Treaty of Waitangi has received a lack of recognition in intellectual property legislation in New Zealand. They have made their concerns known to the Waitangi Tribunal by way of the "Wai 262" claim, in which claimants stated that they have been prejudicially affected by New Zealand's intellectual property laws and by the TRIPS agreement. It was suggested that the lack of consultation afforded to Maori constituted a breach of the Crowns' responsibility to recognise a Maori right of te tino rangatiratanga over their knowledge under the Treaty. The claimants sought change to New Zealand's intellectual property laws in order to protect Treaty rights, including a greater consultation role in relation to anything affecting the rights of Maori in respect of their knowledge.

VI: RESOLUTION OF THE CONFLICT

Resolution of the conflict between the two regimes could take one of two main directions. Firstly, reform of the current regime can be pursued by the amendment of current practices and structures. One suggestion has been the establishment of a pan-tribal Maori Intellectual Property Commissioner,[78] who would be responsible for:

(i) holding on trust all Maori intellectual property not identified as belonging to a specific tribe;
(ii) allocating to tribes annual returns on registration and development fees; and

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[76] GATT Agreement on Trade-Related Aspects of Intellectual Property Rights.

[77] Amendments have been made to the Patents Act, Trademarks Act and Fair Trading Act. In 1994, pursuant to TRIPS, the Layout Designs Act and the Geographical Indications Act were introduced.

[78] Lenihan, supra note 18 at 213, citing "Detailed Scoping Paper on the Protection of Maori Intellectual Property in the Reform of the Industrial Statutes and Plant Varities Act" (1994) *Nga Kaiwhakamarama I Nga Ture.*

(iii) advising the Government and the Commissioners of Copyrights, Patents and Trade Marks on policy relating to these issues.

With the establishment of such a Commissioner, the law could be amended to require the obtaining of a licence from the appropriate hapu or iwi for the right to use Maori intellectual and cultural property. Lenihan suggests that this "would preserve the authority of the true guardians of the taonga, although it could never be the 'full, exclusive and undisturbed' authority as guaranteed in the Treaty".[79] This suggestion has been met with the view that such reform would cause fragmentation and loss in a manner akin to individual land ownership.[80]

Secondly, constitutional change could be utilised. It should be understood, however, that the aim would be to establish an alternative regime whereby Maori taonga are sufficiently protected against appropriation and exploitation. This would necessitate the transferral of control from present legislators to Maori. Maori would be afforded the right to determine the appropriateness of the use of their own cultural heritage, requiring that the law break from its traditional purpose to assimilate indigenous cultures into western legal frameworks. "[The] right to define, control and protect [Maori] culture must be recognized to reside in Maori alone".[81]

The Ministry of Commerce has suggested that there are some steps that Maori could take under existing law in order to protect their taonga. They suggest that some Maori inventions may be patented, while others may be commercially exploited and their details kept secret. It provides the example of the formula for Coca-Cola being kept secret for many years. Details of such inventions could be protected by the law as "confidential information" (trade secrets).[82] Though this is plausible, it is a suggestion that is only really relevant to newly formed knowledge. It should be noted that most Maori intellectual property derives from traditions practiced for hundreds of years. This could negate the effectiveness that laws applicable to new inventions would have in affording protection.

VII: CONCLUSION

There are stark differences between the traditional Western legal intellectual property framework and the traditional Maori regime. The Western structure reflects an economic individualistic motive which contrasts greatly with the more communal-based approach of the Maori system. This conflict has had a profound effect on Maori intellectual property. Protection has been virtually non-existent because traditional Maori knowledge and intellectual property does not fit within established Western models. Resolution of the conflict is plausible, but requires change to a well-entrenched mind set.

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79 Supra note 18.

80 Ibid.

81 Ibid.

82 Supra note 47 at 18.