

Māori Claims to Traditional Knowledge of New Zealand
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I. Introduction

The Māori are the “tangata whenua”, best translated as the indigenous peoples of New Zealand.¹ The Māori tradition is rich in New Zealand and their identity and culture has had a profound impact on the country that exists today.² The Māori were the first inhabitants of modern-day New Zealand and today constitute approximately 15 percent of the island-nation’s population.³ The Māori, who have sought to preserve their culture and heritage, place great importance on the natural environment, especially as it is unique to New Zealand.⁴

Captain James Cook first explored New Zealand in the late 1700s. By the early 19th Century, “Pakeha”, or Europeans, were living on and colonizing New Zealand.⁵ New Zealand was attractive to many Europeans because of the availability of natural resources, particularly, the whaling industry; as a result, European, particularly British, settlements quickly became commonplace and the colonies there burgeoned.⁶

The humanitarian movement in Britain of the 1830s sparked concern for the sustainability of the Māori (as well as indigenous people of Africa and the Pacific) culture, heritage, and way of life.⁷ The humanitarians feared that the Māori society and general way of life faced grave danger from rapidly advancing European exploration.⁸ Although British policy-

¹ Tourism New Zealand, Māori History, http://www.newzealand.com/travel/media/backgrounders/maori_history_-backgrounder.cfm (last visited Jan. 9, 2007).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Tourism in New Zealand, Treaty of Waitangi, <http://www.newzealand.com/travel/about-nz/history/history-treaty-of-waitangi.cfm> (last visited Jan. 9, 2007).

⁶ *Id.*

⁷ The Ministry for Culture and Heritage, The Formation of British Policy, <http://www.treatyofwaitangi.govt.nz/story/formationbritishpolicy.php> (last visited Jan. 9, 2007).

⁸ *Id.*

makers did not originally favor settlement, they did wish to continue what was by that time a thriving trade with the region.⁹ However, as Britain's presence in New Zealand continued to increase, likewise did the need for an official presence or representation there. The eventual result was the appointment of James Busby to represent Britain's interests and, supposedly, to guard against the annihilation of the Māori way of life.¹⁰ Although the Māori, had their own laws, rules, and system of administration, the "iwi", a loose confederation of tribes, was hardly recognizable as a system of government.¹¹

The need for a more defined relationship between Britain and the Māori became ever-more apparent when Frenchman Charles de Thierry proclaimed that he would begin a "sovereign and independent" state there. Shortly thereafter, in 1835, thirty-four Māori chiefs signed New Zealand's Declaration of Independence, which declared that the sovereignty and authority of the land resided in the Māori chiefs.¹² The Māori granted friendship and peace to British subjects in New Zealand in exchange for Britain's promise to serve as the parent state of the infant nation and protect its independence.¹³ But as settlers left continually greater footprints on the emerging nation, the British government began to realize the need for still more legal authority over British subjects living in New Zealand.¹⁴ In August of 1839, Captain William Hobson was dispatched with orders to bring New Zealand within the British Empire.¹⁵ By January of 1840, Hobson had

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² The Ministry of Culture and Heritage, The Declaration of Independence (1835), <http://www.treatyofwaitangi.govt.nz/story/declarationofindependence.php>, (last visited Jan. 9, 2007).

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

reached New Zealand.¹⁶ The British government believed that by “amalgamating” the Māori, it could encourage growth, development, and prosperity between British subjects and the Māori.¹⁷

II. The Treaty of Waitangi

On February 5, 1840, Hobson met with nearly 500 Māori chiefs at Waitangi (Bay Islands) and commenced arguments and negotiations regarding a treaty.¹⁸ By the next day 40 of the chiefs had signed what would become known as The Treaty of Waitangi.¹⁹ But not all of the chiefs present at the negotiations favored the Treaty, thus, Hobson began a journey throughout the territory to obtain the consent of the other chiefs. It was not until September 3rd that the last of over 500 Māori chiefs signed the document.²⁰ The Treaty of Waitangi is an important document in New Zealand’s history, often referred to as “the founding document of [the] nation”.²¹ Originally, the Treaty was the Crown’s means of retaining control over British subjects immigrating to New Zealand as well as securing to the Māori their rights and traditions.²² The Treaty was initially meant to define the relationship between Britain and the native peoples who were to be amalgamated into the British Empire. Today, the Treaty continues to fulfill much the same role by defining the relationship between the Māori and the Government of New Zealand.²³ The treaty is of foremost importance in safeguarding Māori culture, tradition, and heritage by

