

D261 DAVIS, C. TE MATAUURANGA Māori i te taha o te matauranga.

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TE MATAURANGA MĀORI I TE TAHA O TE
MATAURANGA

LLM RESEARCH PAPER
INTELLECTUAL PROPERTY (LAWS 535)

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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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FOREWORD

Ko Ngāti Kuri, Te Aupouri me Te Rarawa öku Iwi.

Ko Matätua te Waka.

Ko Karirikura te Moana.

Ko Whangatauatia te Maunga.

Ko Te Öhäkī te Marae.

Ko Emily Murupaenga räua ko Haimoana Ngauma öku Tūpuna.

Ngāti Kuri, Te Aupouri and Te Rarawa are my Tribes.

The Great Voyaging Canoe (that brought my Ancestors here) is Matätua.

Karirikura is the Ocean;

Whangatauatia is the Mountain;

Te Öhäkī is the Ancestral Meeting House;

Emily Murupaenga and Haimoana Ngauma are my Grandparents.

I chose to begin my research paper with these words for a number of reasons, which I felt were important. Firstly, the words establish my Māori ethnicity. Therefore, my opinions and insights in this paper are drawn from my experiences as a Māori, as opposed to opinions and insights of a non-Māori writing about things 'Māori'. This is not to say that non-Māori views and insights about Māori things are valueless (or vice-versa) - every viewpoint adds value to the dialogue on Māori issues. But that I am Māori establishes a context within which the views in this paper can be considered. My background might also be a consideration to factor in when comparing my views against others'.

Secondly, the views communicated here will be my own. I am not an expert on Māori values and beliefs, nor do I profess to be. I am merely one individual Māori presenting her thoughts on a particular issue. Similarly, my words do not represent the "definitive Māori view": on the contrary, I doubt that there is such a thing. Iwi, hapū (sub-tribes), whānau (families) and Māori individuals all have different aspirations, goals, values and beliefs. This is not to say that to talk about issues for "Māori", their beliefs, traditions and so on is a worthless exercise. While the indigenous people of Aotearoa are made up of distinct nations and

each societal group's perspective and history is unique, it can still be said that there are fundamental similarities with regard to our world view and core values which we all share.

The term "intellectual property" refers to the products of one's intellectual efforts. It also implies a claim, if not the existence of, some form of product protection from those who would, without right, benefit from the use or otherwise of that product. It is a concept which is widely known in market-driven societies, i.e. societies whose existence and growth is based primarily in the production and consumption of goods and services by its members, and where the value of things in the natural world is determined primarily by commercial considerations and market forces such as supply and demand.

A fundamental tenet of intellectual property law is that individuals are entitled to the fruits of their labour, to the extent that they are accorded exclusive "ownership" rights over the products of their efforts.¹ This includes the right to protection of their intellectual property from unauthorised reproduction, application and sale, and the right to transfer ownership fully (or in part) to others.

However, the market notion of intellectual property and its protection is not a universal concept, and the degree to which intellectual property protection has been a matter of concern and contention, particularly for indigenous peoples, has varied. On the one hand, communities world-wide have developed their own ways of relating to their environment, accessing resources and knowledge, and security there are just as many varieties of means of protection. The fact that certain indigenous peoples have remained relatively isolated from the rest of the world has enabled them to maintain their cultural practices and traditions and to safeguard their knowledge in accordance with those practices and traditions as they have done over the generations. As they have not been exposed to market-driven society, they have been able to subsist in an environment free of the threats to their resources and knowledge such as misappropriation and exploitation.

¹ With certain exceptions. For example, employees generally have ownership rights over the products of their employer's labour.

INTRODUCTION

The term "intellectual property" refers to the products of one's intellectual efforts. It also implies a need, if not the existence of, some form of product protection from those who would, without right, benefit from the use or otherwise of that product. It is a concept which is widely known in market-driven societies, i.e. societies whose existence and growth is based primarily in the production and consumption of goods and services by its members, and where the value of things in the natural world is determined primarily by commercial considerations and market forces such as supply and demand.

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¹ With certain exceptions, for example, employers generally have ownership rights over the products of their employees' labour.

On the other hand, many other indigenous peoples have become increasingly aware of intellectual property issues. This has resulted from their community's exposure to the market society via contact with 'bioprospectors' and 'bio-pirates', and subsequently in the introduction of threats to their knowledge which they are unequipped to defend against (should they be fortunate enough to recognise them).

As a complicating factor, intellectual property protection has also assumed increasing prominence as technological advances have expanded the ways in which ideas can be recorded, accessed, distributed, analysed and utilised. In addition, states, multinational companies and other non-governmental organisations have come to realise the market value of the knowledge and resources of indigenous peoples. This is related to the onslaught of 'globalisation' and the accompanying international agreements such as the General Agreement on Tariffs and Trade (GATT) and the Agreement on trade Related Aspects of Intellectual Property Rights (TRIPS) which have also facilitated (and, in some minds, provided justification for) what indigenous peoples have come to perceive as the new era of colonisation and plunder. GATT is an international agreement which seeks to reduce the barriers to international trade and actively encourage liberalisation of world trade. New Zealand became a member of the GATT on 30 July 1948, and several rounds of negotiation have taken place since then among its member states. The most recent (and arguably the most comprehensive) "Uruguay" round of negotiations was undertaken from 1986 to 1994. TRIPS, as the name suggests, relates specifically to intellectual property and international trading practices. Of particular concern to indigenous peoples is how TRIPS operates to loosen patentability criteria (i.e. exposing more life forms to the possibility of being patented). Together, these agreements, and others like them, have been recognised by indigenous peoples as threatening to the protection of their knowledge and resources. The primary criticism is that agreements such as these reduce the power of governments to "regulate international trade" while at the same time increasing the ability of international corporations and companies to exploit the resources of member states (and the indigenous peoples of such member states).

The extent to which indigenous peoples knowledge has been inappropriately used, exploited and expropriated as a result of these factors has been enormous. But the effects of this expropriation and so on are not merely confined to indigenous knowledge. Firstly, a community's culture is defined and identified by its language and the body of values, beliefs, stories, songs, customs and practices: in short, its knowledge. Any effect on that knowledge (be it through inappropriate use, exploitation or expropriation) will have a corresponding effect on the health and well-being of the culture of the indigenous community and ultimately on the indigenous peoples themselves. The mere act, for example, of altering traditional stories in any way for distribution (perhaps to make them more suitable for 'foreign' audiences) re-defines the culture of the indigenous community where the stories originated from.

Secondly, the negative effects on indigenous knowledge are equally significant in terms of the self determination of indigenous peoples. For how can indigenous communities exercise their rights to use and protect their knowledge and fully express their culture if, for example, aspects of that knowledge has been expropriated by others? Thirdly, the impacts on indigenous knowledge have implications for those communities who also desire to participate in the market economy and benefit commercially from that knowledge.

