

INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS

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I. INTRODUCTION

In an increasingly globalised trading environment, businesses are seeking not only markets but also sources of innovation in and from the world's indigenous peoples.¹ Indigenous peoples, individually (by person and by people) and collectively, are, not surprisingly, seeking to protect their resources and their heritages.² A recent focus of their attention has been the use of intellectual property law for such protection and calls have been made to include cultural heritage protection in both the international and domestic schemes of intellectual property law. The reaction of intellectual property lawyers and bodies, however, has not been entirely favourable and indigenous claims have met with some difficulty. I suggest that part of this difficulty stems from the different perceptions that the two groups have of the content and context of intellectual property law.

The requirements of indigenous peoples, for example, are heritage protection for the survival of the distinct culture of the peoples concerned, rather than principally being concerned with monopolies or gaining the economic benefit of commercial exploitation.³ However, the principal

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¹ See, eg, in the USA: Carroll, AE "Not Always the Best Medicine: Biotechnology and the Global Impact of US Patent Law" (1995) 44 *American Univ LR* 2433; Hut, MJ "Indigenous Peoples and Drug Discovery Research: a Question of Intellectual Property Rights" (1995) 89 *Nw U L Rev* 1678; Peterson, K "Recent Intellectual Property Trends in Developing Countries" (1992) *Harv Int'l L J* 277; Yano, LI "Protection of the Ethnobiological Knowledge of Indigenous Peoples" (1993) 41 *UCLA L Rev* 443.

² See Section II, *infra*. See also submissions to World Intellectual Property Organisation of the African nations, *infra* note 46 and accompanying text; and "Stopping the Rip-Offs. Intellectual Property Protection for Aboriginal and Torres Strait Islander People," discussion paper, Australian Attorney-General's Department (1994, 15 pp).

³ As characterised by Moutsakas, indigenous peoples' cultural property tends to be "property for grouphood," and promotes group development and flourishing. See Moutsakas, "Group Rights in Cultural Property" (1989) *Cornell L Rev* 1179 at 1185.

purpose of intellectual property rights for their proprietors is control of commercial exploitation. Thus the different property rights require to be monopoly rights, for the time for which they exist.

Indigenous requirements are often directed to protection of ideas or styles; whereas there is no property in an idea in current intellectual property law. The intellectual property rights which do exist flow from a particular expression, manifestation, or application of an idea. Indigenous requirements are also characterised by a desire to restrict release of culturally important material into the wider world.⁴ This is as opposed to the policy supporting the recognition and enforcement of national and international intellectual property rights, which is that the grant of monopoly rights, limited in duration, promotes the early release of innovation and creative work.

In this article I describe the existing intellectual property regime, the indigenous calls for protection and (mis)perceptions of current intellectual property law, and the international reaction to these claims. Finally, I suggest that, despite the different perceptions of the aims of intellectual property protection, there are some extensions of existing law that could properly and effectively accommodate the wishes of indigenous peoples in the protection of such things as traditional remedies, recipes, and rituals, as well as allowing development and commercial benefit. However, any greater or more extensive protection will first require the implementation of a very different system from that which presently exists.

II. EXISTING INTELLECTUAL PROPERTY REGIMES

1. Property and ownership

It is important to recognise that intellectual property law worldwide centres on essentially European concepts of “property”. Some European concepts of property evident in intellectual property law are that:

- ◆ property is in some legally definable thing, tangible or intangible;
- ◆ property is not limited in time separate from the time during which the thing exists;
- ◆ property is held by some identifiable legal person or persons as owner;

⁴ UNESCO Special Rapporteur report, *infra* note 29.

- ◆ property is capable of being alienated from one owner to another;
- ◆ property is concerned with the allocation rather than the use of resources;⁵
- ◆ property is a relation between the owner and other people in relation to things.⁶

Ownership of property implies rights to alienate, modify, assign for a limited period, and even destroy the property right. It is important to note that the ownership is of the right, which is not necessarily the same as the thing itself. There are thus layers of ownership inherent in the concepts. For example, the “full” owner of a thing can create a lease in it, and the lease then can have a separate owner. The subordinate ownerships are of subordinate property.⁷

Waldron⁸ observes that ownership is a term “peculiar to systems of private property.” However, ownership, being transferable from one owner to another, can be limited in time for any one owner. Ownership in the general sense of the ability for someone, anyone, to own, is more the idea that we try to convey using the word “property,” or at least the expression “property in.”

The thing, the property, and the ownership, are all three capable of independence. The three relate and are linked by notions of control and rights. Those notions are imposed or implied by law. The controls and the rights are all exercisable by legal persons and by governments.⁹

⁵ See generally Waldron, J “What is Private Property?” (1985) 5 *Oxf Jnl of Legal Studies* 313; also Waldron, *The Right to Private Property* (1988), at 31.

⁶ See Cohen, “Property and Sovereignty” (1927) 13 *Cornell L Q* 8, at 12.

⁷ In the example of the lease, the lessee as owner of the lease can terminate the lease by agreement, can assign it, can sublease it (ie lease the lease), but can do no more with the thing being leased than the lease itself permits. The lease can be terminated for reasons extraneous to ownership of the thing being leased - such as arrival of the end of the lease’s term or non-payment of rent - and thereupon the property in the lease comes to an end, without affecting the property in the thing itself. Property in the leasehold interest continues as long as the lease does, no more but no less; a shorter property interest given by the lessee on the same terms as the lease is a sublease, which has its own property in it.