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The Treaty of New Zealand – New Zealand in History, <http://history-nz.org/colonisation2.html> (last visited Mar. 1, 2008).

¹⁹ The Ministry of Culture and Heritage, Signing the Treaty, <http://www.treatyofwaitangi.govt.nz/story/signingtreaty.php> (last visited Jan. 9, 2007).

²⁰ The Treaty of New Zealand – New Zealand in History, *supra* note 18.

²¹ The Governor-General, Treaty of Waitangi, <http://www.gg.govt.nz/aboutnz/treaty.htm>, (last visited Jan. 10, 2007).

²² *Id.*

²³ Immigration New Zealand, What is the Treaty, <http://www.immigration.govt.nz/migrant/settlementpack/treaty/WhatIsTheTreaty/>, (last visited Jan 10, 2007).

ensuring that New Zealand's government does not encroach upon rights held exclusively by the Māori or breach protections guaranteed to them.²⁴

The circumstances under which the Treaty was originally endorsed have brought into question what the effect the original signers perceived their signatures would have and, thus, brings into question the extent to which either the Māori or New Zealand's government is bound to its terms.²⁵ Just nights before the Treaty would be presented to the Māori chiefs, Hobson, sitting on a ship off the coast of New Zealand, prepared a draft of what would become the Treaty and presented it to Henry Williams, a former Royal Navy lieutenant and missionary to the Māori, for translation into a form that could be understood by the Māori.²⁶ It was Williams who bore the great responsibility of helping the Māori to understand the significance of this document; it was Williams who then presented this Treaty to the Māori Chiefs.²⁷ It is seemingly impossible that either Hobson or Williams could have realize the significance of this Treaty and the importance it would have in shaping relationships between people for centuries to come. Dispatched with orders to join the land which would become New Zealand, Hobson, with the assistance of Williams, was likely much more focused upon drafting an agreement which would bring these new lands into the British empire and to which the Māori Chiefs would be amenable than he was concerned with drafting a document which would shape relationships between peoples and nations and safeguard the heritage of those people.

Although historians disagree about the source of the differences in the texts of the English and Māori versions of the Treaty, the fact remains that there are significant differences in

²⁴ *Id.*

²⁵ The Ministry for Culture and Heritage, Read the Treaty, <http://www.treatyofwaitangi.govt.nz/treaty/>, (last visited Jan. 9, 2007).

²⁶ The Ministry for Culture and Heritage, Signing the Treaty, <http://www.treatyofwaitangi.govt.nz/story/signingtreaty.php> (last visited Jan. 9, 2007).

²⁷ *Id.*

the texts, and more importantly in the meaning, of the English and Māori versions of the treaty.²⁸ These discrepancies have created a particularly difficult challenge to overcome in analyzing how the treaty should be construed today.²⁹ Nonetheless, the Treaty of Waitangi is of pivotal importance in the history of New Zealand and in establishing and protecting many of the rights and privileges enjoyed by the Māori today.

III. Traditional Knowledge

Among these rights, are claims by the Māori to certain realms of intellectual property. Specifically, the intellectual property claimed by the Māori can generally be termed “traditional knowledge.”³⁰ The Treaty of Waitangi, which guarantees to the Māori “exclusive and undisturbed possession” of certain tangible and intangible property, is thereby the basis from which the Māori retain the ability to make exclusive claims to certain plants, music, forms of expression, tribal marks and more.

