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Māori Culture in the Modern World: Its Creation, Appropriation and Trade

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ABSTRACT

As a consequence of the colonisation of New Zealand and the subsequent removal of many Māori from their traditional social structures and norms, Māori culture and identity has become muddled in the Pākehā dominated world. Exactly what it is to be Māori and the extent to which culture defines identity is not agreed upon. In this paper, it is discussed why Māori interests and needs, with respect to their cultural heritage, should be met, in relation to the benefits from its use and trade, socially and economically. This is followed by an analysis why current intellectual property regimes do not allow for this. Finally, a survey of recent “pop-culture” appropriations of Māori culture is made and, from the reaction of prominent Māori to these, the interests and needs of the Māori and how they can best be met are extrapolated.

KEY WORDS

Māori culture, Māori identity, cultural appropriation, protection of culture.

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1. INTRODUCTION

Similar to many other colonised Indigenous peoples,¹ those of New Zealand (commonly referred to as the Māori)² were disenfranchised of their land and of rights relative to the Pākehā (non-Māori New Zealanders, usually of European descent) and to their own pre-colonisation social system (*Tikanga Māori*). Their subjugation away from their traditional lands and *Tikanga Māori* subsequently resulted in the “social, economic, spiritual and political degradation of Māori society”.³ As will be discussed, though vastly improved in recent times, the Māori generally continue to make up a disproportionately large number of those considered to be in the lower socioeconomic bracket. Statistics, such as those relating to education, immunisation and life-expectancy, also reflect the depressed position of the Indigenous people, as compared to those of other ethnic or descent origins, in New Zealand.⁴

This paper assesses how the socioeconomic position of the Māori could be enhanced by meeting their interests with respect to the use and trade of their cultural heritage. Originally, most Indigenous peoples only sought to prevent the appropriation of their cultural heritage for social and “property” (within their own concept of ownership) reasons, in most part to prevent offence of their world view. However, in recent times it has become apparent that there is a great socioeconomic value to Indigenous peoples in benefiting from the trade of their cultural heritage. The realisation that their cultural heritage is an economic asset has increased and diversified the interest of Indigenous peoples to have some form of self-determination over such trade. However, this level of control is not allowed for by any mechanism existent in New Zealand, including the nation’s intellectual property regimes. This paper attempts to assist the bridging of this divide.

It starts by looking at what the term “Māori” actually means, both anthropologically and legally, and whether it is appropriate. How the term is defined is important due to the cultural assumptions made pertaining to its use and the potential benefits to those falling within its parameters. Though the term is now part of everyday parlance, the discussion herein shows that it continues to have some controversy attached to it. Following this, the paper addresses why the interests of Māori should be met. It takes a novel trade focus, specifically reasoning that, though a predominant interest is the prevention of cultural offence, the Māori must be given

¹ There is some argument over whether Indigenous communities are “peoples” with regard to several international documents, or are rather ‘minorities’. The term ‘Indigenous peoples’ is used throughout this paper without any intention to comment on this debate.

² Editorial Note: This paper uses a macron accent on vowels in Māori words where appropriate, even when quoting a source that has not done so. In some sources, this accent can also be observed as an umlaut or a circumflex. These have been converted to macrons in this paper. Māori words and terms have been italicised, except where it has become a part of everyday parlance in New Zealand, even if not italicised in the source being quote from. For a discussion on why *Tikanga Māori* was and continues to be unrecognised as law in New Zealand, see John Dawson, ‘The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law’ (2008) *Journal of South Pacific Law*, 12 (1), pp. 55-62.

³ Timoti Gallagher, ‘Tikanga Māori Pre-1840’ (2008) *Te Kāhui Kura Māori*, 0 (1) (electronic version, available online at www.nzetc.org) (all online sources were accessed 26 March 2010).

⁴ See Natalie Coates, ‘Kia tū taikākā: Let the Heartwood of Māori Identity Stand - An investigation into the appropriateness of the legal definition of “Māori” for Māori’, *University of Otago*, Honours Thesis (2009), at pp. 49-51, particularly fns 33-40, available online at http://eprintstetumu.otago.ac.nz/67/01/Coates_1.pdf [hereinafter Coates, ‘Let the Heartwood of Māori Identity Stand’].

positive rights over their cultural heritage in order to benefit from its trade (and also non-trade) to their socioeconomic betterment. The paper further discusses current regimes which affect such trade and whether they ensure that the benefits of it are returned to its creators. Finally, the paper analyses the relevance and place of Māori culture, both socially and economically, in contemporary New Zealand, both to the Māori and to New Zealander's generally, before exploring where Māori culture stands from a global viewpoint. From this examination and further discussion over well-known "pop-culture" examples of appropriation of Māori culture, what the Māori actually seek to protect and how this can best be achieved are extrapolated.

Though New Zealand is not a geographically large country and its Indigenous population is relatively small, Māori cultural heritage is vast in depth and diverse across different *iwi* (tribes). Thus, this paper does not set out to disseminate all aspects thereof. Instead, it will briefly and generally describe characteristics considered to be important to the overall discussion. Additionally, though aspects of "traditional knowledge" (TK)⁵ (such as traditional medicines and practices and genetic resources) are undoubtedly part of an Indigenous people's cultural heritage, in its broadest sense, as are references to land rights, this paper focuses on "traditional cultural expressions" (TCE) and only discusses TK and claims to land in an illustrative or analogous manner.

2. WHO ARE THE "MĀORI": HISTORICALLY AND LEGALLY?

Prior to colonisation, the term Māori had never been used in reference to the Indigenous people of New Zealand. Originally, the word meant that something (whether human or not) was "normal, ordinary, or of the usual kind".⁶ The connection of the word and the people has its origin in the arrival of the Pākehā. Before this, there was no need for the Indigenous people to identify as a single collective race or ethnicity, but rather identification was tribal and sub-tribal.⁷ Colonisation and the ensuing desire of the colonisers to deal with one people, rather than many tribes, resulted in an encouragement of such a collective identity⁸ Furthermore, the increasing scale of warfare over land also resulted in the enlargement of identity.⁹

The term Māori is now commonly used to refer to the New Zealand Indigenous people, almost always with little or no thought as to its history, or to its underlying implication of the existence of a single race. Moreover, though some controversy still

⁵ As has been distinguished from traditional cultural expressions (TCE) by the World Intellectual Property Office (WIPO). See, for example, the separate TK and TCE WIPO Draft Provisions: IGC, Secretariat, 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles', (WIPO Doc. WIPO/GRTKF/IC/9/4, 2006); and IGC, Secretariat, 'The Protection of Traditional Knowledge: Revised Objectives and Principles', (WIPO Doc. WIPO/GRTKF/IC/9/5, 2006).

⁶ Andrew Sharp, *Justice and the Māori: Māori Claims in New Zealand Political Argument in the 1980s*, Hong Kong: Oxford University Press, 1990, at p. 50; and Courtney Sullivan, 'Mai i Aotearoa – From New Zealand: The effects of living in Australia on Māori identity', *University of Otago*, Honours Thesis (2009), at pp. 29-30, available online at http://eprintstetumu.otago.ac.nz/80/01/Sullivan_1.pdf.

⁷ Coates, 'Let the Heartwood of Māori Identity Stand', *supra* note 4, at p. 13.

⁸ *Ibid*, at p. 15.

⁹ Gallagher, *supra* note 3.

exists as to its usage, it is generally accepted by most Indigenous peoples in the country.¹⁰ Therefore, the term is used throughout this paper to refer to the New Zealand Indigenous people, without any intention to imply a judgement of whether the term is valid or not.

There exists a greater debate over the legal definition of the term Māori. Since 1840, when the founding document of New Zealand was signed (The Treaty of Waitangi), the Māori have been statutorily defined in a number of different ways. In 1960, there were ten different definitions across the New Zealand statutes.¹¹ In the Māori Representation Act 1867, they were defined as a “male aboriginal native inhabitant of New Zealand”, aged twenty one years or older and included “half-castes”. The Māori Affairs Act 1953, Māori Trustee Act 1953 and Adoption Act 1955 had similar definitions, excluding the reference to sex and age, and included those between half-caste and of pure descent. The Electoral Act 1956 had three different classifications, depending on blood quantum: if one was more than half-caste, they were on the Māori roll; if one was less than half, they were on the European roll; and half-castes were able to choose.¹²

In 1974, the Māori Affairs Act 1953 was amended, including its definition of Māori. Following this, the general legal definition of Māori became “a person of the Māori race in New Zealand” (hereinafter “the general legal definition”).¹³ As a result, there arose a single legal definition of Māori, which focused solely on any descent, regardless of how little.¹⁴ This definition exists still today. Since 1986, the New Zealand Census has taken an even broader approach, having two possible ways of identifying as “Māori”, either by ethnicity or through descent. The former refers to “cultural affiliation” or self-identification, whereas the latter to “ancestry”.¹⁵ In other words, it is possible to be “ethnically” Māori with no Māori ancestry, in contrast to being Māori by descent. In the last Census, in 2006, less New Zealanders identified with the Māori ethnic group (565,329) than those that claimed Māori descent (643,977).¹⁶ Therefore, there are many New Zealanders who do not self-identify as Māori, but are technically recognised as such under the general legal definition. The appropriateness of the general legal definition has been considered elsewhere¹⁷ in some depth and, consequently, will only be minimally discussed here.