The harmful effects to indigenous knowledge, and the wider ramifications for indigenous peoples' culture, self determination and ability to benefit commercially from that knowledge, have increased the drive from indigenous communities, including Māori, to seek effective and appropriate protection of their knowledge. In the scramble to protect their knowledge, some indigenous peoples have, in ad hoc style, turned to the already established intellectual property protection mechanisms developed by market societies, only to discover that those mechanisms were ineffective in providing the protection they desired. Moreover, these mechanisms often played a significant role in the further inappropriate exploitation of their knowledge. The benefits for indigenous peoples who have, or have access to, a comprehensive knowledge and understanding of intellectual property law are not necessarily much greater. While more familiar with the protection mechanisms available, they have found those mechanisms to be

inadequate. Indigenous peoples have consequently pressured states at both national and international fora to recognise and acknowledge their plight, and to work together to develop protection mechanisms which meet their interests.

What I hope to achieve in this paper is to expand the current dialogue as to why the market-driven regime of knowledge protection - i.e. intellectual property law - fails to adequately protect indigenous peoples' knowledge. I will outline the philosophy upon which the market notion of property is based drawing on the theories of Grotius, Pufendorf and Locke. I will then establish the relationship between Grotius', Pufendorf's and Locke's philosophies and intellectual property law theory. This will be followed by a discussion of the traditional Māori worldview and the relationship that Māori traditionally had with things in nature, and a comparison of that relationship with how market society relates to things in nature as 'property'. This will provide a basis for identifying the areas in which intellectual property laws are inadequate in terms of meeting Māori interests concerning the protection of their knowledge (be it traditional or contemporary). The writer also argues that indigenous peoples generally share many of the concerns that Māori have with regard to of intellectual property law and the inadequacy of the protections offered under that regime for indigenous knowledge.

Finally, while many cultural barriers exist for indigenous peoples in relation to knowledge use and protection, the writer will show that there are nonetheless some interests common to both western and indigenous peoples. These interests could be used as a basis for the development of new and enlightened attitudes and models for the appropriate use of indigenous knowledge and protection.

The subject matter of this paper requires a measure of generalisation of the traditions, cultures, practices and values of different peoples - each of whom as a distinct communities contribute to the diversity of our planet. However, a more detailed discussion is beyond the scope of this paper. It is hoped, nonetheless, that the writer's views and conclusions will add value to the ever increasing commentary and dialogue on this subject.

PRACTICAL EXAMPLES OF INTELLECTUAL PROPERTY 'MIS'-USE

The issue of indigenous knowledge protection can sometimes seem to problematic and complex as to appear overwhelming. For many, merely trying to visualise practical examples where issues of indigenous knowledge protection (or, rather, the lack of it) may arise is difficult. For this reason, the writer has provided two concrete and everyday examples below. These will be used in this paper to help illustrate how intellectual property law is inadequate in protecting indigenous peoples' knowledge.

MACDONALD'S RESTAURANT

MacDonalds has produced a paper 'mat' which is used in their restaurants nationwide to cover their food trays (a copy of the mat is included on the next page). On it are pictures of various New Zealand 'icons': a Kiwi, a native tree, and a 'heitiki' (greenstone pendant personifying a human ancestor).

As a Māori I find the depiction of the heitiki in that context inappropriate. The offence felt is not easy to express, however, it could be likened to having a picture of a person on a doormat and having all manner of people scuffing and wiping their dirty shoes all over that mat. It is not obvious from the image that it was based on or was a reproduction of an actual heitiki, but had this been the case the offence felt would be even greater. It would be the equivalent of having the picture of someone dear to me or someone whom I recognised as a person of great mana (prestige) on the doormat.

Another factor about the inappropriate use of the heitiki in this example, however, is that in traditional Māori society there were many rules and protocols regarding aspects of everyday life: not only rules of common sense, but having to do with the tapu (sacredness) of certain things. And although I will not attempt to go into details here (as I do not have the expertise to do so, and it could easily take up a whole chapter of its own), suffice to say that from my upbringing and the community that I was raised in, I have always understood that there are certain 'do's and 'don'ts concerning the preparation and eating of food. For instance, I



We're cutting them in bits, in Nelson and the Bluff. We're cutting in the Morrie Minor. We just can't get enough.


Jim's cutting in Invercargill. The sheevers are cutting too. New Zealand's Favourite Burger. That Kiwis choose like you...

Two all Beef Patties, special sauce, lettuce, cheese, pickles, onions on a sesame seed bun.

Hey! We're cutting them down in Taupo, in Auckland & Wellington. We're cutting watching Shortland Street. We're cutting on the run.

The boys are cutting in the stand. We're sure you're cutting too. The unique World Famous Big Mac Burger. Kiwis choose like you.

true blue,
toodle doo!

It's  ac Time.

would never put my bone pendant (or any other taonga [treasured thing] for that matter) on a kitchen bench or table, let alone have it be soiled with food.

A hundred years ago, Māori may never have envisaged the way in which the image of a heitiki might be used as MacDonalD's has done. However, the rules and protocols used by our Māori ancestors continue to hold relevance for Māori today. One may even go as far as to say that these rules are more pertinent now where society is dominated by market-driven culture and values, and where those things which hold special importance to Māori are threatened daily.

THE USE OF NAMES - THE "PARORE" INCIDENT

During March in 1995, an interesting issue arose which sparked much debate among sporting New Zealanders and Māori, and for a brief time caught the attention of the local media.

The issue centred around the correct pronunciation of the family name of the New Zealand cricket team wicket-keeper, Adam Parore. Sports commentators had up until that time pronounced his name by accentuating the 'o' and stretching out the 'e' sound at the end, as in "Pah-roar-ee (as in "story").

A prominent Māori figure, Sir Howard Morrison, challenged sports commentators to pronounce the surname correctly in accordance with Māori tradition (i.e. accentuating the 'a' in "Pa", 'rolling' the letter 'r', and having a short 'e' at the end, as in "egg"): *Pa-ro-re*. However, Mr Parore responded with a press statement asking the media to pronounce his name "correctly": *Pah-roar-ee*.

It should be noted at this point that Sir Howard was prompted to raise the issue publicly because it was Māori Language Year. This combined with the fact that Mr Parore was the only Māori in the team, he considered that Adam had an obligation to pronounce the name properly, saying that "In Māori traditional terms

² 'Papers along with pronunciation' *The Dominion*, Wellington, New Zealand, 25 March 1995.

[pronouncing it wrongly is] tramping on the mana of a very dignified and well established name."²

In this way, Sir Howard summed up the issue correctly: by mispronouncing his family name, Parore was insulting those who bore the name before him - his ancestors. That he did so intentionally only made his actions worse.