Although a precise definition is difficult to articulate, traditional knowledge, in essence, refers to “knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation.”³¹ Traditional knowledge, however, does not necessarily refer simply to old knowledge, traditions, or customs.³²

²⁸ *Id.*

²⁹ *See Id.*

³⁰ Ministry of Economic Development, Information Sheet, http://www.med.govt.nz/templates/Page___1207.aspx (last visited Jan. 19, 2007).

³¹ Introduction: What is Traditional Knowledge and What Are These Fact Sheets About?, Ministry of Economic Development, http://www.med.govt.nz/templates/MultipageDocumentPage___1940.aspx (last visited Jan. 19, 2007) *citing* Convention on Biological Diversity website.

³² Introduction: What is Traditional Knowledge and What Are There Fact Sheets About?, Ministry of Economic Development, *supra* note 29.

Traditional knowledge may just as readily refer to knowledge that is new or developing.³³ The critical element then becomes that the knowledge, whether new or old, in question is closely linked to a traditional knowledge system so as to be deemed traditional.³⁴

Māori claims to traditional knowledge arise under Article II of the Treaty of Waitangi which, in the English version of the Treaty, guarantees to the Māori, "exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties".³⁵ The Māori text went further to secure to the Māori "te tino rangatiratanga", which might best be translated as chieftainship, over "wenua" (lands), "kainga" (villages), and "taonga katoa" (property and treasures).³⁶ It is these guarantees upon which the Māori assert many of their claims to intellectual property based in traditional knowledge.³⁷

The extent to which Article II of the Treaty protects Traditional Knowledge came into question, although not for the first or last time, in 1991 when six "iwi", roughly translated as tribes, filed a claim under the Treaty.³⁸ This claim, designated WAI 262³⁹, is known and commonly referred to as the "flora and fauna claim".⁴⁰ The WAI 262 Claim consists of a series of exclusive rights to native flora and fauna, cultural knowledge, and property to which the Māori believe they were granted property rights under Article II.⁴¹ Specifically, WAI 262 asserts that New Zealand's Crown has (1) not actively protected the exercise of "tino rangatiratanga" and "kaitiakitanga" (the full exercise of chieftainship) by the Māori over native

³³ *See Id.*

³⁴ *Id.*

³⁵ Ministry of Culture and Heritage, The Treaty Text, <http://www.treatyofwaitangi.govt.nz/story/treatytext.php> (last visited Jan. 20, 2007), *quoting* Treaty of Waitangi, Eng.- Māori, Feb. 6 1840.

³⁶ Ministry of Culture and Heritage, The Treaty Text, <http://www.treatyofwaitangi.govt.nz/story/treatytext.php> (last visited Jan. 20, 2007), *quoting* Treaty of Waitangi, Eng.- Māori, Feb. 6 1840.

³⁷ *See Id.*

³⁸ Introduction: What is Traditional Knowledge and What Are There Fact Sheets About?, Ministry of Economic Development, *supra* note 29.

³⁹ The claim was the 262nd claim brought under the Treaty of Waitangi, therefore resulting in the designation WAI 262. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

flora and fauna, other “taonga” (property), and “matauranga Māori” (Māori traditional knowledge), (2) not protected the “taonga” (property) itself, (3) infringed the “tino rangatiratanga” and “kaitiakitanga” (the full exercise of chieftainship) of the Māori through the enactment of legislation, and, (4) breached its obligations by agreeing to international treaties which affect the Māori’s rights to indigenous flora and fauna and other “taonga” property.⁴²

The Crown has determined that, in essence, the Māori claims appearing in WAI 262 which fall into four categories:

- First, traditional knowledge, which concerns traditional and customary Māori arts, carving, oral tradition, medicine and healing. The Māori claim that their traditions and customs are ever becoming more a target for others to impede upon.⁴³ Cultural music, dance and art, among other examples, are no longer found simply within Māori society, but around the globe.
- Second, the Māori claim cultural property, referring especially to the exploitation of historical Māori artifacts such as carvings and preserved heads.⁴⁴
- Third, the Māori claim intellectual and cultural property rights.⁴⁵ Within this category, the Māori contest patents regarding life form inventions, the registration of trademarks bearing Māori text and imagery, and the general inappropriateness of intellectual property as a means of protecting these claims.⁴⁶
- Fourth, the Māori claim indigenous flora and fauna and thus seek to limit any bio-prospecting which might occur. The Māori claim chieftainship (sovereignty) over access to those indigenous flora and fauna as well as any technological

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.*

developments which utilize genetic material derived from indigenous sources or otherwise discovered.⁴⁷

Although not explicitly outlined in the WAI 262 claim itself, the concerns regarding intellectual property and traditional knowledge tend to arise on two levels.⁴⁸ It is noteworthy that these issues are not being faced solely in New Zealand; indigenous peoples around the world are struggling to protect their traditional knowledge. The debate occurring in New Zealand mirrors the debate as it occurs throughout the world.

The first level of concern is the impact granting rights to intellectual property could have on traditional knowledge.⁴⁹ By granting intellectual property rights to third parties for innovations based on Māori traditional knowledge, the Māori fear commercialization of Māori tradition and culture.⁵⁰ Māori who fear commercialization voice objections that it will destroy the sacred nature of that knowledge. Other Māori emphasize that they (meaning the Māori people as a whole) should be able to participate in any decision and to share in the benefits of any resultant commercialization of traditional knowledge that might occur.⁵¹

The second basis for Māori discontent is with intellectual property as a means of protecting or commercially exploiting whatever rights the Māori may in all actuality hold.⁵² This concern strikes at the heart of the differences between intellectual property schemes, which are largely creations of Western culture, and the ways in which indigenous peoples like the Māori seek to protect their traditional knowledge and culture.⁵³ For example, intellectual

⁴⁷ *Id.*

⁴⁸ *See Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

property rights are generally rights of limited duration while the protections sought by indigenous peoples are of much great, perhaps indefinite, duration.⁵⁴ The underlying philosophical principles are inherently different⁵⁵, thus making usual intellectual property regimes wholly inadequate as a means of protecting native heritage and culture.

IV. Moving Forward

The Māori claim WAI 262 introduces a unique and difficult series of challenges to be resolved in any effort to change or reform New Zealand's intellectual property regime.⁵⁶ The way in which New Zealand will approach any changes in grants of patent, grants of plant variety rights, and adherence to international standards of intellectual property are influenced to a large degree by the Māori culture and tradition, the intellectual property interests held by the Māori, and the way in which New Zealand chooses to address these concerns.⁵⁷ With regard to the reformation of the Patents Act, the Māori have indicated a level of apprehension because the proposed reforms failed to address the patentability of biotechnological inventions, the patentability of inventions in living matter, the protection of traditional remedies, and the award of patents to inventions based in traditional knowledge.⁵⁸ The tension which exists between the

⁵⁴ *Id.*

⁵⁵ Intellectual property mechanisms, like patenting, have developed as a means of allowing inventors or creator to commercially exploit their innovations by rewarding them with intellectual property rights. Intellectual property rights, therefore, function as a sort of *quid pro quo*, that is, the creator or inventor gains a limited monopoly-like rights in exchange for making that work available to society. Commercial exploitation is not the primary focus of indigenous cultures who instead desire to shield traditional knowledge from commercial exploitation and preserve its sacred nature. *See id.*

⁵⁶ *See* Ministry of Culture and Heritage, The Treaty Text, *supra* note 34.