¹⁰ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4, at p. 15. The term ‘*Tāngata Whenua*’ is also used by the Māori to self-identify. In its broadest sense, it means “people of the land”.

¹¹ Jack K. Hunn, *Report on Department of Māori Affairs*, Wellington: Government Printer, 1960, at p. 19.

¹² There were some Acts which were not so exclusively based on blood quantum, such as the Māori Social and Economic Advancement Act 1945 and 28th Māori Battalion Memorial Scholarship Fund Act 1945, which were based on any descent.

¹³ This definition is now common in legislation referring to the Māori. For example, it is in the Treaty of Waitangi Act 1985 and the Te Ture Whenua Māori Act 1993.

¹⁴ The effects of the Amendments are discussed in the *Report of the Waitangi Tribunal on the Waiheke Island Claim* (1987) Wai 10, at part 7(4), para. 3.1 M.J.Q. Poole.

¹⁵ Statistics New Zealand, ‘QuickStats About Māori’, *New Zealand Census 2006* (2007), at p. 1 [hereinafter ‘QuickStats About Māori’].

¹⁶ *Ibid*, at p. 1.

¹⁷ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4. See also Natalie Coates, ‘Who Are the Indigenous Peoples of Canada and New Zealand?’ (2008) *Journal of South Pacific Law*, 12 (1), pp. 49-55; Tahu Kukutai, ‘The Problem of Defining an Ethnic Group for Public Policy: Who is Māori and Why Does it Matter?’ (2004) *Social Policy Journal of New Zealand*, 23, pp. 86-108; and Sullivan, supra note 6, at pp. 26-40.

It has been stated that the very wide general legal definition of Māori, which includes those with any Indigenous ancestry, is consistent with the ideology behind the Māori concept of *whakapapa*.¹⁸ This is generally translated as genealogy, but is actually much more expansive in meaning, encompassing the view of existence itself and the relationship between this and the natural world.¹⁹ Consequently, *whakapapa* also connects Māori existence to the *atua* (gods), creation and all life and represents the inheritance Māori receive from descent. Both the general legal definition of Māori and *whakapapa* make ancestry crucial to identity.

However, that some ancestry is required can be problematic when those who self-identify as Māori, live fully immersed in the culture and contribute to the community, but have no blood ancestry, are not considered legally Māori.²⁰ These may be, for example, those adopted or married into Māori families, or those that have studied and greatly contributed to Māori communities. Additionally, there are many people of Māori descent, who through no fault of their own, can no longer trace their *whakapapa*. This may be due to colonisation or urbanisation.²¹

The general legal definition, additionally, severs culture from the Māori legal identity.²² *Māoritanga* (or “Māoriness”) encapsulates elements of traditional Māori expressions considered to be essential to Māori culture,²³ and have been defined as: the Māori language; the sayings of the ancestors; traditional chant songs; posture dances, decorative art; the traditional Māori house and *marae*; the body of Māori custom, particularly that pertaining to the *tangi* and the traditional welcome; and the retention of the prestige and nobility of the Māori people.²⁴ The general legal definition of Māori does not take these aspects of culture into consideration. There is, thus, a divorce between what many argue to be what truly defines being Māori (the culture that defines Māori identity) and the general legal definition (based purely on ancestry). Coates put it quite succinctly, when she asked: “What’s the point in being Māori if genetic material is the only thing that differentiates Māori from Pākehā?”²⁵

Another major problem with the descent only general legal definition is the tension that it creates. Modern day legislation distinguishes between Māori and non-Māori to give the former an advantage of some kind. Both Māori closely associated

¹⁸ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4, at p. 18. See also Coates, ‘Who Are the Indigenous Peoples of Canada and New Zealand?’, supra note 17, at pp. 50-52.

¹⁹ Coates, ‘Let the Heartwood of Māori Identity Stand’, *ibid.*, at p. 18-19. Coates references Cheryl W. Smith, ‘Straying Beyond the Boundaries of Belief: Māori Epistemologies Inside the Curriculum’ (2000) *Educational Philosophy and Theory*, 32 (1), pp. 43-51, at p. 4; and Hana O’Regan, *Ko Tahu, Ko Au*, Christchurch: Horomaka Publishing, 2001, at p. 50.

²⁰ See, for example, Geoff Melvin, ‘The Jurisdiction of the Waitangi Tribunal’, in Janine Haywood and Nicola R. Wheen (eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Watangi*, Wellington: Bridget Williams Books Limited, 2004, pp. 15-28. See also Coates, ‘Who Are the Indigenous Peoples of Canada and New Zealand?’, supra note 17, at p. 53. This is also discussed in Kukutai, supra note 17, at pp. 93.

²¹ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4, at pp. 28-29; Kukutai, supra note 17, at p. 94-95; and Kimiora Raerino, ‘He tirohanga a Ngāti Awa uri taone mo ngā ahuatanga Māori: An urban Ngāti Awa Perspective on Identity and Culture’, *Auckland University of Technology*, Masters Thesis (2007), available online at http://aut.researchgateway.ac.nz/bitstream/10292/423/2/RaerinoK_a.pdf. Arguably, this loss of *whakapapa* removes much of the Māori identity, see Sullivan, supra note 6, at pp. 29-31.

²² Coates, ‘Who Are the Indigenous Peoples of Canada and New Zealand?’, supra note 17, at p. 53.

²³ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4, at p. 32.

²⁴ Sir Aprirana Ngata, cited in James E. Richie, *The Making of a Māori*, Wellington: A.H and A.W Reed, 1963, at p. 37. See also Sullivan, supra note 6, at pp. 34-36.

²⁵ Coates, ‘Let the Heartwood of Māori Identity Stand’, supra note 4, at p. 34.

with their communities and many non-Māori feel frustrated when those who are legally Māori, but culturally non-Māori, obtain those benefits. This one-way taking goes against many concepts of *Tikanga Māori*.²⁶ This unease is reflected in modern New Zealand society, which disfavors positive discrimination given to those considered not to be the targeted beneficiaries.²⁷ Connected to this are issues relating to the fact that the number of people with Māori ancestry is increasing. In the 2006 Census, the number of people of Māori descent had risen by 26.0 per cent over fifteen years.²⁸ The increasing number of Māori by descent places pressure on the limited resources distributed through legislation. This dilutes the resources to a point where they may no longer be maintained.²⁹ It was noted by the Waitangi Tribunal³⁰ that due to the advantages only given to Māori, it is likely that more people will claim their Māori ancestry.³¹ This was reflected in the 2006 Census.³²

Finally, there is no single Māori reality,³³ making defining "Māori" even more difficult. Part of the problem of trying to legally define the Māori is that the term itself is a non-Māori construct.³⁴ The diversity of the Māori people and the non-exactitude of their definability, resulting from their identity being "fluid and in a perpetual state of evolution", means that it cannot be reconciled with the more rigid nature of the law.³⁵ As a consequence of this, it is not possible to theoretically define "Māori" such that it matches the practical reality.

In discussing the general legal definition, two commentators, Coates and Kukutai, both ultimately concluded that the best solution would be to retain the existing general legal definition of "Māori" based purely on any descent, despite that this would exclude those who have no ancestry, but who nonetheless identify as being Māori.³⁶ The retaining of the need for ancestry is due to the centralism of *whakapapa*

²⁶ Ibid, at pp. 36-43. The definition of who should benefit from government policies is also discussed in Kukutai, supra note 17. For discussion on problems associated with the legal distinction (and therefore rights) of Indigenous and non-Indigenous people, see Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy' (2003) *New Zealand Journal of Public and International Law*, 1, pp. 55-82; and Claire Charters, 'Do Māori Rights Racially Discriminate Against Non Māori?' (2009) *Victoria University of Wellington Law Review*, 40, pp. 649-668.

²⁷ For example, see BBC Sports, 'Rugby Union: Uncovering the Māori Mystery', *BBC News UK* (20 September 2008), available online at http://news.bbc.co.uk/sport1/hi/rugby_union/international/2965212.stm, which discusses the inclusion of Christian Cullen into the Māori All Blacks team, when he is only 1/64th Māori (this means that he had one great, great, great, great, great grandparent that was Māori).