However, unlike Sir Howard, this writer considers that *all* Māori - not just famous ones - at *all* times - not just in the year of Māori Language - have a duty to pronounce their own family name correctly. The reason is, in my view, that as Māori our family names are ours individually in the sense that we bear them or are associated with them and they provide us with our sense of identity. However at the same time it cannot be said that we 'own' the name. Firstly, others also hold that name or are associated with it. In this sense, the name 'belongs' to all those people *collectively* - no one person can lay exclusive claim to it. But secondly (and perhaps more significantly), in terms of what a "name" is and what it represents, it is not appropriate from a traditional Māori view to speak of ownership of a name at all: a name is something that has been passed down from our ancestors, and carries with it their reflections, their prestige. Possibly a more appropriate way to describe the relationship would be to say that we 'belong' to the name. I would not, therefore, be so arrogant as to say I owned my family name, let alone declare that I had the right to trample its mana by intentionally altering it in any way.

² "Parore sticks with pronunciation" The Dominion, Wellington, New Zealand, 25 March 1995.

THE ORIGINS OF 'PROPERTY'

Before embarking on an evaluation of the compatibility of intellectual property law with indigenous concepts of knowledge use and protection, it is best to look at how both western and indigenous societies relate to resources. In terms of Western societies, I will attempt to provide an overview of the origins of the notion of 'property' by examining some of the pertinent influences on the jurisprudence of Western property law generally: Grotius, Pufendorf and Locke.

This is followed by a review of the origins of intellectual property law, specifically patenting and copyright. Together, these discussions will supply the basis for contrasting and comparing western property law with the ways in which indigenous peoples relate to their knowledge.

'NATURAL LAW' - PROPERTY' AS A NATURAL EXTENSION OF 'COMMON OWNERSHIP'

Fundamentally, the concept of property law is grounded in "natural law". As a concept, it has as many different meanings as there are philosophers who have written on the subject. Nonetheless, a common characteristic of natural law for philosophers such as Hugo Grotius, Samuel Pufendorf and John Locke, appears to be that natural law is a set of norms that evolved over time as a result of the 'sociableness' of human beings, combined with the each individual's desire for self-preservation.

Grotius saw "natural law" as innate ideas³ which existed independent of the divine will. He posited that, although God gave 'primitive'⁴ mankind the earth, the practice of private property was "a natural response to circumstances generated"⁵ as humans abandoned their primitive state:⁶

³ S Buckle *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press, Oxford, 1991) 64.

⁴ Buckle, 37.

⁵ Above n 4, 43.

⁶ Above n 4, 35.

Soon after the creation of the world...God conferred upon the human race a general right over things of a lower nature. 'All things...were the common and undivided possession of all men, as if all possessed a common inheritance'. In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act.

COMMON 'USE RIGHTS'

Grotius explained that, at this stage mankind lived in a simple state of 'moral purity', each taking from nature only that which they needed to survive. In this sense, humans had only 'use-rights' in the resources of the earth. No-one owned anything, no-one held 'property' in the strict or 'positive' sense. In Pufendorf's words, this created a kind of 'negative' community. To illustrate, Buckle gives the following analogy of guests invited to a buffet:⁷

The food...is for the guests, but no particular item is for any particular guest. ...Rather, the food is just there for the taking...provided what is taken has not already been claimed by someone else, and provided the taking itself involves no violence or injury.

Moreover, while property did not exist in individuals in the positive sense, "there [was] nevertheless 'indefinite' or 'potential' property".⁸ Consequently:⁹

Just as the original property in things in the natural state is only 'potential' property, so the original right to use things in that state is no more than a 'potential' or 'indefinite' right: 'God allowed man to turn the earth, its products, and its creatures, to his own use and convenience, that is, he gave men an *indefinite* right to them.'

So where did the shift from 'indefinite use rights of mankind collectively' to 'positive ownership rights of individuals' occur? For Grotius and Pufendorf,

⁷ Above n 4, 95-96.

⁸ Above n 4, 78.

'propriatorship' evolved as human interaction dictated. Grotius theorised that, over time, humans abandoned their state of moral purity and became corrupted, rivalrous and ambitious. This eventually led to a gradual displacement of sharing of the 'common' with a division of that common into "territories of first, nations, and secondly, households."¹⁰ Private ownership was the further and final stage of this "sequence of divisions or agreements."¹¹ In Pufendorf's words, property was necessary "in order to avoid quarrels and preserve peace".¹²

LOCKE'S RELIANCE ON THE MIXING OF "LABOUR"

Grotius, Pufendorf and other philosophers were responsible for establishing a general theory on the progression of the things in nature from state of 'belonging' to mankind *in common* to a state of 'private property ownership' *in individuals*. However, it was Locke's theory which came closer to identifying specifically at what point that shift from the common to the private occurred. And it is Locke's ideas which have consequently had the most significant influence on modern notions of property, and hence property law in market societies today.

Locke agreed with Grotius and Pufendorf that the state which preceded private ownership was a state where things were held 'in common' by all to be used for their preservation and subsistence.¹³ However, he distinguished that, while things of Nature belonged to mankind, it made no sense to speak of an person 'belonging' to anyone other than himself [sic]. Similarly, an individual's energy - or labour - could also belong only to that particular person. He then reasoned that whatever (of the things in nature held 'in common') an individual affected with her labour must necessarily become hers to claim as property:¹⁴

Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The

⁹ Above n 4, 79.

¹⁰ Above n 4, 40.

¹¹ Above n 4, 41.

¹² Above n 4, 98.

¹³ J Locke *Of Civil Government - Two Treatises* (J M Dent & Sons Limited, London 1924) 129.

¹⁴ Above n 13, 130.

"labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

A further aspect of Locke's 'labour' theory strongly influences modern day property law. The first was founded in his view that mankind owed obedience to God and should therefore live consistently with God's design. In terms of God's intent in gifting the world to mankind, Locke's view was that:¹⁵

God and his reason commanded [all mankind] to subdue the earth - *i.e.*, improve it for the benefit of life... but since He gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious.

Therefore, Locke seemed to be endorsing the view (implicitly if not explicitly) that labour, inasmuch as it furthered activities undertaken in accordance with "the purposes of God", morally entitled those who laboured to claim the thing affected as their property. His theory on mankind's duty to engage in activity according to God's purpose also necessarily denotes that whatever was left 'unmixed' with labour was to leave it available for another's improvement. This perhaps provides insights as to the origins of the legal concept of "Terra Nullius" (or, literally translated: "Land that has no value"). This term was often used in the era of colonisation in reference to lands that were not cultivated or farmed or appeared not to be used for any obvious purpose, and were therefore deemed by explorers to be lands that were legitimately available for claim by those who "discovered" them.

¹⁵ Above n 13, 132-133.

Therefore, labour was of primary importance to Locke's theory of how things in Nature transferred from being held in common to private ownership. In fact, it was Locke who believed that:¹⁶

of the products of the earth useful to the life of man, nine-tenths are the effects of labour...when anyone hath computed, he will then see how much labour makes the far greatest part of the value of things we enjoy in this world; ...It is labour,... which puts the greatest part of value upon land, without which it would scarcely be worth anything.