⁸ Waldron, *supra* note 5.

⁹ Although, note that where the rights are held and exercised by governments, they are still private law rights; see Declarations to the text of GATT/TRIPS: “*Recognising* that intellectual property rights are private rights”.

Different municipal legal systems define in their own terms just what rights are enshrined in and flow from property and ownership, and the extent to which the rights grant control and are subject to external controls. In my discussion in this article, therefore, unless otherwise expressed I use the term “rights” in the restricted sense of defined legal rights rather than some more general sense of that which is good and proper. Even then, usually what I will discuss are rights attaching to ownership, proprietorship, and property. The discussion is about intellectual property rights. The global legal system is very clear on what those rights are, since they have been defined for decades.

III. INTELLECTUAL PROPERTY RIGHTS

As mentioned above, under current intellectual property laws there is no property in an idea. The property is of a particular expression, manifestation or application of an idea. The purpose of protection is to control commercial exploitation, and the policy is that such intellectual property rights promote creative work and public release of its products.

Current measures for the protection and exploitation of intellectual property rights worldwide stem from three significant international conventions concerning intellectual and industrial property.¹⁰ There are four broad areas of formal intellectual property right protection: trademarks and service marks; design rights; patents; and copyright. All four allow for their own set of monopoly rights in use and exploitation, and all four prescribe time limits for which their own monopolies run. In addition, all four provide for systems of ownership and subsidiary rights, assignment, and different levels of property interest. There is increasing convergence between domestic legal systems and the international norms as expressed in the intellectual property conventions and the updates of the international conventions.¹¹

¹⁰ The Paris Convention for the Protection of Industrial Property 1883 (current version the Stockholm Text 1967), for patent, trademarks and service marks; the Berne International Convention for the Protection of Literary and Artistic Works 1886 (current version, the Paris Text 1971), for copyright; and the Universal Copyright Convention 1971. Also of significance are a number of other more specific conventions, such as the Rome Convention for the Protection of Producers of Phonograms and Broadcasting Organisations 1961.

¹¹ See generally and for a local example in Australasia, the discussion in Brown, A “Intellectual and Industrial Property” [1996] NZ Law Review 125 at 125-128 and particularly the comments as to the GATT/TRIPS-stimulated reforms.

1. Trademarks and Service Marks

Trade and service marks are distinctive symbols used to authenticate the particular product or service which a manufacturer or provider is releasing into a market. The mark is meant to serve as a method of verifying origin, and can also be a powerful marketing tool in the differentiation of products and services from those provided by commercial competitors of the manufacturer or provider. Differentiation in the market is a prized objective of many marketers, particularly where there is a wish to project an image of high quality.

The rights to use trade marks and service marks are conferred through registration systems. Acceptance for registration revolves around the distinctiveness of the mark, its use and potential use in a market, and in some jurisdictions prior established use and reputation. Breach occurs by use of someone else's mark after registration. The world-wide registration systems depend on international treaty and convention arrangements for their enforcement.

2. Design Rights

The local definitions and exercise of design rights vary to some extent, but again depend on a registration system. In order to register a design, the applicant must demonstrate the exercise of artistic endeavour and originality. Questions of style do not come into consideration, as the originality may be and often is within some recognised style or genre.

"Design" is interpreted in many jurisdictions to be purely artistic embellishment, though it would appear that the tide is turning so that the majority of countries with design legislation will accept for registration items of industrial or applied design. Breach occurs by use of someone else's design after registration. The world-wide registration systems again depend on international treaty and convention arrangements for their enforcement.

3. Patents

Patents are created through another system involving rights granted and held, and exercisable, pursuant to registration. The system had its origin in the English Crown grant of monopolies by letters patent. Patenting depends on invention of novel items, objects, and processes which have

proven utility. They have to be able to work.¹² Patented inventions have to have had their novelty, and their effectiveness to perform their design task, demonstrated before acceptance for registration.

That is not to say that the design task has to be of any particular utility or benefit to society, and a patent holds good even if the invention turns out to have some entirely unexpected useful application.

The patent holds good against subsequent entirely independent invention and application of the same thing, and the monopoly rights give a time typically of 20 or 25 years from grant or sealing of the patent, together with interim protection while a patent application is being processed.¹³ This is an illustration of the commercial function of protection.

Breach occurs by use or application of the patented invention after registration. As for the specific intellectual property protection systems discussed above, the rights are created by statute and international convention, carry rights of assignment and use together with enforcement, and are applicable overseas in other Convention countries upon creation of the right by registration in the country of origin.

4. Copyright

Copyright is its own thing to a much greater extent than are the other three classes of intellectual property protection. There are several points of difference in the schema of copyright compared with those for the other three classes.

- ◆ Copyright exists by virtue of the creation of an original work. The registration regimes present in some countries are not essential, and many countries — including Australia and New Zealand — do without any form of registration system for copyright.
- ◆ Copyright, except in respect of some of the rights which flow from it, does not have to be asserted in any way unless local legislation calls for claims of copyright to be expressed.