²⁸ 'QuickStats About Māori', supra note 15, at p. 9. This is in part due to an increase in intermarriages, see Coates, 'Who Are the Indigenous Peoples of Canada and New Zealand?', supra note 17, at p. 52.

²⁹ Coates, 'Let the Heartwood of Māori Identity Stand', supra note 4, at p. 46-47. See also Coates, 'Who Are the Indigenous Peoples of Canada and New Zealand?', supra note 17, at p. 53.

³⁰ A specialist tribunal, established to deal with Māori claims of breaches of the Treaty of Waitangi, established by the Treaty of Waitangi Act 1975.

³¹ *Report of the Waitangi Tribunal on the Te Reo Māori Claim* (1986) Wai 11, at p. 15.

³² 'QuickStats About Māori', supra note 15, at p. 9.

³³ Coates, 'Let the Heartwood of Māori Identity Stand', supra note 4, at p. 1. See also Margaret Forster, 'Being Māori in the Context of Poverty, Prosperity and Progress', *Pōhara, Tōnui, Kōkiri: Poverty, Prosperity, Progress*, Biennial International Development Studies Network (DevNeT) Conference (Victoria University, Wellington, New Zealand, 17 November 2000), at pp. 3-4, available online at www.devnet.org.nz/conf/Papers/forster.pdf; and Sullivan, supra note 6, at pp. 37.

³⁴ Coates, 'Let the Heartwood of Māori Identity Stand', *ibid*, at p. 7.

³⁵ Ibid, at pp. 52-53.

³⁶ Ibid, at pp. 66-67; and Kukutai, supra note 17, p. 101

in the Māori identity.³⁷ The definition further includes people who, as a mere reflection of contemporary society or a result of colonisation, no longer associate with the traditional culture, but should not be denied a Māori identity.³⁸ However, Coates argued that further criteria should be added, according to the specific policy reasons behind why the Māori are being distinguished in the particular Acts.³⁹ Specifically, each Act should have additional criteria, on top of the requirement of descent, to meet the particular policy interests of the Act. Thus, she argued for a differentiation between the definition of “Māori” and which “Māori” should be entitled to the right endowed by any specific Act. The further restrictions in each Act would acknowledge that there is no one Māori experience. The requirement would also ensure flexibility in law and policy and that the right people benefit from the advantages given through legislation. Furthermore, it would control the number of people competing for the limited resources. Like Coates, Kukutai also argued for further requirements over ancestry alone. Namely, that ethnicity should also be a requirement. In other words, Kukutai concluded that the definition of “Māori” should be limited to those who identify culturally as Māori, as self-identification is an important aspect of identity.

In the author’s view, Kukutai’s need for self-identification is too legally undefinable and practically unworkable. It would not be logistically or financially feasible to assess an applicants self-identification (and genuineness of such) under every statute that seeks to give a benefit to the Māori. Coates conclusion is more legally and practically sound and is arguably a refined approach to Kukutai’s suggestion, as tailoring each Act to target certain groups of Māori could be used to take into account certain aspects of self-identification. Therefore, the author supports the solution proposed by Coates.

3. CREATION AND TRADE OF MĀORI CULTURE

This section of the paper evaluates the socioeconomic reasons why the Māori must be the ones to benefit from their cultural heritage. It further discusses why New Zealand law does not currently protect these interests. As mentioned in the Introduction, this paper takes a novel trade focus, with the approach that the Māori need to be the ones who: (1) decide the trade or non-tradeability of their cultural heritage; and (2) be the ones who profit from such trade. It takes this approach keeping in mind that the overall solution proposed needs to be one of a procedural nature, as many sociopsychological studies, performed with many different cultures, have proven that when parties to a decision-making process have a sense of fair procedure they more ready to accept the outcome as being just.⁴⁰

³⁷ Kukutai, *supra* note 17, p. 101.

³⁸ Due to governments’ tendency to only deal with *iwi*, urban Māori have been left out of Treaty settlements, For example, see *Te Waka Hi Ik o Te Arawa v The Treaty of Waitangi Fisheries Commission* (2000) 1 NZLR 285 (CA), where urban Māori were denied a share of a fisheries settlement, even though it was intended as a pan-Māori settlement, as it was only for *iwi*.

³⁹ Kukutai, *supra* note 17, p. 101.

⁴⁰ Christoph Beat Graber, ‘Institutionalization of Creativity in Traditional Societies and in International Trade Law’, in Shubha Ghosh (ed.), *Creativity, Law and Entrepreneurship*, Cheltenham, UK: Edward Elgar, 2010 (forthcoming).

3.1 HOW THE MĀORI ARE MISSING OUT

Outside of New Zealand, there is currently something “cool” and “hot” about Māori designs and culture that have made them increasingly popular on the global market and in the tourism industry in New Zealand.⁴¹ As Māori MP John Tamihere said “[w]orldwide indigenous shares are skyrocketing”.⁴² When products from New Zealand are associated with Māori symbols, they tend to gain a higher value overseas from seeming more “authentic” and “in touch with nature”.⁴³ In fact, Māori culture is considered to be more “in” overseas than in New Zealand. This prompted Aroha Mead to point out the irony of this, stating that “[i]t’s cool to be Māori overseas, but for us here, it’s a daily struggle.”⁴⁴ Though this may seem like something that should benefit the Māori, at least in an economic sense, it is likely that it seldom does.⁴⁵ Rather, aspects of Māori cultural heritage are appropriated, often without their knowledge and outside of *Tikanga Māori*. It is probable that oftentimes, consumers are not even aware of the appropriation and are, thus, not even appreciative of the deeper significance of the items that they purchase.

The current interest and, hence, increased pop-culture visibility of Indigenous cultural heritage is sometimes mistakenly viewed as contributing towards the modern movement by Indigenous peoples to recover their heritage. However, this perspective does not appreciate the underlying values of a culture and its ability to change over time. Furthermore, it fails to understand the “political, economic, and cultural battles fought by indigenous activists, motivated by a desire for sovereignty and the right to cultural self determination”.⁴⁶ Many Māori do not consider inappropriate uses of their cultural heritage as being complimentary or somehow a sign of esteem for their culture. As Nicole MacDonald stated:⁴⁷

Māori are prepared to fight to protect their traditions, to hide them, if necessary, from the bored, fascinated eyes of a world hungry for the “exotic.” Though they do not feel compelled to share their culture with those who do not respect it, they are eager to educate others who are willing to understand. They want to show them that there is important, sacrosanct meaning behind the beauty of the design, in order to further protect the art from those who look purely out of horrified curiosity or who attempt to appropriate the patterns for uses other than those that are personal and sacred.

⁴¹ Maui Solomon stated that ‘Māori imagery has become fashionable nationally and internationally’, see TVNZ, ‘BBC Hijacks the Haka’, *TVNZ National* (8 April 2002), available at <http://tvnz.co.nz/view/page/423466/92609>.

⁴² Paul Ward, ‘Moko: Te Māori Ki Te Ao’, *nzedge.com* (April 2002), available at <http://www.nzedge.com/features/ar-moko.html>.

⁴³ Andrew Janes, ‘Selling Your Culture Sensitively’, *Unlimited* (26 April 2005), available online at <http://unlimited.co.nz.nsf/growth/selling-your-culture-sensitively>.

⁴⁴ Quoted in ‘Māori Culture Taking Off Overseas’, *The Dominion Post* (4 February 2008), available online at <http://www.stuff.co.nz/dominion-post/archive/national-news/252323>.

⁴⁵ An example where it has benefited some Māori *iwi* is ‘Tohu Wines’, owned by four *iwi*. The chief executive of the company stated that the story about their culture gave them a “marketing edge”. See Janes, *supra* note 43.

⁴⁶ Christian Palmer and Mervyn L. Tano, *Mokomokai: Commercialization and Desacralization*, Denver, USA: International Institute for Indigenous Resource Management, 2004 (electronic version, available online at www.nzetc.org).

⁴⁷ In Hans Neleman, *Moko: Māori tattoos*, Zürich, New York: Edition Stemmler, 1999, at p. 13.

It is, however, important to note that there are some Māori who do not take such a restricted point of view. For example, Māori MP and leader of the New Zealand First party Winston Peters has made statements pertaining to the over-sensitivity of some Māori. When a Dutch restaurant (selling New Zealand and Australian cuisine) re-named itself “Moko”, some Māori groups were outraged, which Peters called being “precious”.⁴⁸ Peters viewed the imitation as the “highest form of flattery”.