This, then, was Locke's reasoning: firstly that a person's labour being her own, that which was mixed with her labour must become hers. This premise was complemented by his consideration of labour as "a rational (or purposeful), value-creating activity".¹⁷

THE NEED FOR AGREEMENT

While private property may have arisen out of a need to keep the peace or because it was justified by the use of one's labour, the act of carving out a thing held in common and believing or declaring it to be private property did not in itself guarantee recognition of that thing as private property. Acceptance or agreement had to exist in the community about the creation of private property, and whether ownership rights would be respected. In other words, according to Grotius, Pufendorf and Locke, use-rights evolved into private ownership either tacitly (by acceptance) or explicitly (by agreement). Again, using his 'buffet' example, Buckley illustrates this point:¹⁸

Successful removal [of food] must be publicly recognizable ...At a banquet, ...placing food on a plate, and drink in a glass, are usually recognised as acts of removal. Whether the act is successful just because of the act itself, or because of the acceptance of the act as appropriate, is another matter. On the former understanding, ...[s]uccessful removal could ...be described as being due to the

¹⁶ Above n 13, 136-137.

¹⁷ Above n 4, 151.

¹⁸ Above n 4, 96.

exercise of labour. On the latter understanding, the act is successful because it is *seen* to be an appropriate solution to the problem, and so is not interfered with.

SUMMARY

The predominant feature of property law theory as espoused by Grotius, Pufendorf and Locke is the need for 'self-preservation' and the rights of the individual to this end. The theory also reflects the notion that the earth was 'given' to mankind for their use, which somehow places humans in a position 'divorced' from their environment.

In a general sense, property evolved from the gradual development of the common 'use right' to individual 'ownership'. This development was depicted as a 'natural' result of the evolution of human societies. More specifically, Locke theorised that the point at which things held in common became private property was when individuals mixed their labour with those things. However, acceptance or agreement within the community was also required to maintain the system of proprietorship.

¹⁹ G. Hammond "The Legal Protection of Ideas" (1991) 29 *Osgoode Hall Law Journal* 93, 94.

²⁰ Ministry of Commerce Review of Intellectual Property Rights, Patents, Trade Marks and Designs: Possible Options for Reform (Competition Policy and Business Law Division, Ministry of Commerce, Wellington) 223.

²¹ *Ibid.*

THE ORIGINS OF INTELLECTUAL PROPERTY LAW

The preceding discusses some of the main characteristics of property law theory generally. The following section provides an overview of the basis for intellectual property law specifically. Harking back to Grotius', Pufendorf's and Locke's theories, intellectual property law may be seen merely as a system of codification of the market society's agreement about the circumstances which justify private ownership of things previously held 'in common'. Here we can also see how intellectual property law is influenced particularly by Locke's views on the pre-eminence of human labour in justifying ownership of knowledge.

Economic Incentive

Hammond says that "[t]he thrust of intellectual property law is today usually expressed in economic terms".¹⁹ The Ministry of Commerce states:²⁰

The essence of intellectual property rights is the conferral or recognition of an exclusive right to exploit the owner's invention, literary or artistic work, design or trade mark as an incentive to encourage ongoing innovation and investment.

Intellectual property law therefore reflects Grotius', Pufendorf's and particularly Locke's views about the paramount importance of utilising and improving things in the natural world for the benefit of mankind. Innovation and the development and implementation of new ideas (or old ones for that matter) is important to society to "promote economic advance [sic] and consumer welfare".²¹

However, for most people, it is the anticipation or expectation of receiving some benefit at the end of the process of developing a product which encourages them to invest time and resources into creating it. For example, no-one would write books for a living if people could obtain copies of their works for free. Intellectual

¹⁹ G Hammond "The Legal Protection of Ideas" (1991) 29 Osgoode Hall Law Journal 93, 94.

²⁰ Ministry of Commerce *Review of Industrial Property Rights, Patents, Trade Marks and Designs: Possible Options for Reform* (Competition Policy and Business Law Division, Ministry of Commerce, Wellington) 223.

²¹ *Ibid.*

property rights therefore provide the right-holder *exclusivity* over her work so that she might "capture the full or at least fuller, benefits of those commodities."²²

Identifying the Source of the Knowledge

Locke's theory that individuals are entitled to the fruits of their labour forms one of the cornerstones of intellectual property law. Intellectual property law offers protection to individuals, or individuals jointly, of knowledge where that individual or individuals can establish that they were the creator of that knowledge and therefore entitled to claim ownership of it. For example, section 7 of the Patents Act 1953 states that:

- (1) An application for a patent for an invention may be made by any of the following persons, that is to say:
 - (a) By any person claiming to be the true and first inventor of the invention;
 - (b) By any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application,--and may be made by that person either alone or jointly with any other person.

In relation to copyright, the source of the creation (i.e. the author) is ordinarily the person or persons who were responsible for "first reducing the work to writing or some other material form."²³

Originality/ Novelty/ Innovative Requirement

The individual or individuals applying for protection under intellectual property law must demonstrate that their work is more than a mere 'discovery'. Patents, for example provide protection for "inventions", which implies an element of innovation or ingenuity. In addition, Cornish distinguishes discovery and invention in this way:²⁴

²² Above n 19.

²³ Brown and Grant *The Law of Intellectual Property in New Zealand* (Wellington, Butterworths 1989) 272.

²⁴ WR Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2 ed, Sweet and Maxwell, London, 1989) 139.

THE INEFFECTIVENESS OF 'INTELLECTUAL PROPERTY'

[D]iscovery is the unearthing of causes, properties or phenomena already existing in nature; invention is the application of such knowledge to the satisfaction of social needs.

Section 14(1) of the Copyright Act 1994 provides that copyright subsists only in *original* creations. Again, this criteria reflects Grotius', Pufendorf's and Locke's concept that there naturally exists some 'common' pool of resources, and to separate out something from that common requires an individual (according to Locke) to mix her labour with it - in this instance, the mixing of labour needs to be to a degree which creates an original work.

Limited Duration of Protection

With the exclusivity of ownership comes the risk that the owner could *limit* society's access to resources over which the right is held. This would negate the benefits to society of establishing incentives for individuals to be creative in the first place. Intellectual property law therefore also attempts to maintain "the balance between individual and social rights."²⁵ It does this principally by offering temporary protection to intellectual property (for example, section 22 of the Copyright Act 1994 states that copyright in a literary, dramatic, musical, or artistic work expires at the end of the period of 50 years from the end of the calendar year in which the author dies).

²⁵ Malcolm McNeill *A Critique of GATT:TRIPS - A report prepared for the Waitangi Tribunal for the Hearing of the Treaty of Waitangi Flora and Fauna Claim (WAI 262)* (2 February 1997) 32.