¹² For example, in New Zealand, no punter's betting system has been patented although applications have been made. However, computer software patent applications have been accepted. The Hughes Aircraft Corporation decisions by the New Zealand Patent Commissioner on 3 May 1995 were the first examples of this; see Moon, K "Software Inventions Now Patentable in New Zealand" [1995] EIPR 203.

¹³ Hence the description "Patent pending."

- ◆ Copyright has many more layers of rights and potential property interests than do the other forms of intellectual property protection.
- ◆ Copyright can be extended conceptually to overlap considerably with each of the other three systems. In New Zealand, copyright has almost superseded design rights, for example.¹⁴
- ◆ Copyright is still a monopoly right, but there are different types of copyright.¹⁵
- ◆ Copyright may still exist in a work which infringes someone else's rights.
- ◆ Copyright can subsist in different renditions of the same thing.¹⁶
- ◆ Copyright grew out of protection of artistic and literary endeavour, but in some countries and in particular in the common law world aesthetic judgement is not applied to determine the existence of copyright.

Copyright applies to all sorts of expressions of creativity. Literary works (with which copyright had its origins), artistic works, works of artistic craftsmanship, architectural works, plans, performances, broadcasts, and computer software are all within the protections provided by copyright.

The international systems for copyright protection also arise out of treaty and convention arrangements. Breach of copyright occurs where the material in question is copied without permission; and proof of copying in some form or another, direct or indirect, is an essential element of a successful claim for breach of copyright.

¹⁴ See, e.g., Thomas J in *Franklin Machinery Ltd v Albany Farm Centre Ltd* (1992) 23 IPR 649 (a case concerning farm gate latches, where His Honour recognises the place that copyright has come to take in New Zealand copyright law, but is critical of the extension the principles have been given so as to cover the most basic and utilitarian of articles). A three-dimensional item can infringe copyright in a two-dimensional plan, and a two-dimensional plan can infringe copyright in a three-dimensional object.

¹⁵ For example, Crown copyright in statutes and court judgments in the common law of the British Commonwealth; see Monotti, A "Crown Copyright" [1992] EIPR 305.

¹⁶ For example, an edited version of a trial transcript: *Warwick Film v Eisinger* [1969] 1 Ch 508.

IV. INDIGENOUS CLAIMS

Indigenous peoples have made various claims to protection of their intellectual property, in both domestic and international fora. For example, in New Zealand, at the domestic level, Maori currently have a pan-tribal claim before the Waitangi Tribunal for ownership of rights in relation to New Zealand's indigenous flora and fauna, including intellectual property rights arising from those resources, as well as cultural and intellectual property generally and moveable cultural property.¹⁷

At the international level, indigenous peoples have been organising and pressing their claims at various international fora, trying to get acknowledgement of their claims and recognition of their claimed rights in international law. One such forum, for example, is the UN Working Group on Indigenous Peoples, where indigenous representatives have attempted to get a statement of their rights acknowledged in the Draft Declaration on the Rights of Indigenous Peoples.¹⁸ The most

¹⁷ Wai 262. The claim is expressed as follows:

protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use and transmission of the knowledge of New Zealand's indigenous flora and fauna and the genetic resource contained therein.

The claimants go on to claim that:

te tino rangatiratanga was and is an absolute authority which incorporated and incorporates the right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna, in the preservation of biodiversity, and in the ongoing development of a philosophy of eco-ethnic ethics.

The claim does extend to ownership of natural resources and includes bioprospecting and biotechnical development of genetic material from flora and fauna native to New Zealand. The applicants now wish the claim to cover Maori cultural and intellectual property rights and also moveable cultural property in the nature of artefacts. The Wai 262 claim has been accorded urgency, but it appears that the hearing will not be until late 1997. Personal conversation with Judge Richard Kearney, Waitangi Tribunal member in Wai 262 claim, Hamilton, New Zealand, 23 May 1997.

¹⁸ This was achieved in draft Article 12:

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

See Draft Declaration as agreed upon by the members of the Working Group as its Eleventh Session, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994).

comprehensive statement of their claims, however, has been the Mataatua Declaration, which resulted from a 1993 conference of indigenous peoples convened solely to discuss issues relating to the protection of what they termed indigenous intellectual property.

1. Mataatua Conference 1993

In June 1993 the Nine Tribes of the Mataatua Confederation of the Bay of Plenty in New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples (“the Mataatua Conference”). As expressed in subsequent United Nations documentation:

Over 150 delegates from 14 countries attended, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Suriname, the United States and Aotearoa [New Zealand]. The Conference met over six days to consider a range of significant issues, including the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms.¹⁹

The core declaration of the Mataatua Declaration is as follows:

WE

Declare that indigenous peoples of the world have the right to self-determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property;

Acknowledge that indigenous peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the indigenous peoples of the world is of benefit to all humanity;

¹⁹ Mead, A “First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples,” (Report to the Eleventh Session of the UN Working Group on Indigenous Peoples, July 1993). The report makes clear that the Mataatua Conference was attended also by participants from Brazil, Chile, and from organisations such as the World Bank, UNDP, UNESCO, the World Wildlife Fund, Greenpeace, museums and research institutions and official representatives of two governments. *Ibid*, at 1-2.