As is clear from the often publicised appropriations of Indigenous culture, in New Zealand, the Māori are not reaping all the benefits from the trade of their cultural heritage, whether nationally or internationally. For example, in 2008, matryoshka dolls featuring a Māori family were designed in New Zealand and manufactured in China to be sold in New Zealand. They were described as insulting and ugly.⁴⁹ The “Russian doll” imports were particularly controversial due to the fact that New Zealand had just signed a Free Trade Agreement with China, which was feared to have detrimental effects on Māori interests. Critics warned that similar exploitations of Māori cultural heritage could be expected as a result of the Free Trade Agreement. Aroha Mead (a senior lecturer in Māori business studies at Victoria University of Wellington) stated that it was ironic that the same Government that encouraged the Māori to become entrepreneurial had just signed an agreement which would “flood the market with cheap, poor-quality imitations”.⁵⁰

This situation emphasises the problem that the Māori have in controlling and benefiting from the trade of their culture. It is likely that the insult would not have been as great had there been prior-consultation, perhaps if the dolls been designed by a Māori and had they not appeared “cheap and simplistic”.⁵¹ Palmer and Tano stated that, as with the historical commercial demand for the *mokomokai* (dried, tattooed Māori heads), modern Western⁵² demands on Indigenous art “not only desacralized ... but destroyed their aesthetic value as well”.⁵³ In other words, modern interest in Māori art often causes the breach of *Tikanga Māori*, while at the same time being somewhat crude or vulgar. However, a problem is that the dolls were very well-received and sold very well. It is questionable if better-made, more authentic and, thus, more expensive dolls would have sold as well. Arguably not. This is due to the interest in Māori culture being shallow, which is discussed further below.

⁴⁸ New Zealand First Party, ‘Māori Moko - Are We Getting Precious Or What?’, *Press Release* (20 March 2002), available online at <http://www.scoop.co.nz/stories/PA0203/S00341.htm>.

⁴⁹ Māori Party Co-leader Pita Sharples stated that he opposed “this kind of commodification” of Māori culture. “These dolls tell us exactly what the 941 pages of the free trade agreement with China will mean for Māori people.” See Craig Simcox, ‘Māori Russian Dolls Made in China, Sold in NZ’, *The Dominion Post* (11 April 2008), available online at <http://www.stuff.co.nz/dominion-post/361204>.

⁵⁰ Furthermore, she considered the dolls to be an insult to traditional artists: “If you compare these to authentic Russian dolls, which are well-designed and beautiful with very intricate patterns, they are cheap and simplistic. They certainly don’t have anything to do with Māori culture ... I don’t think any Māori would make something like this.” *Ibid.*

⁵¹ *Ibid.* For a discussion on whether Māori cultural images and designs can only be “Māori” if created by Māori, see Pania Waaka, ‘Hei Tiki and Issues of Representation Within Contemporary Māori Arts’ (2007) *MAI Review*, 1, available online at www.review.mai.ac.nz.

⁵² In this paper, the term “Western” is used to denote the non-Indigenous majority, usually Anglo-Saxon.

⁵³ Palmer and Tano, *supra* note 46. For a discussion on *mokomokai* at auction, see Robert K. Paterson, ‘Protecting *Taonga*: The Cultural Heritage of the New Zealand Māori’ (1999) *International Journal of Cultural Property*, 8 (1), pp. 108-132, at pp. 125-126.

The loss of control over the trade of Māori culture is partly due to its increasing popularity. Te Puni Kōkiri (Ministry of Māori Development) believes that Māori culture can give New Zealand a competitive advantage in international trade, particularly the Māori. It was stated that “[p]oints of difference are potentially very valuable and traditional Māori values, activities and protocols are providing Māori with natural advantages they can exploit.”⁵⁴ Well-known Māori MP John Tamihere also believes that the Māori need to take advantage of the obvious interest in Māori culture, rather than complain about it. With reference to European designers using the *moko* (Māori facial tattoos) to sell clothing, Tamihere stated that it was wonderful and “not an insensitive act at all”.⁵⁵ He further urged Māori and New Zealand to increase marketing and branding strength through Māori culture. He argued that using Māori culture as a point of differentiation would ensure that New Zealand “goods, services and products are highly priced, niche marketed, value added and highly sought after ... this is all about releasing potential and we must acknowledge that the world-wide indigenous shares are sky rocketing. Take advantage of this as a nation.”⁵⁶

However, the reality is that the more popular Māori culture becomes overseas, the more likely it is that “intellectual property rights may be lost, and that Māori won’t benefit from it.”⁵⁷ In other words, it is not necessarily only about taking advantage of international trends, as without a means to prevent appropriation there is no control over who can benefit from Māori cultural heritage. Furthermore, offence may still be caused when there is no means to control what can or cannot be traded. This is exacerbated by the fact that, as is within New Zealand, this interest in Māori culture appears to be somewhat shallow. Those that truly wish to understand the culture and respect *Tikanga Māori* are likely few and far between. This is evidenced by recent figures, which indicate that most tourists in New Zealand know almost nothing about the Māori (if they have heard of them at all) and are sometimes unaware that the cultural attractions that they attend are Māori and are often deterred by Māori-appearing products.⁵⁸

In summary, there is a growing demand for “Māori” cultural products. Though this may benefit the trade of authentic Māori cultural products, it also results in an increase of trade of non-authentic products outside of *Tikanga Māori*, as the demand lacks real depth.

3.2 WHY MUST MĀORI BENEFIT FROM THEIR CULTURE?

There are many reasons why the Māori should be allowed to reap the potential benefits of their cultural heritage. The first reason discussed elaborates on the link between cultural identity and well-being (as defined below). Secondly, this part addresses the relationship between culture and socioeconomic development. The

⁵⁴ Te Puni Kōkiri CEO Leith Comer, quoted in ‘Māori Culture Taking Off Overseas’, *supra* note 44.

⁵⁵ Ward, *supra* note 42.

⁵⁶ *Ibid.*

⁵⁷ Victoria University Māori Studies Head Peter Addis, quoted in ‘Māori Culture Taking Off Overseas’, *supra* note 44.

⁵⁸ The Press, ‘Māori Culture Not a Hit with Visitors’, *stuff.co.nz Travel* (13 August 2008), available at <http://www.stuff.co.nz/travel/579029>.

final ground relates to the history of the colonisation of the Māori and the Treaty of Waitangi obligations towards them.

3.2.1 Cultural Identity and Overall Well-being

The Māori do not wish to “preserve their cultural heritage in amber for the edification of nationalists or blandishments of the tourist trade. Quite the reverse, they want to consolidate a unique cultural identity based on the retention of selective patterns”.⁵⁹ Thus, one of the main goals of the Māori is the sustainability of *Te Ao Māori* (the Māori world).⁶⁰ There is likely a fear that misappropriation of their cultural heritage may not only potentially be offensive, but may dilute the culture or eradicate its connection to the Māori identity. Thereby, a vital aspect of the Māori ethnicity would be removed.

Like many terms related to culture, “cultural identity” is a nebulous concept that is difficult to define.⁶¹ The UNESCO Universal Declaration on Cultural Diversity noted “that culture is at the heart of contemporary debates about identity” and that “diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind”.⁶² However, this Declaration, as well as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,⁶³ fail to actually define “cultural identity”.

Claire Wright stated that cultural identity is the “freedom to create and choose our own images. A society which abandons the means of depicting itself would soon be an enslaved society.”⁶⁴ She further wrote that common identity, which distinguishes a group from other people, is created through the transmission of the group’s culture via group participation in shared practices, which inform or remind members of what is “meaningful” to them.⁶⁵ There are many ways to more precisely define cultural identity, which are discussed in depth by Wright.⁶⁶ What follows is a short summary thereof. Structuralism defines identity through binary word systems, which serve to mark “outsiders” and “insiders”. It is limited in that it only considers

⁵⁹ Augie Fleras, ‘Redefining the Politics Over Aboriginal Language Renewal: Māori Language Preschools as Agents of Social Change’ (1987) *The Canadian Journal of Native Studies* VII, 1, pp. 1-40, at pp. 12.

⁶⁰ Whetu Wereta and Darin Bishop, ‘Towards a Māori Statistics Framework’, *UNESCO Meeting on Indigenous Peoples and Indicators of Well-Being*, Aboriginal Policy Research Conference (Ottawa, 22-23 March 2006), at p. 8.

⁶¹ See, for example, the discussion in Christopher M. Bruner, ‘Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products’ (2008) *New York University Journal of International Law and Policy*, 40, pp. 351-436, at p. 360-365.

⁶² UNESCO, Universal Declaration on Cultural Diversity (2001) 41 ILM 57 (2 November 2001), General Conference and art. 1.

⁶³ UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 October 2005) (in force 18 March 2007).

⁶⁴ Claire Wright, ‘Reconciling Cultural Diversity and Free Trade in the Digital Age: A Cultural Analysis of the International Trade in Content Items’ (2008) *Akron Law Review*, 41, pp. 399-507, at p. 400.