THE INEFFECTIVENESS OF 'INTELLECTUAL PROPERTY' PROTECTION FOR INDIGENOUS PEOPLES

Having established the theoretical framework for, and some of the main characteristics of, intellectual property law, the writer will now explore the main aspects of the traditional Māori world-view. In particular, traditional Māori views of their place in the world and the relationship they hold with their environment will form the basis for a comparison with the market notion of property (i.e. as based on Grotius', Pufendorf's and Locke's views) and hence the effectiveness of intellectual property law protections relating to Māori knowledge. The writer will show that the market intellectual property regime reveals a markedly different world view to indigenous peoples' about the relationship that individuals and communities have with things in the natural world; a world view that is inadequate in terms of acknowledging indigenous peoples' values and beliefs.

As many facets of the traditional Māori world-view hold similarities with other indigenous peoples, it is argued that these inadequacies are also relevant for indigenous communities generally.

'PROPERTY' - COMPARISON WITH THE MĀORI WORLD VIEW

THE MĀORI "COSMOGONY"

Perhaps the most fundamental characteristic that indigenous peoples share is the extent to which they value and respect all things in the universe, both tangible and intangible.

For Māori, this value and respect stems from the belief that we, and all the elements and contents of the universe, share the same origins in creation. Among Māori, there are a number of different accounts of how the universe came to be. Sometimes it is described as a birth-like process, other times images of the growth of a tree are used. Yet another version, particularly relevant here,

describes it "as a searching, an unfolding of consciousness and thought"²⁶ which began with the uttering of a single word, increasing to energy, memory and wisdom. They all provide an account of where life began:

Te Kore

(the realm of "chaos"/ "nothingness"/ "potential being")

Io

(The Supreme Being who dwelt in Te Kore)

Te Hirihiri

(pure energy)

Te Po

(the night)

Te Ao Marama

(the full light of day)

Te Kowhao

(the single being/ ancestor created by Io)

Then, from the creation of the universe came the creation of the world and everything in it, beginning with the sky, the earth, and their many children - all supernatural beings:

Te Kowhao

Ranginui e tū iho nei ----- Papatuanuku

(the "sky father")

(the "earth mother")

²⁶ MP Shirres *Te Tangata - the Human Person* (Accent Publications, Auckland, 1997) 23.

Tane mahuta	Tangaroa	Tawhirimatea	Tumatauenga	Rongomatane...
(God of the Forests)	(God of the Sea)	(God of the Winds / Weather)	(God of Warfare)	(God of Agriculture)

From the earth of Papatuanuku, Tane mahuta created Hineahuone, the "earth maiden"; and together according to traditional Māori belief, they brought forth humanity. He was also responsible for creating all things in the forests - trees, plants, birdlife, etc.

As a result, for traditional Māori, all things - inanimate objects, plants, animals and humans - share a common ancestry through Rangi and Papa, back to the very origins of the universe. Māori are consequently inextricably connected to all that surrounds us. This is perhaps best described by Dr M Roberts, Dell Wihongi and others, Māori Claimants for the Flora and Fauna (WAI 262) claim to the Waitangi Tribunal:²⁷

...everything in the Universe, inanimate and animate, has its own whakapapa or genealogy, and all are ultimately linked via the gods to Rangi and Papa. ... "The bond this creates between humans and the rest of the physical world is both immutable and unseverable" (Tomas, 1994). Every Māori shares this descent from gods, goddesses, guardians and superhumans.

The whakapapa or genealogy of the cosmos according to Māori tradition reinforces the relationship between humans, the gods, the ultimate creator and the universe. More than being made merely in the image of our creator, humans are reminded that they carry the wairua (life force/ spirit), mana (prestige), ihi (power) and wehi (awesomeness) of our god ancestors:²⁸

²⁷ Dr DV Williams *Matauranga Māori and Taonga - The Nature and Extent of Treaty Rights held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Heritage Objects, Valued Traditional Knowledge* (A report prepared under a commission from Gina Rudland of Wellington, Solicitor to the Wai 262 Claimants as authorised by a Direction from the Waitangi Tribunal dated 3 May 1996, January 1997) 91.

²⁸ Above n 27, 91.

... as Hohepa (1994) remarks, "these multi-god/goddess guardians and responsibilities, these ties with humans who have the divine spark of descent from gods, are not compatible with ... the Christian belief of an independent God who has no genealogical connection, and who exists in splendid isolation somewhere in heaven".

The ramifications that this state of affairs has for traditional Māori are highly significant in terms of the relationship we have with our knowledge and the requirements for its protection. Numerous themes become evident which characterise how we value our indigenous knowledge. Some of these are discussed below. Again, it is argued that these hold much in common with other indigenous peoples' world-views.

THE RELATEDNESS OF ALL THINGS

The most apparent effect of the Māori account of creation is that traditionally, all things are seen as being related. The importance of establishing and maintaining human 'relationships' is evident from the customs associated with speaking on the marae. For example, it is customary for visitors to announce their whakapapa in order to establish where they are from and, where possible, their genealogical links with their hosts. Even in more informal settings, when Māori individuals meet each other for the first time, the conversation usually begins with each enquiring as to where the other is from.

However, the Māori tradition is also characterised by the genealogical links its people have with all other things in the universe - both tangible and the intangible, animate and inanimate - and by the way in which these links are maintained. The Ministry of Research Science and Technology has stated that "...mātauranga Māori is a system which codifies knowledge according to its relatedness to environmental and life issues, rather than to what things are in themselves".²⁹ This 'system' of knowledge codification is illustrated by the following example:³⁰

²⁹ See the Ministry's 1995 publication entitled "The Interface Between Mātauranga Māori and Mainstream Science" referred to in Williams *Mātauranga Māori and Taonga* 1997 14-15.

³⁰ Above n 27, 16.

An example of this in mātauranga Māori would be the use of whakapapa to describe the different forms of stone and their groupings. Best describes the following classification (abridged): 'From the tenth period of Chaos sprang Papa the Earth Mother already mentioned, and then appeared Papa-matua-te-lore (Papa the parentless) who mated with Rangi-a-Tamaku and had a firstborn Putoto, whose sister was Parawhenuamea (personified form of water). Putoto took his own sister, Parawhenuamea, to wife, and she bore Rakahore, who mated with Hineuku (the Clay Maiden), who bore Tuamatua (all kinds of stones found on sea coasts...), from whom came gravel and the stone. The younger brother of Tuamatua was Whatuaho (greywake, chert, etc), next came Papakura (origin of volcanic stone, kauwhanga, whatukura, waiapu...kinds of stone), then Taurira-karapa (greenstone of different kinds)...

Although Māori used names different to the equivalents that scientists use today, they nonetheless represent many of the same classifications of rock and soil, etc. Such "whakapapa" also reveals the Māori awareness of the relationships (literally) between, as in the case given above, the different rock and soil types and what geological forces create them.