⁵⁷ *See id.*

⁵⁸ Māori and the Patenting of Biotechnological Inventions, Ministry of Economic Development, http://www.med.govt.nz/templates/MultipageDocumentPage____1459.aspx (last visited Jan. 19, 2007).

proposed revisions to the Patent Act and the ideals the Māori hope the revised Act will embody have resulted in a near stand-still of the reform process.⁵⁹

The bulk of the submissions received by the Ministry of Commerce during the reform process seem to indicate that the Māori are opposed to any reform of the Patent Act which might extend patentability to within the realm of biotechnology or, further, which would not bar patentability of inventions based on living matter.⁶⁰ This apprehension stems from two sources: first is the concern that grants of patent derived from indigenous flora or fauna could materially limit the ability of the Māori to control the resources which they believe Article II of the Treaty of Waitangi grants them, thus infringing what they consider to be their rights under the treaty.⁶¹ Second, the Māori voice concern that any alterations of naturally occurring life forms could have serious cultural and spiritual implications and that grants of patent could encourage detrimental and immoral experimentation in this field.⁶²

While the Patents Act 1953 has been reviewed and modified, taking into account many of the suggested avenues for improvement, those changes have not yet been enacted.⁶³ Therefore, the effect these changes to the Patents Act 1953 cannot yet be known or understood. Speculation suggests that the revisions⁶⁴ to the Patent Act might yield at least some of the outcomes desired by the Māori. The addition of an inventive step requirement could very well be an important step toward many of the changes which the Māori wish of the patent system. Though a seemingly simple measure, the addition of a requirement of inventiveness means that patents will

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See* Ryan D. Jenlink, *Biotechnology, Patents, and the Law: Reform of the Intellectual Property Law of New Zealand* (2008).

⁶⁴ Under the proposed changes to the Patent Act 1953, the newness or novelty standard will shift from local novelty, that is to say that the invention had not been previously described in New Zealand, to absolute or global novelty, which requires that the invention not be previously described anywhere in the world. *See id.*

only be awarded for genuine innovations capable of contributing to New Zealand's economic well-being. The addition of an inventive step requirement would also seem to limit the potential for parties to financially exploit New Zealand's native flora and fauna, or, to engage in bioprospecting⁶⁵. The addition of an inventive step requirement does not, however, seem to entirely preclude bioprospecting or the usage or manipulation of genetic material derived from indigenous flora and fauna in the creation of a new plant or animal species or variety. Therefore, although the addition of an inventive step requirement seems to be a step in the direction of granting the Māori's wishes to guard native flora and fauna and to preclude materials derived from indigenous species from inclusion in patents or patentable inventions the modifications proposed to the Patent Act 1953, seem to stop short of accomplishing, or, arguably, even directly addressing, the full wishes of the Māori.⁶⁶ It is not until the revisions have been enacted that the effectiveness of those revisions can be known and, thus, whether other measures subsequent will be required to address the desired changes.

There exists a similar tension between New Zealand and the Māori with regard to grants of plant variety rights. While New Zealand considers whether it will ratify UPOV 91, the points of concern posed by the Māori will necessarily be integral considerations as to what course of action New Zealand chooses.⁶⁷ In short, the Māori are generally opposed to the adoption of UPOV 91.⁶⁸ The Māori anticipate that the adoption of UPOV 91 would cause New Zealand to breach its duties to the Māori under the Treaty of Waitangi and limit New Zealand's ability to

⁶⁵ The Ministry of Economic Development defines bioprospecting as "the collection of biological material and the analysis of its material properties, or its molecular, biochemical or genetic content, for the purpose of developing a commercial product" such as a "new plant variety, or some other type of product such as a chemical that has the potential to be developed into a pharmaceutical." Consideration of Ratification of UPOV 91, Ministry of Economic Development, http://www.med.govt.nz/templates/MultipageDocumentPage___22605.aspx (last visited Jan. 19, 2007).

⁶⁶ See Jenlink, *supra* note 61.

⁶⁷ Consideration of Ratification of UPOV 91, Ministry of Economic Development, http://www.med.govt.nz/templates/MultipageDocumentPage___22605.aspx (last visited Jan. 19, 2007).