⁶⁵ *Ibid.*, at p. 446. Wright references Harry C. Triandis, ‘Culture and Psychology: A History of the Study of Their Relationship’, in Shinobu Kitayama and Dov Cohen (eds.), *Handbook of Cultural Psychology*, New York: Guilford, 2007, pp. 59-76, at p. 64; and Melvin Konner, ‘Evolutionary Foundations of Cultural Psychology’, in Shinobu Kitayama and Dov Cohen (eds.), *Handbook of Cultural Psychology*, New York: Guilford, 2007, pp. 77-108, at pp. 77-78.

⁶⁶ *Ibid.*, at pp. 450-467.

language to differentiate peoples. Psychoanalytical theories also hold that people define themselves through the continual process of differentiating themselves from others. The concept is taken further by Post-Structuralism, which incorporates into the theory the fact that there is constant evolution of individuals and groups, thus aspects of social practice and the group's knowledge are also considered. Culturalism takes a different approach, defining identity as all aspects of a group's way of life and the "meaning" that is taken from these aspects. Finally, Critical Theory extends this by taking into account that each individual has his or her own "meaning" and the resultant identity of the group is a negotiation between all the different members of society. Put simply, "cultural identity" is a means by which groups differentiate themselves from others and is determined by shared practices and the "meaning" attributed to these practices.

In line with this, there is a strong Māori view that knowledge and use of Māori cultural practices are important for a Māori person's sense of identity, and connectedness to other Māori and important Māori institutions like *marae*.⁶⁷ When customary norms are not adhered to and the market is flooded with poor imitations of aspects of Māori cultural heritage, it becomes harder to distinguish exactly what Māori culture is and what it means to be an "insider" Māori. In other words, the things by which the Māori distinguish themselves are blurred, as are the "meanings" that would traditionally be associated with the appropriated aspects of culture. Thus, Māori lose the ability to differentiate themselves and their sense of cultural identity is diluted. This is made worse by the urbanisation of the Māori, which has resulted in many Māori having very little contact with Māori culture, other than what is "mainstreamed".

As cultural identity affects overall well-being, the loss of the Māori cultural identity impacts negatively on this. In a philosophical sense, well-being is what is ultimately good for a person.⁶⁸ This includes health, economic, social and cultural aspects. In New Zealand, cultural well-being has been defined as "[t]he vitality that communities and individuals enjoy through: participation in recreation, creative and cultural activities; and the *freedom to retain, interpret and express their arts, history, heritage and traditions*."⁶⁹ From this, it is clear that cultural identity is closely related to cultural well-being. It is also strongly believed in the Māori community that Māori culture is critical for their well-being.⁷⁰ Moreover, the New Zealand Ministry of Culture and Heritage noted that a strong sense of cultural identity contributes

⁶⁷ Statistics New Zealand, *Māori Social Survey Discussion Document*, Wellington: Statistics New Zealand, 2009, at pp. 17-18. In line with this, the two co-leaders of the Māori Party (currently part of the coalition Government) argued for Māori-run prisons, if the Government decides to privatise the prison system, as over half of the prison population is currently Māori. They view that in imbuing the inmates with Māori culture and teaching them about where they come from, they will be inspired by a sense of pride and self-esteem to not re-offend. They consider it a way to allow for Māori *iwi* and *whānau* to take responsibility for their own, in accordance with *tikanga Māori*. This increases the well-being of the inmates and New Zealand society as a whole. See Karla Akuhata, 'Restoring Pride', *Waikato Times* (13 April 2009), available online at <http://www.stuff.co.nz/waikato-times/features/2331298/Restoring-pride>.

⁶⁸ *Stanford Encyclopedia of Philosophy*, California: Metaphysics Research Lab, CSLI, Stanford University, 2008, available online at <http://plato.stanford.edu/entries/well-being/>.

⁶⁹ Ministry of Cultural Heritage, 'Cultural Well-being and Local Government: Report 1 Definitions and Contexts of Cultural Well-being', available online at <http://www.culturalwellbeing.govt.nz/files/report1.pdf> (emphasis added).

⁷⁰ Statistics New Zealand, *Māori Social Survey Discussion Document*, supra note 67, at p. 6.

positively to employment, economic growth, social cohesion, the acceptance and encouragement of diversity and creative thinking in a range of fields (in other words, overall well-being) and, additionally, pointed out that “cultural aspects of development sit alongside the economic, social and environmental dimensions of sustainability”.⁷¹ Thus, though there are intrinsic benefits in the growth and development in the cultural sector, there are also positive social and economic side effects. Furthermore:⁷²

Cultural identity is important for people’s sense of self and how they relate to others [and] overall well-being. Identifying with a particular culture gives feelings of belonging and security, and accesses social networks that provide support and shared values and aspirations. These can help break down barriers and build a sense of trust between people – sometimes referred to as social capital – although excessively strong cultural identity can also contribute to barriers between groups.

In summary, the dilution of Māori culture, through the continual appropriation and/or disrespect for *Tikanga Māori*, diminishes the cultural identity of the Māori and impacts negatively on their overall well-being. This could have spiral effects of disenfranchising a minority group of New Zealand, which is already struggling to cope with the changes to their social structures since colonisation.⁷³ In a sense, the effects would be similar to continued colonisation.⁷⁴ As Kawharu noted, “[it] has long been recognised that the lack of secure identity and sense of place in today’s tribal realities have contributed toward poor performance for Māori generally.”⁷⁵

3.2.2 Social and Economic Development

Similar to many other Indigenous peoples, statistics on the prosperity of different ethnic groups in New Zealand do not reflect well on the Māori. For example, Māori unemployment rates and median wages are lower than the national average,⁷⁶ there are more violent crimes committed by Māori than any other ethnic group,⁷⁷ and they

⁷¹ Ministry of Culture and Heritage, ‘Cultural Indicators for New Zealand’, *Cultural Statistics Programme*, (2009), at p. 3 [hereinafter MCH, ‘Cultural Indicators’].

⁷² *Ibid*, at p. 41.

⁷³ See Horatio G. Robley, *Moko; or, Māori Tattooing*, Middlesex, UK: Senate Press, 1998, at p. 123, where it is stated that “European civilization...obliterated the distinction which prevailed, upset all their social order, and reduced the entire race to one dead level of social inferiority to the Pakeha”.

⁷⁴ For an example of such a perspective, see Makere Harawira, ‘Neo-Imperialism and the (Mis)appropriation of Indigenousness’ (1999) *Pacific World*, 54, available online at <http://www.maorinews.com/writings/papers/other/makere.htm>. Harawira calls the appropriation of Māori tradition and culture “theft” of “indigenusns”, which is “nothing less than an act of blatant cultural genocide.”

⁷⁵ Merata Kawharu, ‘Local Māori Development and Government Policies’ (2001) *Social Policy Journal of New Zealand*, 16, pp. 1-16. Merata Kawharu is the Director of Research at the James Henare Māori Research Centre at the University of Auckland.

⁷⁶ ‘QuickStats About Māori’, *supra* note 15, at pp. 7.

⁷⁷ Gary R. Hook, ‘“Warrior Genes” and the Disease of Being Māori’ (2009) *MAI Review*, 2, at p. 1, available online at www.review.mai.ac.nz. Hook notes that these kinds of statistics are similar with the Inuits, Metis, and Indians of Canada and the Australian Aborigines. He comments that the common factors between these groups are colonisation and the “perceptions of their colonizers [of the Indigenous Peoples being excessively violent], their dispossession from their lands, their impoverishment, deprivation, and assimilation” (at p. 7).

fair worse in health-related statistics.⁷⁸ Additionally, families with at least one Māori parent populate the “low income” bracket more than any other ethnic group, they have generally lower education levels, with more households having no educational qualifications, lower percentages of home ownership and more crowded living standards.⁷⁹ As stated by Parekura Horomia, the former Minister of Māori Affairs, “[t]he statistics are bad ... The picture is bad.”⁸⁰

Hence, there is an over representation of Māori in the lower socioeconomic profile of New Zealand. However, the evidence that they do not fully benefit from the national and global use of their culture, combined with the fact that Māori-branding appears to be beneficial for trade and, thus, socioeconomic development (as discussed further below), suggests that some (if not many) of the issues faced by modern Māori could be alleviated through a mechanism that allows them to have greater control over their culture.