Recognize that indigenous peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge;

Declare that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.²⁰

What is most immediately noticeable is the use in the Declaration of the expressions “intellectual property” and “rights”. Firstly, it is noted that the use of “rights” here is in the natural law sense rather than the positivist approach taken by most legal systems and lawyers. That is, most legal systems hold that a right exists only once it is recognised and granted protection in law; whereas these claims argue that the (natural) right already exists and that all that remains is for states to recognise it. This is the primary indicator of the very different perceptions that states and indigenous peoples have of their claims.²¹

Secondly, “property” is used as if that term of art already applied to the interests sought to be protected. As will be realised from the short explication of world intellectual property law systems given above, there are no property rights as such of the sort claimed. Further, something else again from what is commonly known as intellectual property rights is intended: something more akin to *rangatiratanga* over *taonga* than to proprietorship rights limited in time applied to defined individuals’ property. Indeed, the conference organiser’s report uses the term “indigenous cultural and intellectual property” — and, in particular, “cultural and intellectual property” — on several occasions, without explaining in any detail what is intended by the term. It is clear from a reading of the report that the intention is to cover a much broader range of

²⁰ The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, contained in *Other Matters Including Meetings and Seminars and the Voluntary Fund for Indigenous Populations*, UN Doc. E/CN.4/Sub.2/AC.4/1994/12 (6 June 1994), 12, at 12-13.

²¹ For further discussion of this point — of the different perceptions of rights and their recognition — see Iorns, “Indigenous Peoples and Self-Determination: Challenging State Sovereignty” 24 *Case Western Reserve Jnl of Int’l Law* 199, esp. at 224-228.

rights and interests than current international intellectual property law begins to contemplate. The report, for example contains the following passage:

In the rounds of fund raising we encountered attitudes which certainly highlighted the need for the issue of cultural and intellectual property rights to be addressed. We were forewarned by one senior New Zealand Government official to 'stop reaching for caviar and to concentrate instead on fish and chips.' We were told by another senior official that our conference could not meet his Ministry's standards of scientific or even social research because it involved the re-circulation of old knowledge rather than the development of new 'unknown' knowledge. [This is] A disturbing perspective for a national agency to adopt post-UNCED especially given its task of administering the largest research fund in the country.²²

It appears as though there was a fundamental misunderstanding in the exchanges just recounted. Worldwide, legal systems define and thereby recognise what intellectual property as a legal concept is. Intellectual property is property in a new product of the application of intellect, in a form which is capable of being protected in one of the methods described above, or by some other legal mechanism.²³ The use of the term "intellectual property" to describe cultural expressions and forms which are not capable of protection in the legal system as presently constituted is bound to confuse the intellectual property lawyers and those responsible for determining what the law is. It would seem that the use tends also to confuse the callers for protection of wider cultural heritage by way of international law.

As likely to cause confusion, and indeed resentment, is misunderstanding of the time limits of intellectual property protection. Again to quote from the Mataatua Conference organiser's report:

A... profound and wise statement originating from an African elder says 'THE WORLD WAS NOT LEFT TO US BY OUR PARENTS, IT WAS LENT TO US BY OUR CHILDREN.' This proverb has been promoted internationally through UNICEF. The elder's name, tribe, or even country are not acknowledged. The original context of the statement is not identified and subsequently no date can be ascertained. The proverb therefore becomes part of that vast lonely void known as the 'public domain' where proverbs and other aspects of indigenous and cultural property are used, most

²² Mead, *supra* note 19, at 2.

²³ Such other legal mechanisms include the common law actions of passing-off and breach of confidence.

often without permission, taken out of context with no acknowledgment given to the original individual (author, composer, healer, elder etc.). UNICEF is now using this proverb in its international line of stationery to raise funds for its activities. No one would begrudge UNICEF for fund raising. UNICEF is an important worthwhile international agency. We merely wish to illustrate that even the best intentioned are unwittingly contributing to the exploitation of indigenous peoples and their knowledge.²⁴

Intellectual property law would draw the distinction between a proverb²⁵ and an aphorism.²⁶ The latter may well be subject to copyright, but the former very unlikely to be. The difficulty of identification of author in an item that has gained general currency is a reason for the limits in time of and scope of protection afforded by intellectual property law under the copyright conventions.

Regardless of the possibility of defining an aphorism's authorship, if it gains general currency and becomes a proverb, then at about that stage the usual temporal limitation of copyright would apply and copyright cease to apply by the effluxion of time. Typically, copyright expires after the life of the author or creator of the work plus fifty years. For copyright, as for the other formal intellectual property protections, the right to protection is a limited monopoly right given to encourage material out into the world so that in due course it may become a part of the general currency. I use the expression "the general currency" as an alternative to the description in the above passage of "that vast lonely void known as the 'public domain.'" The public domain, in the sense of being the general currency of humankind, is vast and is growing, but it is not a void, and is not lonely, being full of human invention.

While this description is not comprehensive, it is enough to illustrate the difficulties of discussion over law reform when the two 'sides' mean different things by the same term.

²⁴ Mead, *supra* note 19, at 2.