⁶⁸ *Id.*

respond to future recommendations for change and reform of the patenting system. Particularly, there is concern that ratification of UPOV 91 would result in two distinct, potentially undesirable situations.⁶⁹

First, the definition of the word “breeder”⁷⁰ as used in UPOV 91 would mean that Plant Variety Rights would be more easily attainable by anyone who discovers an indigenous species.⁷¹ That is, because UPOV 91 essentially defines “breeder” as one who invents or discovers, the Māori fear that persons apart from their own people could gain exclusive rights to previously undiscovered, although nonetheless indigenous plants, thus detracting from what the Māori perceive to be their protected property under the Treaty of Waitangi.

Second, UPOV 91 requires that protection be available for *all* plant genera and species.⁷² Again, the Māori would be adamantly opposed to such a measure in that it would most certainly allow others to gain variety rights over plants to which the Māori believe that should have sole ownership. The issue potentially exists that the Treaty of Waitangi and UPOV are mutually exclusive. That is, depending upon the extent to which the Māori are entitled to the sole and exclusive control and enjoyment of indigenous species, New Zealand may be bound to honor and respect those rights, thus meaning that New Zealand may be excluded from enacting UPOV 91 or, at the very least, those provisions of UPOV 91 which would require New Zealand to award protection for any species which might be reserved, although previously undiscovered, to the Māori people.

Bearing in mind these inherent tensions which, on the one hand seem to suggest that ratification of UPOV '91 to its fullest extent would preclude the rights of the Māori under the

⁶⁹ *Id.*

⁷⁰ Under UPOV 91, the definition of breeder is expanded to include one who “discovered or developed” a plant variety. UPOV 91. *See id.*

⁷¹ Consideration of Ratification of UPOV 91, Ministry of Economic Development, *supra* note 65.

⁷² UPOV 91. *See id.*

Treaty of Waitangi, and on the other, that anything short of full ratification will cripple New Zealand's efforts to compete in a world market, it seems imperative that New Zealand's policy makers find a solution which will both allows the Māori to retain their rights in traditional knowledge while encouraging New Zealand's economic development. Perhaps one such solution would be to ratify UPOV, thus making possible the protections it provides to intellectual property owners but to reserve all such rights to the Māori. In doing so, the Māori would retain proprietary rights in their traditional knowledge.

However, even in the event that such a charter could be reached, the question of what constitutes "traditional knowledge;" does it include only the known plant and animal genetic resources, or does traditional knowledge include more? Scientific discovery and invention is taking place today at pace which it never before has. "[T]here are lots of genes out there, and we have no clue what they're doing," says professor of microbiology and molecular genetics at Harvard Medical School Roberto Kolter.⁷³ "So when you think about biodiversity, and the extent of diversity on the planet, you really get a sense of how little we know about this undiscovered world."⁷⁴ There is a plethora of yet to be discovered species, mostly microscopic, and genetic resources in New Zealand that are yet unknown to anyone. How these yet undiscovered resources might bear upon the rights of the Māori is yet to be seen.

V. Conclusion

Changes in the intellectual property scheme employed by New Zealand are a virtual inevitability. Whether the rights held by the Māori are as broad as they contend, therefore, bears greatly on New Zealand's ability to reform its intellectual property codes. Changes to grants of

⁷³ Jonathan Shaw, *The Undiscovered Planet*, HARVARD MAGAZINE, Nov.–Dec. 2007 at 47.

⁷⁴ *Id.*

patent and of plant variety rights should not be made that will infringe the Māori's rights.

Therefore it seems necessary for New Zealand to establish the exact extent of the rights held by the Māori so that these rights will not encumber any ability to make changes and respond to future needs. Great import is also placed on safeguarding Māori traditional knowledge, culture and heritage. Intellectual property laws may eventually prove to be insufficient, because these laws are limited in scope and duration, as a means of safeguarding traditional knowledge of native peoples. To truly provide adequate protection may eventually require the creation and implementation of a *sui generis* system aimed specifically at the protection of traditional knowledge; but, as for now, it seems that New Zealand and the Māori must be content to struggle with the laws which are in place and to reform those laws in such a way that can, for now, protect, to the fullest extent possible, Māori traditional knowledge while encouraging the economic growth and development intended by those enacting intellectual property laws.