Beyond merely trading aspects of their cultural heritage, there are also many arguments supporting that there is a need for Māori to connect to their culture to achieve self-identity (as discussed above), which allows for even deeper and real socioeconomic development. After stating that “cultural development” is one of the goals of Māori, Forster continued:⁸¹

Cultural development involves cultural affirmation - maintaining and developing a cultural identity. ... Protection of *taonga* is directly linked to cultural identity and well being, which contributes to both social and cultural development. *Without cultural identity positive Māori development is incomplete. “There is not much point in an effective Māori organisation if it lacks a Māori heart”*. The cultural uniqueness of Māori is determined by *te reo Māori*, by Māori cultural values, Māori knowledge, social structure and heritage. If these *taonga* are lost so is the unique character of the Māori people. Therefore, *the preservation of taonga, knowledge and elements of Māori identity allows the “retention of a cultural identity and the maintenance of a way of life”*. The diversity or pluralistic nature of Māori society is an asset.

Similar statements were made by Wereta and Bishop, who noted that three of the main goals of the Māori are: (1) the sustainability of Te Ao Maori (the Māori world); (2) economic self-sufficiency; and (3) empowerment and enablement.⁸² They continued by stating that because culture is “all-pervasive”, “it penetrates and influences all aspects of life”.⁸³ Consequently, “cultural survival is both the reason

⁷⁸ Forster, supra note 33, at p. 1.

⁷⁹ See Gerard Cotterell, Martin von Randow and Mark Wheldon, *Measuring Changes in Family and Whānau Wellbeing Using Census Data, 1981-2006: A Preliminary Analysis*, Wellington: Statistics New Zealand, 2008. See also Kikutai, supra note 17, at 97-101, who discusses whether associating with Māori identity incurs costs.

⁸⁰ Parekura Horomia (former Minister of Māori Affairs), ‘Opening’, *Pōhara, Tōnui, Kōkiri: Poverty, Prosperity, Progress*, Biennial International Development Studies Network (DevNeT) Conference (Victoria University, Wellington, New Zealand, 17 November 2000), at p. 2, available online at www.devnet.org.nz/conf/Papers/parekura.pdf.

⁸¹ Forster, supra note 33, at pp. 1-2, quoting Mason Durie, ‘Keynote Address’, *Kia pumau tonu*, Hui Whakapumau Māori Development Conference (Palmerston North, New Zealand, 10-11 August 1994); and Mason Durie, *Te Mana Kawangatanga: Politics of Māori Self-determination*, Auckland, New York: Oxford University Press, 1998, at pp. 1-20.

⁸² Wereta and Bishop, supra note 60, at p. 8.

⁸³ Ibid.

for and the ultimate end of indigenous people's development" and "[i]ndeed, the notion of cultural vitality is at the very heart of the concept of Māori well-being."⁸⁴

That the maintenance and development of Māori culture needs to be achieved via some form of cultural self-determination is supported by statements made by Parekura Horomia. When talking about Māori economic development, he stated that Māori communities would benefit through being resourced and given the chance to make decisions for themselves and "driv[e] their future."⁸⁵ Horomia continued that both social and economic outcomes for Māori must start from within the Māori communities, and "Māori need to take, and must be given, ownership and responsibility for shaping their own development."⁸⁶ Such an approach would give the Māori the opportunity to develop their own initiatives and solutions to meet their needs and aspirations.⁸⁷

Therefore, it is argued here that it is important to allow the Māori to regain, maintain, develop and control the connection with their cultural heritage, so that they gain a greater sense of identity and social cohesiveness as an ethnic group. This positive affirmation and assertion of identity could assist in the improvement of the situation of the average Māori by increasing his or her individual sense of dignity,⁸⁸ allowing for positive development, socially and economically, through an enhanced desire to be the architect of his or her future and not dependent on the State. Furthermore, an increased control over their cultural heritage would not only assist in easing the feeling that their colonisation is still continuing, but would also allow the Māori to better take advantage of its potential trade, both nationally and internationally.

3.2.3 The Treaty of Waitangi and Its Guarantees

An important consideration in any dialogue over Māori cultural heritage and its protection and promotion in New Zealand today is the Treaty of Waitangi 1840, signed on behalf of the Queen of England and the Indigenous people of New Zealand. It is essential to note that there exists some controversy surrounding the signing of the documents and that there are differences between the English and Māori texts and, consequently, debate over exactly what was ceded and promised. However, these issues will not be discussed in any depth here.⁸⁹

The Treaty of Waitangi is interpreted and enforced through the Treaty of Waitangi Act 1975, which is an "Act to provide for the observance, and confirmation" of the Treaty principles, through the established Tribunal, which makes "recommendations on claims relating to the practical application" of the said

⁸⁴ Ibid.

⁸⁵ Ibid, at p. 2.

⁸⁶ Ibid, at p. 3. See also Forster, *supra* note 33, at p. 1.

⁸⁷ Wereta and Bishop, *supra* note 60, at p. 3.

⁸⁸ For example, an increase in *Te Reo Māori* proficiency has proven to have this effect. See Te Puni Kōkiri, 'Use of Broadcasting and e-Media, Māori Language and Culture', *Kohi Tātea*, (2010), at p. 7, available online at <http://www.tpk.govt.nz/en/in-print/our-publications/fact-sheets/use-of-broadcasting-and-e-media-Māori-language-and-culture/download/tpk-broadcast-factsheet-en-2010.pdf>.

⁸⁹ For a history of the Treaty of Waitangi, see Claudia Orange, *The Treaty of Waitangi*, Wellington: Bridget Williams Books Limited, 1987.

principles.⁹⁰ The reference to the “Principles” of the Treaty, rather than the Treaty provisions themselves, is due to the differences between the English and Māori text.

According to the English text, Article 2 of the Treaty guarantees to the Māori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...”. The modern English translation of the Māori text, however, guarantees “unqualified exercise of their chieftainship (*rangātiratanga*) over their lands, villages and all their treasures.”⁹¹ The Waitangi Tribunal has made it clear that “treasures” (*taonga*) includes all dimensions of a tribal group’s estate, material and non-material heirlooms and sacred places (*wahi tapu*), ancestral lore and genealogies (*whakapapa*).⁹²

As a consequence of the Treaty and the retention of Customary Title,⁹³ there exists customary usage rights for some aspects of cultural heritage in New Zealand. This has not always been the case and it was not until the ground-breaking judgement of Lord Cooke, in 1986, which truly realised the concept of the “Principles of the Treaty”, that the contemporary understanding of Treaty rights was moulded and established.⁹⁴ Two of these Principles are that the Māori are to retain the chieftainship over their resources and *taonga* and that the Crown has an “active” duty to protect the interests guaranteed under the Treaty.⁹⁵ Though calls for the Crown to abide by the Principles usually relate to land (and claims for fisheries have also been very important), the Principles have also played a large role in the revival of *te reo Māori* (the Māori language), as *taonga*.⁹⁶ A dispute over Government policy relating to the distribution of radio broadcasting frequencies and the argument that the Government had a duty to do so in a way that protected *te reo Māori*, ultimately resulted in the creation of the Māori Broadcasting Funding Agency, which funds Māori radio stations around New Zealand.⁹⁷ The existence of the Treaty and its principles has also allowed for a claim to be made to the Waitangi Tribunal over the rights of the Māori regarding Indigenous knowledge and Indigenous flora and fauna. The intellectual property aspects of the claim have never been addressed before. The report of the Tribunal is expected to be released in 2010.

⁹⁰ Treaty of Waitangi Act 1975, preamble.

⁹¹ For the English and modern translation of the Māori text of the Treaty of Waitangi, see Ministry of Cultural Heritage (with explanatory footnotes by Professor Hugh Kawharu), ‘Te Tiriti o Waitangi - The Treaty of Waitangi’, available online at <http://www.tiritiwaitangi.govt.nz/treaty/translation.pdf>.

⁹² Waitangi Tribunal, ‘Treaty of Waitangi’, available at <http://www.waitangi-tribunal.govt.nz/treaty/>; and *Report of the Waitangi Tribunal on Te Roroa* (1992) Wai 38, at p. 210.

⁹³ For a short summary of customary title in New Zealand, see David V. Williams, ‘*Wi Parata* is Dead, Long Live *Wi Parata*’, *Foreshore and Seabed: the New Frontier*, NZ Centre for Public Law Conference (Victoria University of Wellington, 10 December 2004).

⁹⁴ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 687. See also David Baragwanath, ‘A Perspective of Counsel’, *In Good Faith Symposium* (University of Otago, 29 June 2007); and Paterson, *supra* note 53, at p. 111.

⁹⁵ *New Zealand Māori Council v Attorney-General*, *ibid*, at p. 664 Cooke P.

⁹⁶ *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (1990) Wai 26, 150; and *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA).

⁹⁷ David V. Williams, ‘Customary Rights and Crown Claims: *Calder* and Other Canadian Contributions to the Revival of the Doctrine of Aboriginal Title in Aotearoa New Zealand’, *Let Right Be Done: Calder*, Aboriginal Rights and the Treaty Process: Looking Forward, Looking Back (University of Victoria, British Columbia, 13-15 November 2003), at p. 18.