²⁵ A proverb is "a short pithy saying in general use, held to embody a general truth." Concise Oxford Dictionary (9 ed) (1995).

²⁶ An aphorism is "a short pithy maxim." Concise Oxford Dictionary, *ibid*.

2. *Support for indigenous claims*

In 1994 Mme. Erica-Irene Daes, as Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, released her report "Study on Protection of the Heritage of Indigenous Peoples."²⁷ In preparing this Report, Mme. Daes drew extensively on the Mataatua Declaration and indigenous conceptions of heritage and measures necessary for its protection.²⁸ However, in doing so, many elements stressed by the Special Rapporteur and adopted in her Report again clearly do not fit within existing intellectual property laws. Further, I suspect that some of these will not fit, no matter how hard the laws are made to stretch.

The non-commercial aim of protection is stressed by the Special Rapporteur with the concomitant ambit of protection being full knowledge systems, rather than just collections of manifestations of expression. Indeed, the ambit of "heritage" is extremely wide:

²⁷ UN Doc. E/CN. 4/Sub.2/1994/31 (8 July 1994).

²⁸ See her comments:

6. In elaborating the principles and guidelines, contained in the annex to this report, the Special Rapporteur has drawn extensively on the Kari-Oca Declaration of the World Conference of Indigenous Peoples on Territory, Environment and Development (Kari-Oca, Brazil, 15-30 May, 1992), and the Mataatua Declaration of the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples. Their own conception of the nature of their heritage and their own ideas for ensuring the protection of their heritage are central to the 'new partnership' with indigenous peoples symbolised by the International Year of the World's Indigenous People in 1993.

7. The Special Rapporteur wishes to underscore the fact, emphasized by the Mataatua declaration, that indigenous peoples have repeatedly expressed their willingness to share their useful knowledge with all humanity, provided that their fundamental rights to define and control this knowledge are protected by the international community. Greater protection of the indigenous peoples' control over their own heritage will not, in the opinion of the Special Rapporteur, decrease the sharing of traditional cultural knowledge, arts and sciences with other peoples. On the contrary, indigenous peoples' willingness to share, teach, and interpret their heritage will increase.

Ibid., at 2.

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular peoples, clan or territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works, such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the phenotypes and genotypes of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape or audiotape.

Difficulties with such a wide ambit include that a fundamental element of intellectual property law is that ideas and knowledge as such do not sustain protection; knowledge is instead considered to be the common heritage of humankind and ideas are not to be confined. In addition, styles influenced by or even based on imported ideas and expressions are characteristic of any culture which has contact with a world outside its own. Further, phenotypes and genotypes, unless derived by genetic engineering, have no novelty and therefore are incapable of intellectual property law protection; and in many countries, including the USA, human genetic material as such is incapable of receiving such intellectual property protection.²⁹

A second type of problems with the scope of matters to be protected is the ownership of intellectual property rights. The Special Rapporteur recommends that:

²⁹ This incapability exists regardless of publicity to the contrary, which claims that US patent 5,397,696 "claims a cell line containing unmodified Hagahai [from Papua New Guinea] DNA and several methods for its use in detecting HTLV-1 related retroviruses." (1995) 4:5 Human Rights Defender 3 (Human Rights Centre, University of New South Wales). Inspection of the patent application cited indicates that it does not make a claim to patent the unmodified DNA. Similar comment may be made about the discussion concerning the W R Grace patent as to neem tree pesticide: the patent application is for the method of fixing the pesticide, not for the pesticide in the seeds of the tree; there is no novelty in the pesticide, and it is not the product of invention anyway — being entirely natural — so is incapable of bearing patent protection for anyone.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

As described above, the protections depend, in most countries, on there being identifiable authors or creators of "works." Group ownership, where the group includes everyone within the group as defined only by itself from time to time, is impossible in the current systems. Precise authorship and precise ownership of the various rights (since enforcement is to be by "right holders" if not by "authors") must be able to be determined.

In addition to the scope of the matters to be protected, the scope of protection is similarly expansive. The Rapporteur's Principle 5 reads:

Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.

The primary difficulty with this from the point of view of implementation is that permanent and inalienable intellectual property rights are impossible in a system predicated on time-limited rights of tradeable property.

Additional suggested principles are:

8. To protect their heritage indigenous people must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

These, too, raise difficulties with protection. For example, collective rights are notoriously difficult to enforce in a system which depends initially on registration (which leaves copyright as the only element under which some

development could usefully take place for protection, a point I address below). In addition, a system which allows different applications of rules according to local custom makes for lack of understanding and makes impossible of any degree of certainty (although my own view is that this is a weak objection). Further, no business engages in commerce unless it intends itself to be the primary beneficiary of its commercial effort.

The Special Rapporteur's draft then moves on to set out proposals as to transmission of heritage:³⁰

14. Each indigenous people's rules and practices for the transmission of heritage and the sharing of its use must be recognized generally in the national legal system.

15. In the event of a dispute over the custody or use of any element of an indigenous people's heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognised by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

Pragmatically, formal attempts to give primacy in legal systems to customary law have not met much recent success in our part of the world.³¹ While legal dualism may be something we need to work toward in New Zealand, we would have extreme difficulty in attempting to apply a major part of the legal system in accordance with traditional laws in the foreseeable future.