In addition, "whakapapa" personifies the inanimate and things in the natural world. This increases our relatedness to those things and strengthens the value of those things for individual Māori and the Māori community. Market-driven culture, on the other hand, does the exact opposite: everything is objectified and depersonalised. Something's value is a function of the extent to which it can satisfy human's wants, needs and desires - a mere means to that end. For example, Aroha Mead writes:³¹

Western science goes to great lengths to de-humanise the humanness or life-force of human genes; hence, terms such as "specimens," "materials," "properties," and "collections" ...It is contrary to indigenous tradition to "objectify" a gene or human organs as these are living and sacred manifestations of the ancestors...

The use of whakapapa as a means of conceptualising information therefore has at least a *dual* purpose. Firstly, it reinforces the relationships between everything in

the world and the universe - including the direct links which humans have with our environment. Secondly, whakapapa preserves practical and traditional information from generation to generation.

Consequently, the direct and strong relationship between Māori and our environment dominates our perception of the world, our role in it, and forms the basis of our tikanga (prescriptive rules) for the use of resources in the environment.³²

...materials are [therefore] available for use, but must never be regarded as mere means... Māori traditions give man a degree of dominance over nature... But man is also kin to the rest of nature..."

The relationship described above which Māori traditionally had with physical and tangible objects is the same for intangible resources - i.e. our collective indigenous knowledge.

Comment

The traditional Māori view that we are connected genealogically with our planet and its resources contrasts with the view of the philosophers (Grotius, Pufendorf and Locke) which portrays humans as having been created independently of and divorced from their environment and unaffected by its degradation.³³ This, combined with the theory that the earth was 'given' to mankind to consume (according to Grotius), or to subdue (according to Locke), results in a lack of affinity with the earth and its resources which manifests in market-driven societies as objectification, commodification and commercialisation of things.

Such objectification and commodification is incompatible with traditional Māori views and practices, and in this writer's opinion prevent producers and consumers in market societies to perceive the inherent value that things have over and above

³¹Aroha Te Pareake Mead "Genealogy, Sacredness, and the Commodities Market" (1996) 20 Cultural Survival 46.

³² Above n 27, 98-99.

³³ *Horizon: Icon Earth* (Channel One, Television New Zealand, 8.00am, 31 July 1997).

the extent to which they can satisfy human wants and needs. It therefore impedes them from recognising and appreciating the harm that Māori feel is done to their indigenous knowledge, such as in the MacDonald's case given above. The following commentary about the Human Genome Diversity Project provides another example:³⁴

The HGDP has already begun dehumanising us by labelling us "Isolates of Historic interest". Once human beings are depersonalised, it is easier to go about destroying them or allowing them to be destroyed...

However, further analysis of Locke's view, for example, reveals more parallels with traditional Māori and indigenous world views than initially supposed. Locke did believe, in contrast to our traditional views, that Nature belonged to mankind. At the same time he acknowledged the reasonableness of "every man [having] a "property" in his own "person"³⁵ or, in other words, the *unreasonableness* of including "people" in the pool of natural things that could appropriately be carved out of the 'collective' and made private "property". Traditional Māori also held this belief, *and* we extended it to apply to all things in the natural world (such as plants and animals). This was facilitated via our *personification* of things in the natural world, and the reason we did this was because of the relationship we perceived we had with those things, through whakapapa. Therefore, we maintained a view that it was unreasonable or unthinkable (all other things being equal) to consider humans as having 'property' over things in nature or over other humans.

It should be noted here that traditional Māori did have a range of personal effects including such things as clothing, earrings, pendants, haircombs, etc. However, this writer argues that traditional Māori did not presume the authority (as of right and as some fundamental first principle or rule of nature) to exploit and improve things in nature for human use as Locke suggests of mankind. This way of traditional Māori thinking is illustrated in the following example:³⁶

³⁴ M Solomon *Intellectual Property: Speech Notes for Institute for International Research Conference* (Auckland, 24-25 February, 1997).

³⁵ Ref. P10 - Locke's Reliance on the Mixing of "Labour", above.

³⁶ Above n 27, 97.

The most commonly used material in traditional Māori weaving is *harakeke* or flax. ...today's Māori are related to *harakeke* and all the other plants: Tane is their common ancestor. ...On the other hand, as a descendent of the victorious Tu [the God of War, Tumatauenga], a Māori is able to make use of the descendants of Tane. Use is permitted, sanctioned by Tu's defeat of Tane, but it must be respectful use...

Furthermore, it was not uncommon for an individual to first acknowledge a resource before removing it from its natural state and explicitly seeking permission from the Gods for its use. In some instances, this was achieved by *karakia* (prayer or incantation) or other ritual.

THE INHERENT SACREDNESS/ INTEGRITY OF ALL THINGS

As Margaret Mutu puts it³⁷:

...the most basic aspect of Māori culture which distinguishes it most sharply from that of Europeans is that it puts spiritual and communal matters ahead of material and individualistic needs.

Veronica Jacobsen writes that "[indigenous] Spirituality and sacredness are interconnected with resources in ways which do not fit Western concepts."³⁸ This is reflected in the traditional Māori world that the process and products of creation all are sacred; they are all valuable in and of themselves. Their sacredness and value existed before humans, or their needs, wants and desires ever appeared on the scene, and will continue to do so after we are gone. Aroha Mead also states that:³⁹

Central to indigenous cultures is a profound respect and understanding of sacredness. ... "Believing in the sanctity and integrity of life even in its smallest form...All life forms should be treated in a way that respects their *intrinsic* value as

³⁷ Above n 27, 12.

³⁸ Veronica Jacobsen *What is the Best Mechanism To Recongnise and Protect the Claims of Indigenous Peoples to Plants and their Knowledge of the Use of Plants? - No. 94/2, Working Papers in Economics* (Department of Economics, The University of Waikato, Hamilton, 1994) 17.

³⁹ Above n 31, 46.

living generational manifestations of creation" (Treaty for a Life forms Patent-Free Pacific, 1995). ... The call is the same -nature and living things, tangible and intangible, all are sacred [my emphasis added].

In one sense, to understand the concept of 'sacredness' for traditional Māori is simply to understand what it means to respect the things in nature as wondrous marvels of creation. Māori believe that everything has its own 'mauri' ('energy' or 'life force') "by which all things cohere in nature".⁴⁰ Given this, one can begin to comprehend the relationship that Māori hold with our environment. Other indigenous peoples share similar experiences. Posey argues that⁴¹:

"Property" for indigenous people frequently has intangible, spiritual manifestations, and, although worthy of protection, can belong to no human being. Privatisation or commoditization of their resources is not only foreign but incomprehensible or even unthinkable.

Comment

This aspect of the traditional Māori world view does not seem to share any significant common ground with Grotius', Pufendorf's or Locke's theories of property. The focus of these philosophers' world views appeared to be that the world was given to mankind for our use and to alter as we see fit. Whether those resources had an inherent integrity which required that conditions of their use be defined and adhered to by potential users does not seem to be a significant matter for Grotius, Pufendorf or Locke. They would, perhaps, see nothing wrong with Mr Parore's request (in the example given at page X above) that his name be pronounced Pah-roar-ree. In contrast, Māori appreciative of traditional views and values would understand how compliance with such a request would breach the sacredness and integrity of that name.