It is arguable that the existence of the Treaty of Waitangi and the guarantees therein mean that the Indigenous people of New Zealand may have a greater likelihood of meeting their interests and needs, compared with other Indigenous peoples, with respect to the protection and development of their cultural heritage. This observation requires further analysis, outside of the scope of this paper.

3.3 EXISTING REGIMES TOWARDS THIS END

There are many statutes that potentially affect the creation and trade of Māori artefacts, designs, dances, songs and stories, as examples. Moreover, there are many different legislative, policy-based and ministerial mechanisms through which successive governments have attempted to encourage the creation, maintenance and trade of aspects of Māori cultural heritage.⁹⁸ However, there are no existing organisations that monitor, control and distribute revenues from the trade of Māori cultural heritage, in New Zealand, or that ensure that only Māori benefit from the trade of their cultural heritage. If an *iwi* wants to make a specific complaint, they can only do so through regular intellectual property mechanisms, the media, or via direct negotiations with the Government. Furthermore, most existing legal regimes are defensive in nature,⁹⁹ rather than creating positive rights or any form of self-determination. However, there is recognition of the economic potential from such trade and there exists intellectual property mechanisms to protect Māori cultural interests and their trade. This recognition and protection is expounded herein.

3.3.1 Māori “Cultural Capital” as an Economic Input

It has been acknowledged by the New Zealand Government that “Māori cultural capital” can contribute positively to the New Zealand economy and Māori economic status as “assets”. This may be through the “relationship between having a strong sense of identity and cultural wellbeing and successful economic outcomes for individual Māori”,¹⁰⁰ as well as through the creation of “businesses based on cultural expression and engagement with cultural practises, cultural commoditisation, and the production of cultural goods and services”.¹⁰¹ It was a goal of the last Government to develop the trade of Māori cultural products, made by Māori.¹⁰² The

⁹⁸ For example, see the Ministry of Māori Development Act 1991 and the Māori Community Development Act 1962, (this Act is currently under review; see Māori Affairs Committee, ‘Inquiry into the Operation of the Māori Community Development Act 1962 and Related Issues’, *Press Release: Select Committee* (31 July 2009), available online at http://www.parliament.nz/en-NZ/PB/SC/About/Media/f/c/f/00SCMA_MediaRelease20090731_1-Inquiry-into-the-operation-of-the-Maori.htm).

⁹⁹ For example, the Protected Objects Act 1975, Historic Places Act 1993 and Resource Management Act 1991.

¹⁰⁰ Statistics New Zealand, *Culture and Identity Statistics Domain Plan: Draft for Consultation*, Wellington: Statistics New Zealand, 2009, at p. 15 [hereinafter Statistics New Zealand, ‘Draft for Consultation’].

¹⁰¹ *Ibid*, at p. 32.

¹⁰² For example, see Judith Tizard (former Minister of Arts, Culture and Heritage), ‘Toi Iho Māori Made Mark Will Bring Cultural and Economic Benefits to New Zealand’, *Press Release: New Zealand Government* (8 February 2002), available online at <http://www.beehive.govt.nz/node/12988> [hereinafter Tizard, ‘Toi Iho’].

term “cultural capital” is used in a very broad sense. Examples of what these “assets” may consist of were inexhaustibly listed by Statistics New Zealand as:¹⁰³

- extended family and tribal structures – *whānau*, *hapū* and *iwi* – the *whānau* and the practice of *whanaungatanga*
- collective assets – this relates to *tino rangātiratanga* (fullness of control, eg sovereignty, chieftainship, self-determination, self-management), as well as to *kaitiakitanga* (the concept of Māori stewardship or guardianship over their lands, villages and treasures)
- Māori identifications through *whakapapa* (eg genealogy, lineage, descent) and locality, rather than ethnicity
- sense of *mana* as distinct from economic criteria
- Māori understanding and expression through a fundamental relationship to the land
- differential concepts of location and belonging
- differential notions of wellbeing, success and positive outcomes.

Judith Tizard (the former Minister of Arts, Culture and Heritage) stated that “cultural activities are intrinsically good; they play a huge role in defining our nation; and they are a rich source of employment, foreign exchange earnings, productivity and cultural tourism”.¹⁰⁴ Therefore, it is recognised that there is a fundamental, as well as economic, value in cultural heritage.

3.3.2 Intellectual Property and the Māori

The means by which classical forms of intellectual property (trade marks, copyright, patents, trade secrets, confidential information performers, design and plant variety rights) can be used to protect Indigenous interests has been discussed in depth by many other authors and need not be overviewed for the purposes of this paper.¹⁰⁵ Instead, the following paragraphs briefly assess the particular position of the Māori under New Zealand intellectual property laws and policies. The Intellectual Property Office of New Zealand (IPONZ) *Māori Trade Marks Advisory Committee* and the “*toi iho*” (Māori made) trade mark are discussed in the following paragraphs. This is followed by a short discussion on issues pertaining to the classical intellectual property concept of the public domain.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ For example, see Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, London: Kluwer Law International, 2008. See also Ministry of Economic Development, *Te Mana Taumarū Mātauranga: Intellectual Property Guide for Māori Organisations and Communities*, Wellington: The Crown, 2007; which advises on how Māori can protect their intellectual property rights.

(a) Māori Advisory Committees

Differentiating the rights of the Māori from other Indigenous peoples, under the New Zealand Trade Marks Act 2002, a *Māori Trade Marks Advisory Committee* was set up, to which is forwarded any sign which “is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori”, in order to assess and advise on “offensiveness”.¹⁰⁶ Despite the wording of the IPONZ Practice Guidelines, which state that all marks containing Māori signs, texts or imagery will be forwarded to the Committee,¹⁰⁷ not every application for such a sign is actually sent to the Committee. For example, with regard to the *koru* (a motif of Māori customary art), the Committee advised the Commissioner that not all uses of *koru* on signs are offensive, but it depends on the goods or services with which the sign is associated. Thus, the Commissioner decided that it is not necessary to refer a sign to the Māori Trade Marks Advisory Committee to assess just because it utilises a *koru*, unless the sign claims associations with genetic technologies, due to the *Koru*’s symbolism of natural generation, growth and nurturing to the Māori.¹⁰⁸ General IPONZ policies have also been established for other symbols that are associated with the Māori and the use of which could be potentially offensive to them, such as the Kiwi and New Zealand place names.¹⁰⁹

An analogous *Patents Māori Advisory Committee* has also been proposed in the new Patents Bill, which requires that the Committee advise the Commissioner as to whether a claimed invention is derived from Māori TK or “indigenous plants or animals” and, if so, whether “the commercial exploitation of that invention is likely to be contrary to Māori values”.¹¹⁰ For the Committee to become involved, the Commissioner must decide to seek advice from the Committee regarding whether the “commercial exploitation” of the claimed invention would be contrary to “public order” or “morality”, with respect to the Māori.¹¹¹ As a Government Bill, it is likely that this Committee will come to fruition.

The existence of the Committee for trade marks (and likely also for patents) is an encouraging sign for the recognition of Indigenous interests, with respect to cultural heritage and, importantly, intangible forms thereof. Of great value is that the assessment is automatic, not requiring complaint or challenge by the Māori, thus creating pseudo-positive rights. Also relevant are the potential trade implications,

¹⁰⁶ Trade Marks Act 2002, s 178. Under this Act, an application can be rejected if “likely to offend a significant section of the community, including Māori” (s 17(1)(c)). The history of the establishment of the Committee is described in IPONZ, ‘Trade Marks Practice Guidelines’, (26 January 2010), chapter 16.2. The sections of the Act relevant to Indigenous cultural property are also explained in Susy Frankel, ‘Third-Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard’ (2005) *Journal of World Intellectual Property*, 8, pp. 83-98; and Owen Morgan, ‘Protecting Indigenous Signs and Trade Marks -The New Zealand Experiment’ (2004) *Intellectual Property Quarterly*, 1, pp. 58-84.

¹⁰⁷ IPONZ Trade Marks Practice Guidelines, ch. 4 and 6.3.

¹⁰⁸ IPONZ, ‘Proposed Amendments to the Practice Guidelines: Pitau (Koru)’, *IPONZ Newsletter* (9 November 2006), available online at <http://news.business.govt.nz/news/business/iponz/article/3409>; and IPONZ, ‘Trade Mark Practice Guideline Amendment 2006/11 - Pitau (Koru)’, *IPONZ Newsletter* (15 December 2006), available online at <http://news.business.govt.nz/news/business/iponz/article/4907>.

¹⁰⁹ IPONZ, ‘Trade Marks Practice Guidelines’, supra note 107, chapter 16.1-3.

¹¹⁰ Patents Bill (As Reported from the Commerce Committee) 2010, cls 275-278.

