A culture may change and adapt to new circumstances, as it has been noted. There comes a point, however, when it suffers violence and loses the distinguishing qualities needed for identity to remain intact. For this reason, it would have been preferable for the Court to have undertaken an interpretation more consistent with tradition. It would have been more desirable still for the parties to these proceedings to have resolved the issues without recourse to litigation - either between themselves or at a political level, between the Treaty 'partners'.[8] If any measure of control over the shape of Maori tikanga [9] in law is to be had, litigation of this sort should be the last resort.

*A. Kawharu*
*(Nga Puhi, Ngati Whatua)*

**Whaia kia tata**
**Whakamaua kia tina**

## A Time For Change: Intellectual Property Law and Maori

> The current flurry about the appropriation of Native culture is not new. It may be newsworthy .... But the issue of cultural appropriation and awareness of this by First Nations began when the first Europeans arrived.[1]

This quotation raises three issues of paramount concern to indigenous peoples globally. First, that indigenous cultures and their heritage are in the process of being appropriated and exploited by non-indigenous parties via legal mechanisms such as GATT:TRIPS. Second, that this process is not a new phenonomen, rather it has occurred ever since the arrogance of the imperialist colonising nations of Europe first came to indigenous lands. Third, that because such appropriation has become so profitable and popular — and hence so newsworthy — cessation is unlikely.

### Indigenous Intellectual and Cultural Property

Indigenous intellectual property has no universally accepted definition. Nonetheless, indigenous peoples world-wide have asserted their right of tino rangatiratanga (self-determination) to define what "indigenous intellectual property" means to them as distinct peoples and cultures.

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8 Through the alternative dispute resolution procedures in place for fisheries settlement issues.

9 Custom.

1 Todd, 'Notes on Appropriation' (1990) 16:1 Parallelogramme 24 at p 26. Cited in Pask, 'Cultural Appropriation and the Law' 8 I.P.J. Dec 1993, 57, 60.

With the establishment of the Working Group on Indigenous Peoples (WGIP) by the United Nations in 1982, an international forum was created in which indigenous peoples world-wide could express their concerns. One significant result has been the *United Nations Draft Declaration on the Rights of Indigenous Peoples*. Article twenty-nine of this document states that indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

Erica Irene-Daes, chairperson of the WGIP, notes that "the distinction between cultural and intellectual property is, from indigenous peoples' viewpoint, an artificial one."[2] She also states that the distinction between cultural, artistic or intellectual property is inappropriate for indigenous peoples as it implies different levels of protection for different elements of heritage. Instead, Irene-Daes prefers to categorise all intellectual or cultural property in to the collective 'heritage' of each indigenous people: [3]

> Heritage 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.

## Maori Intellectual Property

Daes' opinions find support amongst New Zealand's own indigenous legal commentators. Of particular note is Aroha Te Pareake Mead (Ngati Awa, Ngati Porou) who points out that the tangible and intangible aspects of property — that is, the cultural and intellectual aspects — are traditionally encompassed in Maori culture under the one concept — *taonga*. This demonstrates that the Maori, and indeed indigenous, understanding of property is holistic. The one concept — 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 from, one another. "Misappropriation of physical indigenous taonga (assets) therefore, is wholly related to misappropriation of indigenous knowledge." [4]

Another leading and perceptive commentator on indigenous intellectual property issues is Moana Jackson (Ngati Kahungunu). In one of his many contributions to this debate, he selects the Antiquities Act 1976 to illustrate how Western jurisprudence fails to recognise the broader scope of Maori intellectual property. He states:[5]

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2 Irene-Daes, 'Study of the Protection of the Cultural and Intellectual Property of Indigenous Peoples', Item 14 of the Fortyfifth Session of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. (E/CN.4/Sub.2/1993/28)

3 Ibid.

4 Mead, 'Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation', Otago Bioethics Report 3(1) Feb 1994: 4-7.

5 Jackson, 'The Details of, and Dangers to, the concept of Indigenous Intellectual Property', Conference paper presented to Te Pupuri i Nga Taonga Tuku Iho a Nga Tupuna.

> [The Act] defines and controls the concept of protectable cultural property in a way which proscribes indigenous thinking and inhibits the acceptance of a more inclusive idea of indigenous intellectual property.

As far as any definition of indigenous intellectual property or heritage is concerned, Jackson regards it simply as all the knowledge developed, and to be developed, by the people themselves. It is taonga in its broadest sense.

Traditionally, protection over taonga was achieved through *tapu.* Tapu existed in differing degrees of strength which varied accordingly to the subject-matter in question. The nature of tapu is that it does not have a definite life span. Therefore, there was no pre-determined, finite period in which tapu would operate over knowledge, protecting it. The suggestion 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.

## Reform and Alternative Frameworks

The direction to be taken in ameliorating the inadequacies of the current intellectual and cultural property regime will depend on the aim to be achieved. Should such a regime exist to protect Maori intellectual property, or merely regulate its use?

The establishment of alternative frameworks may take one of either of two directions. First, it can seek to *reform* the current regime by amendments to existing structures and practices. One suggestion has been the establishment of an inter-tribal Maori Intellectual Property Commissioner.[6] The Commissioners responsibility would be:

(i) to hold in trust all Maori intellectual property not identified as belonging exclusively to individual tribes;
(ii) to allocate to tribes annual returns on registration and development fees;
(iii) to advise both the Government and the Commissioners of Copyrights, Patents etc on policy relating to these issues.

Having established the Commission, the law could restrict all non-entitled persons from the right to Maori intellectual and cultural property unless a licence was obtained from it or the appropriate iwi, hapu or whanau in question. 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/Te Tiriti.

6 'Detailed Scoping Paper on the Protection of Maori Intellectual Property in the Reform of the Industrial Statutes and Plant Varieties Act' (Part IV) Nga Kaiwhakamarama I nga Ture, April 1994.

However, the view has been expressed that: [7]

> [S]ubjecting indigenous intellectual property to the current legal regime will have the same effect on indigenous peoples' identities as the individualisation of land ownership had on individual territories: "fragmentation into pieces, and the sale of the pieces, until nothing remains".

The alternative is to look at the wider picture and seek to cure the problem at it's root. Inevitably, this infers the need for *constitutional change.*

In seeking a solution, we should recognise that the situation is an interaction between 'legal systems' with different organising principles, not a demand made of the law by a special interest group. We should understand that the objective is to establish an alternative framework in which taonga Maori are adequately protected against unwanted appropriation and exploitation. Next, we should realise that the issue is control. Maori must be able to determine the appropriateness of the use being made of our cultural heritage. To permit otherwise would be to deprive Maori of their identity.

The challenge for the domestic and international communities is to acknowledge that Maori and other indigenous peoples have their own perspective of what intellectual and cultural property are and to recognise why such taonga should be protected. It is clear that the law must break from it's traditional intention to assimilate indigenous cultures into western legal paradigms.

In order to prevent further harm to Maori culture, the power to define, control and protect that culture must be recognised to reside in Maori alone. In terms of te Tiriti/the Treaty, Maori must be recognised as possessing the "full, exclusive, and undisturbed" right to exercise tino rangatiratanga over all their taonga. This, it is submitted, can be achieved. Moreover, it is not something that should be viewed as separatist. The fact that Maori seek to preserve that intellectual and cultural property — and thus Maori heritage generally — should be seen as a something positive for all who choose to live in Aotearoa.

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7 Supra at note 3.