A further suggestion that runs into practical difficulties is Principle 46:

46. Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.

³⁰ *Supra* note 27, at 6.

³¹ Consider the place of customary law enshrined in the Papua New Guinea Constitution of 1975, and then compare with that the place that custom law has taken in actual cases. PNG may be an extreme example because of the sheer number of different cultures in the country, but in New Zealand we are still grappling with the intricacies of dealing with different customs, customary laws, and customary law systems between hapu within iwi (roughly, family and subtribal groups within tribes). Even though custom and customary law are meant to be of guidance in relation to Maori land matters, the Maori Land Court rather more functions under its own statute and its own jurisprudence as yet.

It is no small objection to mention the difficulties of identifying the “traditional owners” in many societies which have concepts of ownership different from those underpinning intellectual property law, as described above. However, in terms of implementation, it is a difficulty easier to overcome than some of those more at odds with the whole intent of intellectual property law.³² A larger difficulty is the point made earlier in relation to the difficulty of attributing artistic inspiration: styles influenced by or even based on imported ideas and expressions are characteristic of any culture which has contact with a world outside its own. It would be hard, practically speaking, to police this suggestion. Further, in many, if not most or even all, societies, parody is a method used by members of the society to comment on aspects of the society, sometimes for deeper social purposes and sometimes only to amuse. This guideline would seem capable of stifling parody within society.

There are, however, some concepts and proposed practices which could fit into the accepted paradigms of intellectual property law. Both consent to the use and application by others, and the concept of attribution as conditions of use and application, are familiar and capable of early achievement. The Special Rapporteur makes some suggestions that, while subject to the same comments about determining traditional owners in some circumstances, would be more easily implemented in national laws³³ and practice:³⁴

26. National laws should deny to any person or corporation the right to obtain patent, copyright, or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the ownership, control and benefits.

27. National laws should ensure the labelling and correct attribution of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned.

³² Note, however, that this is not solely a matter internal to indigenous peoples. See, e.g., the difficulty caused in the Morning Star Pole case in Australia, *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481. There has been some progress in assimilating into Australian copyright law some aspects of customary Aboriginal laws: *Milpururru & Ors v Indofurn Pty Ltd & Ors* [1995] AIPC 91-116.

³³ *Supra* note 27, at 7,8.

³⁴ *Ibid.*, at 8.

35. Researchers and scholarly institutions must refrain from engaging in any study of previously-undescribed species or cultivated varieties of plants, animals or microbes, or naturally-occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the traditional owners, if any.

36. Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without identifying the traditional owners and obtaining their consent to publication.

V. MOVEMENT TOWARD SOME SOLUTIONS

1. Modifying Existing Law

I would not like my commentary above to be taken to indicate that I have little sympathy with the needs of indigenous peoples to preserve and protect their cultural heritage through the intellectual property law system. Far from it: I wish to find some solutions, ones that can be put into effect by way of international treaty and national laws, and soon. But my discussion shows some of the difficulties with using current intellectual property rights regimes to do so. I thus suggest that a very different regime will ultimately be necessary. That said, there are some possible modifications to the current regime that could allow for some measures of protection.

Some very general initial thoughts as to practicalities may dispose of most of the alternatives. First, protections by registration are going to be impracticable for most indigenous peoples. The problem of travel and access to the system, whatever it be, is one difficulty. The strong possibility of abuse by prior registration by commercial interests with more knowledge of systems and ability to buy advice is another. Trademark, design, and patent protection are all unlikely to be useful on these grounds.

Within existing intellectual property law, therefore, we are then left with either copyright or such things as the common law remedies of passing off or breach of confidence. The passing-off action depends on established commercial presence, and very often what an indigenous people is trying to do is to prevent any commercial presence, its own or anyone else's, being established. Breach of confidence is a tort requiring a commercial relationship between the parties to have been breached by the unauthorised use of private information. Once again, this is just not suitable for the requirements of protection of the rights of indigenous people to their knowledge systems and cultures.

We are left with copyright, which has several current advantages and fewer disadvantages than the other intellectual property law alternatives. Its primary advantages are its flexibility — in New Zealand at present copyright is our main intellectual property protection³⁵ — and the ease of obtaining protection: copyright exists by reason of the existence of the work and there is no extraneous judgement of quality or value — it is not for anyone other than a holder of a right to say whether it should be protected. Additional advantages include that the system of protection is a world-wide one which is relatively untrammelled by national boundaries;³⁶ that multiple layers of ownership and exercises of rights are available, so that licensing use is available; and that rights to control applications are available, in the moral rights area, even once “economic” rights, the rights to commercial application, are disposed of. Finally, some things which can be patented can be protected also by copyright; for example, a traditional remedy bears copyright if written down, in the written version. If a remedy or a way of preparation of food is not written down but, say, chanted or sung, then that version is copyright. Indirect copying is still actionable: even though the copyist’s version may bear its own copyright, it infringes the original.