From a traditional Māori perspective, intellectual property law fails to protect our knowledge in a fundamental way: for Māori and other indigenous communities our knowledge has an *inherent* value due to its integrity and sacredness. Its value is

⁴⁰ Above n 26, 116.

⁴¹ Above n 27, 46.

not derived solely or primarily from its economic utility; our traditional knowledge did not evolve as a result of 'economic incentive'. Yet the overriding objective of intellectual property law is to protect individual's rights to exploit their knowledge and receive the commercial benefits associated with that exploitation. Many Indigenous peoples *do* wish to take advantage of commercial opportunities and to share their knowledge with others - if it can be assured that such knowledge will be appropriately used and protected.

In addition, what protection intellectual property law does offer is only temporary. This will not suffice with regard to indigenous knowledge. The sacredness of knowledge is not bound temporally; the inherent integrity of knowledge does not wane after any amount of time, let alone a term prescribed by another culture.

Intellectual property law does acknowledge that certain uses of intellectual property may be inappropriate. For example, section 17 (1) of the Patents Act 1953 states:

- (1) If it appears to the Commissioner in the case of any application for a patent that the use of the invention in respect of which the application is made would be contrary to morality, the Commissioner may refuse the application.

However, this writer asks, to what extent does the concept of morality (bound within the 'market' framework of intellectual property) incorporate or recognise indigenous values, rights, interests and concerns as opposed to the market-driven values, rights, interests and concerns? And what would be the outcome for indigenous peoples in the likely event that their values, etc, competed directly with market and economic considerations on issues of 'morality'? Would indigenous peoples succeed in their case? One can only speculate.

However, there are many areas of intellectual property law which offer only strictly defined 'morality' provisions. For example, in terms of the Copyright Act 1994, section 94 (1) (a) states that:

The author of a literary, dramatic, musical, or artistic work that is a copyright work has the right to be identified as the author of the work.

Taking the example of the use of the heitiki image in the MacDonald's case, it would appear that had the MacDonald's 'mat' been copyrighted Māori would have no recourse under section 94(1)(a) for voicing or addressing their concerns about the inappropriate use of that image. Even where recourse exists, however, given that the values and world-views of market society and indigenous peoples seem to differ on such fundamental levels, the possibilities that indigenous peoples would *not* be successful in arguing their case seem significant.

CREATION AS AN ONGOING PROCESS

Rev M Marsden has described the Māori world view in this way:⁴²

...the Māori perceived the universe as a "Process"... a world comprised of a series of interconnected realms separated by aeons of time from which there eventually emerged the natural world. This cosmic process is unified and bound together by spirit.

This account of Māori cosmogony is supported by Dr M Roberts, Dell Wihongi and others, who note that "...the universe is holistic and dynamic; there is within it [an] ongoing process of continuous creation and recreation."⁴³

This is in stark contrast to how western cultures relate to their environments which, in their view, are assumedly comprised of "indestructible atoms of solid matter and conforms to strict mechanical laws in an absolutely predictable manner".⁴⁴ In short, Māori and western views are polarised on this front:⁴⁵

...The ease with which western scientists are able to deconstruct objects and then treat each component part as independent of its counterparts is not readily acceptable to the Māori mind. ...the whole of nature exists in a delicate balance of life which ought not to be disrupted unnecessarily. ...Transgenic research involving the introduction of human genes into non-human species [is] considered reprehensible and offensive by most Māori... This reductionist mentality is reflected

⁴² Above n 27, 88.

⁴³ Above n 27, 91.

⁴⁴ Above n 27, 96.

⁴⁵ Above n 27, 145-146.

in Pakeha 'laws' which divide up and apportion exclusive rights in objects to individuals. ...Even if an acceptable consent procedure is developed, there still remains the question as to how many and who has the right to give consent to research which could affect the wider collective.

Comment

The traditional Māori world-view that creation is ongoing reflects the difficulty that Māori also have in identifying the *source* of their indigenous knowledge. Intellectual property law is an acknowledgement of Locke's theories on the mixing of labour with things in the natural world, suggesting that it is a relatively simple task to identify the creator of things. But for much of traditional knowledge its author or "first creator" is not known. Jacobson writes:⁴⁶

[Intellectual property rights] are designed to protect identifiable individual innovations, not communal knowledge. Traditional knowledge is usually the result of the contributions of many people over a long period. Generally the identity of the originators is unknown, and if known is ancient. Although some individuals within a community, such as traditional healers, may have specialised knowledge, they do not have the right to sell that knowledge commercially.

In other situations, authorship or creation is not attributed to natural persons:⁴⁷

In Western societies, the creator of a new song is usually an individual who automatically becomes its owner... In a traditional society, however, the "creator" may attribute "authorship" to a member of the spirit world.

While the attribution of authorship in this indigenous sense is no less legitimate than that which occurs in a market society, this can be somewhat problematic for indigenous peoples who wish to gain access to intellectual property protections! While the inability to conform with intellectual property requirements (in terms of

⁴⁶ Above n 38, 17.

⁴⁷ DA Posey and G Dutfield *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous People and Local Communities* (International Development Research Centre, Ottawa, 1996) 60.

identification of the creator) impedes access for Māori and other indigenous peoples to those protections, there is also another issue to address:⁴⁸

Although some individuals within a community, such as traditional healers, may have specialised knowledge, they do not have the right to sell that knowledge commercially.

EMPHASIS ON 'PERMITTED USE' AND 'DUTIES' RATHER THAN 'OWNERSHIP RIGHTS'

Another point to note regarding Māori knowledge is that our traditional system of values and beliefs did not allow for a sense of 'ownership' of resources in the market sense. This has been an issue of some contention in the context of Treaty of Waitangi claims.

Many Māori claim that they have suffered prejudice and loss as a result of Crown actions, policies and/ or omissions regarding resources which have been depleted, confiscated or otherwise detrimentally affected. In an attempt to establish the basis for such grievances, these claimants have provided evidence of 'rangatiratanga' or 'control and authority' over resources. Often the Crown has attempted to undermine these claims by stating that the claimant's ancestors did not, in fact, have a concept of (market) 'ownership'. From this, the Crown reasons that the claimant's ancestors had no 'ownership' rights in regard to resources associated with the claim, and that the claimant therefore had no case against the Crown.

However, in presenting their case in this manner, the Crown relies on the false assumption that there is, somewhere 'out there', only one 'correct' way in which people and communities relate to their environment, and that the system of 'ownership' familiar to the Crown is the only system that holds any authority; that other cultural frameworks are unworthy of recognition.