However, there are disadvantages for indigenous people in relying on current copyright law, and only some of these can be overcome or minimised by appropriate modifications to the law. The biggest problems are in relation to what can be protected. The protection is not for the idea or for knowledge as such — the protection is of expression — and there is a requirement of originality of expression, though not of novelty.³⁷ Thus undocumented knowledge systems, traditional remedies, cultivation methods for plants or cooking techniques are likely incapable of protection in their own right. The novelty requirement can be countered in relation to works of cultural expression with the principle that individual renditions of works can each bear their own copyright. There is still a problem with traditional remedies if there is not a rendition in writing or performance.

³⁵ It covers such utilitarian items as toilet pan connectors (*Johnson v Bucko Enterprises* [1975] 1 NZLR 311), kiwifruit tray plastic liners (*Frank M Winstone (Merchants) Ltd v Plix Products Ltd* [1985] 1 NZLR 377), plastic flying discs (*Wham-O Manufacturing v Lincoln Industries* [1984] 1 NZLR 641), as well as the more obvious artistic works such as books, musical and architectural works, and (now, by statute) computer programs.

³⁶ Some nations, such as Papua New Guinea, have no copyright law, but most have some law as parties to the Berne Convention (*supra* note 10), which provides in Article 3(1) for copyright protection to extend automatically to other member States if it exists in the country of origin. Article II.1 of the Universal Copyright Convention has a similar provision to the Art. 3(1) provision in the Berne Convention.

³⁷ “... the starting point is that the work is not copied and originates from the author.” Holyoak, J and Torremans, P *Intellectual Property Law* (1995), at 149.

The solution appears easy: express the idea, and preferably ensure the expression is recorded in some way. However, this may not be as easy as it sounds, quite apart from practical problems such as access to recording materials. Thus, for example, documentation of undocumented knowledge systems may not allow for preservation of the richness of those knowledge systems. This will not get over the difficulty that styles rather than individual works have no protection. This is linked to the disadvantage that derivatives from cultural heritage material may be incapable of being controlled.³⁸ The only remedy for this appears to be the application and extension of the concept of moral rights. This is a concept present in many common law countries such as Australia, New Zealand, and the UK as well as continental Europe, where it originated.

A second set of problems arise in respect of ownership of copyrights. The only way for these problems to be overcome would be by modifying the law. For example, the concept of moral rights could be expanded so that group proprietorship of moral rights becomes justiciable, not just personal individual moral rights.

Even once problems of the definition of the property and its ownership were overcome, the law would have to be modified to overcome the (short) length of copyright protection currently enjoyed. This, however, could be overcome with the application of the concept of moral rights³⁹ as, in many jurisdictions, moral rights continue for the benefit of an author's descendants as well as being, in almost all jurisdictions, inalienable by way of trade.

³⁸ See, for example, the German product "Kavakava," chemically synthesized to mimic kava and blatantly trading on the name of a drink carrying huge cultural significance. *Waikato Times* March 23, 1996 at 2; also *New Zealand Intellectual Property Journal*, May 1996, at 102.

³⁹ This gives authors the right to attribution, the right to object to derogatory treatment, and the right to control the method of release of material.

2. Current NZ Reform Proposals

New Zealand is currently considering intellectual property law reform, for various reasons: ensuring compliance with GATT TRIPS;⁴⁰ the fact that each of the three statutes dealing with patents, trademarks, and designs⁴¹ is now 43 years old; and the need to remove the overlaps between the areas covered by these three statutes and the Copyright Act 1994. The Ministry of Commerce intends the introduction of an all-encompassing Intellectual Property Law Reform Bill to achieve reform. The expected introduction date is now some time in 1997.

The suggested reforms are to take into account the views and interests of Maori, and Maori have been consulted. Indicative of the usual official view of intellectual property law is the fact that the proposed statutory reforms in New Zealand are under the purview of the Ministry of Commerce as the responsible department. Maori have expressed some dissatisfaction with the attitudes taken by the Ministry in the reform process to date, including concerns about inadequacies in time allowed for submissions to be prepared and the extent of Maori consultation.⁴² These procedural problems must be overcome because the Ministry needs to have a clear picture of the particular needs of Maori in relation to protection of their cultural heritage. I suggest that current intellectual property law, and particularly copyright law, needs to be modified in order for it to be able to protect the kinds of things that Maori are arguing for. Even if New Zealand does modify its law, extensions to cover some Maori intellectual property rights will not apply worldwide unless international protection regime is changed as well.

⁴⁰ The General Agreement on Trade and Tariffs, side agreement on Trade-Related aspects of Intellectual Property (Marrakech, 15 April 1994).

⁴¹ These are the Patents Act 1953, Trademarks Act 1953, and Designs Act 1953.

⁴² Minutes of meeting on patentability of biotechnology, Ministry of Commerce, Wellington, 19 April 1995; and McNeill, M "Intellectual Property reform and the Marginalisation of Maori," *Proceedings of the Inaugural NAMMSAT Conference*, Te Puni Kokiri (Ministry of Maori Development), Wellington, at 25. [NAMMSAT stands for National Association of Maori Mathematicians, Scientists and Technicians.]

3. Reform of International Law

There have been several attempts by indigenous peoples to persuade the World Intellectual Property Organisation (WIPO) to recognise indigenous claims. To date, indigenous peoples have been relatively unsuccessful. However, there is one significant aspect of indigenous peoples' claimed intellectual property rights which has been supported by some states and which has very recently received protection: folklore.