In employing such an argumentative line and relying on the mere assumption that the market society system of 'ownership' somehow applied universally, the Crown

⁴⁸ Above n 38, 17.

risked creating an appearance of itself as arrogant and ethnocentric. It is obvious that the values and beliefs of indigenous peoples were different to those of the market world, as evidenced over the centuries by encounters between the two cultures.

In the context of such Waitangi Tribunal hearings, it could be argued Māori and the Crown present evidence about two different concepts: while the Crown speaks of 'ownership', Māori speak of 'rangatiratanga'. For traditional Māori (and indeed, for Māori today) rangatiratanga referred to a complex system whereby they were permitted to use resources primarily for survival purposes, and had corresponding duties as 'kaitiaki' or 'guardians' to maintain and protect these resources. For example, in the Ngai Tahu Sea Fisheries Report, the Waitangi Tribunal considers Crown evidence that the claimants did not "own" the sea and its resources:⁴⁹

...At the same time, as Dr Morton and messrs Molloy and Anderson have pointed out, there is no evidence that Ngai Tahu claimed ownership of the creatures in the sea, be they whales or any other species. We do not find this surprising. Whales, like fish, were in Maori terms the children of Tangaroa, they were not owned as property. They were an essential part of the natural world, a resource made available to the tribe, through beaching or for smaller whales through capture. Ngai Tahu did not see themselves as owning whales, or any fish for that matter, as they swam freely in the sea. While the mana of the tribe was seen as extending over their taking and use, this did not imply ownership of the sea, or of sea mammals or fish, but it did reflect the exercise of rangatiratanga over the resource.

Another example is given of a greenstone tiki which, over 30 years, was successively buried with the "ancestors" (presumably with the one who had worn or been affiliated with it) and then dug up to be worn by the living.⁵⁰ This illustrates the absence of a strict market sense of ownership, and the emphasis Māori placed on intergenerational links.

Comment

⁴⁹ Chapter 3.9.21.

⁵⁰ TK Penniman (ed) *Makereti: The Old-Time Māori* (New Women's Press, Auckland, 1986) 11.

The distinction between the concepts of rangatiratanga and ownership of resources and knowledge seems to reside firstly in the fact that Māori historically did not focus on 'economic incentive' as the basis for their relationship with those resources and their knowledge. However, iwi and hapū did have a custom of trading and exchanging resources with other iwi and hapū (for example, food and raw materials), so the commercial practices of the settlers and colonists were not completely foreign to us in the early stages of our exposure to the market society. What characterised our traditional relationship with our environment was the belief first and foremost, that the resources and knowledge was ours to *protect*, and to use for sustenance and survival.

As the focus of intellectual property laws are on ownership and exploitation rights rather than duties of protection, the issue must necessarily arise whether the protections offered will adequately satisfy the needs of indigenous peoples.

NO DISTINCTION BETWEEN TANGIBLE/ INTANGIBLE

Finally, in terms of its value and protection, Māori do not differentiate between knowledge as an intangible resource and other tangible resources. All are valued equally, which in turn requires that all must be equally protected.

As for other indigenous cultures, the value of both knowledge and natural resources in traditional Māori culture stemmed *fundamentally* from the need to survive: for example, we needed to know where local food sources are, how to build shelter, etc. However, Māori culture was traditionally oral - although we recorded ideas and communicated through whakairo (carvings), tukutuku (lattice-work), moko (tattoos) and other forms, we had no written language. And even though in this day and age we are able to record ideas and communicate them in writing, we still treasure highly those aspects of our oral, *intangible*, culture which make us unique - the ability to kōrero (converse daily in the Māori language), to waiata (sing our traditional songs), to whakaako (educate and transmit information).

Western culture, on the other hand, does distinguish between knowledge (intangible) and tangible objects. As McNeill writes:⁵¹

...tangible objects possess an economic value as a natural quality. This value being, for example, an expression of the quality of natural scarcity. Knowledge, however, being intangible and incapable of exclusive possession isn't be nature scarce. Given this, it possesses no natural value. In order for it to acquire value, therefore, a scarcity must be artificially (socially) attributed.

le. the market-driven society. It is as if the creators of these laws have deemed them to be universally applicable. Indeed, they are not.⁵²

The [intellectual property] right is based on certain presuppositions and values and in practice these are taken to have a universal validity; but to what extent do these reflect Maori values? For example, the law works by creating an economic value in knowledge - by facilitating the commodification of various kinds of objects - but is this an acceptable treatment of knowledge for Maori? Also, the law assumes that the greatest social utility follows from the creation of individual and primarily economic rights in knowledge - how valid is this assumption? Such questions are obscured to the extent that the law is treated as a given entity, beyond question or contest.

The discussion has shown that in many ways the traditional Maori world view - and those of other indigenous peoples - seems incompatible with the values and beliefs of the philosophical underpinning of intellectual property law. Indigenous peoples, Maori included, exercise a different relationship with their knowledge to that which is reflected in intellectual property law: we value our knowledge in ways that do not appear to be acknowledged in the protection mechanisms offered under that legal regime.

A new and improved system of knowledge protection is required which recognises and reflects the differences between both market-driven societal concepts and indigenous peoples' concepts about the nature of our relationships with knowledge, the difference in our values and beliefs, and our interests which need to be met in terms of the protection of that knowledge. This needs to occur

⁵¹Above n 25, 30.

CONCLUSION

Intellectual property law codifies what is supposedly an acceptance or agreement of a particular 'community' about the conditions under which knowledge can appropriately be carved out of that 'common' pool of resources for private ownership according to "Natural law". Intellectual property law does not define the 'community' upon which acceptance and agreement its provisions are based - i.e. the market-driven society. It is as if the creators of these laws have deemed them to be universally applicable. Indeed, they are not:⁵²

The [intellectual property] right is based on certain presuppositions and values and in practice these are taken to have a universal validity; but to what extent do these reflect Maori values? For example, the law works by creating an economic value in knowledge - by facilitating the commodification of various kinds of objects - but is this an acceptable treatment of knowledge for Maori? Also, the law assumes that the greatest social utility follows from the creation of individual and primarily economic rights in knowledge...; how valid is this assumption? Such questions are... obscured to the extent that the law is treated as a given entity, beyond question or contest.

The discussion has shown that in many areas the traditional Māori world view - and those of other indigenous peoples - seems incompatible with the values and beliefs of the philosophical underpinnings of intellectual property law. Indigenous peoples, Māori included, exercise a different relationship with their knowledge to that which is reflected in intellectual property law: we value our knowledge in ways that do not appear to be acknowledged in the protection mechanisms offered under that legal regime.

A 'new-and-improved' system of knowledge protection is required which recognises and reflects the differences between both market-driven societal concepts and indigenous peoples' concepts about the nature of our relationships with knowledge; the difference in our values and beliefs; and our interests which need to be met in terms of the protection of that knowledge. This needs to occur

⁵² Above n 25, 41-42.

not only for the protection of indigenous knowledge, but also to ensure that the indigenous cultures themselves survive intact through to the next century, and beyond.

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