The need to protect folklore has been recognised by WIPO since before 1985, when WIPO and UNESCO jointly published WIPO's Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.⁴³ The model law indicates that there is provision in both the 1967 Stockholm and the 1971 Paris Acts of the Berne Convention for legislation to be passed providing for copyright protection for unknown authors of unpublished works, which would clearly allow for State protection of folklore.

There have, however, been difficulties with this model law. Firstly, all the texts, and also the international treaty on the topic,⁴⁴ regard "works of folklore as part of the cultural heritage *of the nation*."⁴⁵ Secondly, the time duration for copyright protection is still too restrictive because the As a result of the push for change, WIPO recently adopted a Protocol to

⁴³ This model law followed local attempts in a series of countries, from Tunisia's attempt in 1967, through to the Guinea law in 1980, to include folklore protection in municipal copyright law.

⁴⁴ The Bangui text of the 1977 Convention concerning the African Intellectual Property Organisation, commonly known as the OAPI Convention.

⁴⁵ Introductory Observations prepared by the Secretariats of the United Nations Educational, Scientific and Cultural Organisation and the World Intellectual Property Organisation on the Model Law on Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Geneva, 1985), at 4, para.5; emphasis added. "Property of the nation" is, of course, not the same as property of an indigenous people.

provisions and indeed the Model Law are structured to fit within the existing copyright law framework. Because of such difficulties, several states — most notably African countries — have pushed for change in the model folklore protection law.⁴⁶

⁴⁶ A joint submission to WIPO in the lead-up to the December 1996 conference, made by a number of African countries notes that:

³² African countries have consistently maintained that folklore, as an integral part of the cultural heritage of a country, is bound up with the identity and self-expression indigenous communities within that country. Incidentally many other countries outside Africa share the view that folklore is a wholistic system of rules which gives meaning to human existence within the framework of culture as a continually evolving living functional tradition of society.

³³ Folklore is accepted as a basis for the cultural identity and a most important means of a nation's self-expression at domestic and international levels. Unfortunately the creations of many developing countries, most of which are based on their traditional artistic heritage, are being plundered and seriously endangered by accelerating technological development. In the course of exploitation they are commercialized without due respect for the cultural sensitivity and commercial interest of the respective communities. African countries, like many other developing countries have therefore suffered from the contextual distortion and abuse of their folklore without adequate economic remuneration.

³⁴ It is accepted that folklore in many developing countries has an intimate bearing on the creative lives of the people and should not be dismissed as relics of a primitive past as is often argued in the industrialized countries. Rather, it should be given adequate protection in order to accelerate creative development. Such manifestations of culture as folktales, myths, legends, proverbs, anecdotes, music, drama, etc. qualify to be protected especially in the face of more aggressive exploitations in the field of sound recording, broadcasting and cinematography.

See Proposals of Burkina Faso, Cameroon, Cote D'Ivoire, Egypt, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Senegal, Sudan, Togo, Tunisia, and Zambia made to the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Fifth Session, Geneva, 1-9 February 1996, WIPO document INR/CE/V/12 (February 2, 1996), at 5. The submission goes on to recognise the failings of the Stockholm revision and the Model Laws to achieve protection of folklore, and recommends evolution of a *sui generis* right in respect of folklore, by way of a separate international instrument addressing the peculiar character of folklore. The submission remarks that the nations "are mindful of some of the practical problems associated with the protection of folklore at the international level, such as the non-availability of a workable mechanism for identifying ownership of "regional folklore." Ibid, at 6,7.

the Berne Convention concerning performers' rights. In this Protocol, protection is granted for "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."⁴⁷ The focus is on the fixation of performances and the right of performers to control such things as attribution and release of their performances. The question of the origin of the item of folklore that the performer is performing is not addressed. The importance of this in the context of this article is that there is now explicit recognition in a major international instrument regarding intellectual property of some of the claims indigenous peoples have been making.

VI. CONCLUSION

There is great distance between the claims of indigenous peoples to protection of what they term their intellectual property and the coverage of current intellectual property protection regimes. There has been discussion as to narrowing or closing this distance in order to protect indigenous culture and heritage. However, there have been two primary impediments to this protection. First, the content of existing intellectual property law does not provide for the types of protections that indigenous people seek, so it is unable to be applied to their benefit. Second, the claims for protection and discussion in this area appear, on their face, to be based on misunderstandings of the content of existing intellectual property law by indigenous peoples and their advocates. I thus suggest that perhaps the appropriation of terms of art without recognition of the limits imposed by the use thereof has hindered the discussion on solutions.

Despite the difficulties to date, I suggest that the existing New Zealand and international intellectual property law system does hold the potential to resolve many of the demands of indigenous peoples for proper regard for their cultural heritage, and for protection. While there will need to be some modification to existing laws for more effective and meaningful protection, some expansion of the existing copyright systems could cover considerable ground towards workable solutions. This should be a continuing process, with New Zealand implementing positive developments in international law — such as those concerning folklore — but at the same time continuing to work on reform of New Zealand laws, which may in turn be extended to greater worldwide protection for all indigenous peoples.

⁴⁷ Draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms, WIPO document CRNR/DC/5, at 15, Article 2 Definitions; adopted by WIPO in December 1996.