¹¹¹ Patents Bill (As Reported from the Commerce Committee) 2010, cl 14(3).

due to the commercial nature of trade marks and patents, which could prove to direct or limit commercial benefits derived from Māori TCE or TK, in favour of the Māori. However, the protection offered through these Committees is limited when one considers that much appropriation is international. These mechanisms do not protect Māori interests from offence or bio-prospecting by those who do not try to register their trade mark or be granted a patent, within New Zealand. In fact, as the Trade Marks Act only applies to marks for which registration is sought, this mechanism has no effect over un-registered marks, even within New Zealand. With regard to the Trade Marks Committee, the protection is not actually positive, as full control is not bestowed, but only the prevention of offence. Finally, the Commissioner is not bound by the recommendations of either Committee, although, to date, the Commissioner has not contradicted the Trade Marks Committee.

Also problematic, the Patents Bill requires that the Commissioner seek the advice of the Committee, meaning that there must first be a realisation that the patent application may be derived from Māori TK, or Indigenous plants or animals. This is not an easy task, given that this knowledge is often not well publicised, even if not secret. It is worth bearing in mind that the Committee may “regulate its own procedure, subject to any direction given by the Commissioner”,¹¹² thus raising the possibility that the Committee may informally advise the Commissioner, even if not approached to do so. Furthermore, as with trade marks prior to the formation of the Māori Trade Marks Advisory Committee, the Commissioner has already been known to informally take into account Māori values when assessing patent applications.

Under the Bill, if the decision is made to seek advice from the Committee, the role of the Committee and the exception to patentability are narrow. This is because the Committee must assess both the conditions of: (1) derivation; and (2) commercial exploitation being contrary to Māori values. This second requirement severely limits the protection over Māori TK, plants or animals. The provision closely mirrors that for trade marks, which also requires derivation and likelihood of offence. However, as the protection from trade marks is over the use in trade of exact (and confusingly similar) expressions, and not the idea behind the mark, it is arguable that the requirement for likelihood of offence from the use or registration makes sense. This is not the case with patents, which protect the ideas embodied in an invention, as stipulated in the claims of the patent specification.¹¹³ If it is the idea that is protected, the more relevant point (with specific regard to the issue of derivation from TK) is where that idea came from, rather than its use. It is not clear, from the Bill, whether the role of the Committee falls under the auspice of “public order” or “morality”. The Bill does not define either of these terms (nor “values”). Arguably, under either, the fact that the derivation has occurred, without consent or benefit sharing, should be enough. In other words, the exception requires that the commercial exploitation of the invention would be contrary to public order or morality, and the commercial exploitation of an invention derived from Māori TK, or Indigenous plants or animals should be contrary to public order or morality.

¹¹² Patents Bill (As Reported from the Commerce Committee) 2010, cl 278. This is the same in the Trade Marks Act 2002, s 180.

¹¹³ William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 5th edn, London: Sweet & Maxwell, 2003, at para. 1-05.

(b) The “Toi Iho” Trade Mark

Another point of difference, in New Zealand, is the existence of trade marks for goods and services that are “Māori Made”. The idea of a trade mark to denote authenticity and also quality was first suggested, in 1936, by Sir Apirana Ngata.¹¹⁴ Though discussed by the Māori Council, in 1964, such a mark was not created until 2002. “Toi iho” came to existence when the previous Labour Government, in 2000, developed a Cultural Recovery Package, part of which funded the “Seriously Māori” strategy, which sought to “strengthen and develop the infrastructure for Māori art.”¹¹⁵ The then Minister in charge, Judith Tizard, further stated that the “strategy w[ould] assist Māori artists, *iwi* and Māori authorities to protect and develop their art, deliver community projects and increase employment opportunities.”¹¹⁶ Moreover, it sought to address the need to protect Māori intellectual and cultural property rights.¹¹⁷ Toi iho was, thus, created.

The toi iho brand includes four trademarks: toi iho Māori Made, toi iho Mainly Māori made, toi iho Māori Co-production and toi iho Licensed Stockist. Thus, cross-cultural ventures were also acknowledged. Creative New Zealand stated that the Mark aims to “promote Māori artworks commercially; *protect the integrity of Māori art and culture in the marketplace; and encourage Māori artists to create and market their works*”, creating long-term financial benefits for Māori artists and *iwi*.¹¹⁸ A second goal of the Seriously Māori campaign was to help *iwi* and Māori authorities to develop and implement arts management plans, in order to preserve and develop heritage arts. It was perceived that the mark would “assist Māori to create viable careers as practising artists, and promote Māori art and artists in the global market”.¹¹⁹ It would do this by taking advantage of the burgeoning interest in Māori art through provision of “[a]ssurances of authenticity and quality have been lacking in the tourism industry for many years.”¹²⁰

It is important to note that a trade mark does not protect the goods or services with which it is associated. If any intellectual property resides in the goods or services themselves, it is not typically in the form of trade marks,¹²¹ but possibly in other forms, such as patent, copyright or design law. For example, a trade mark for a telephone manufacturing company does not prevent others from also manufacturing identical telephones. However, if the first company has copyright in the design of the

¹¹⁴ Sarah Hardie, ‘Māori Save Art Trade Mark Toi Iho From Demise’, *NewsWire.co.nz WaeaRongokōrero* (18 February 2010), available at <http://www.newswire.co.nz/2010/02/maori-save/>.

¹¹⁵ Judith Tizard (former Minister of Arts, Culture and Heritage), ‘Māori Benefit from Arts Cash Injection’, *Press Release: New Zealand Government* (29 May 2000), available online at <http://www.beehive.govt.nz/release/Maori+benefit+arts+cash+injection> [hereinafter Tizard, ‘Arts Cash Injection’].

¹¹⁶ *Ibid.*

¹¹⁷ Creative New Zealand, ‘Background To Creative NZ Funding Announcement’, *Press Release* (5 September 2000), available online at <http://www.scoop.co.nz/stories/SP0009/S00004.htm>.

¹¹⁸ Tizard, ‘Arts Cash Injection’, *supra* note 115; Creative New Zealand, ‘Background To Creative NZ Funding Announcement’, *ibid.*

¹¹⁹ Tizard, ‘Toi Iho’, *supra* note 102.

¹²⁰ *Ibid.*

¹²¹ There has been some case law development where “shape marks” have essentially resulted in the goods itself being trade marked. For example, in *Fredco Trading Ltd v Miller* (2006) 11 TCLR 751 (NZCA). But, such a situation is not perceivable with the Toi Iho marks.

phones or a patent over certain functions, these rights can inhibit the second company's manufacturing-related actions. In most cases, trade marks only protect the use of a mark, in relation to certain goods and services. Thus, the *toi iho* marks do not prevent appropriation of the goods or services for which the marks have been licensed for, but merely restrain un-authorized persons or entities from using the marks in association with their goods or services. Furthermore, the protection afforded is normally limited to use in trade.¹²² Though trade marks are narrow in the protection they offer, they are often the favoured form of classical intellectual property mechanisms for the protection of Indigenous interests. This is because of the potentially unlimited term of protection offered by trade marks. Comparatively, patents are limited to twenty year terms and copyrights are also limited, usually to life of the author plus fifty (as in New Zealand) or seventy years (as in the United States). Hence, even though the cultural products associated with the *toi iho* marks are contemporary in their production and, thus, fall under modern copyright protection, copyright is inadequate for many reasons, including the short time frame of protection and that the idea of exclusive property rights may be foreign to an Indigenous people.¹²³

On its inception, *toi iho* was considered to be a world-leading initiative, often cited as a model to be used by other Indigenous peoples. However, the current National Government has decided to cease investment, management, licensing and promotion of *toi iho*. Creative New Zealand stated that market research showed that it had not achieved increased sales of Māori art by licensed artists or retailers.¹²⁴ Though many artists had used the mark successfully (215 artists license the mark for their work), more Māori artists had successful careers without the mark. They further stated that the fund would be relocated to other Creative New Zealand Māori arts development initiatives.¹²⁵

The opposition Labour Party, who had initially set up the mark, disagreed with the withdrawal of government support, accusing the Government of trying to save a "meagre \$320,000 a year" and calling the abandonment of the mark "not aspirational" but "plain short-sighted".¹²⁶ Many Māori artists and leaders were also not pleased. A furniture designer, Carin Wilson, refused to relinquish the mark, stating that "*Toi Iho* is a source of pride and cultural identity for Māori artists."¹²⁷

¹²² For a deeper discussion about the limitations of trade marks for Indigenous TCE, see Susy Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights', in Graeme B. Dinwoodie and Mark D. Janis (eds), *Trademark Law and Theory*, Cheltenham, UK: Edward Elgar, 2008, pp. 433-463.

¹²³ For a more comprehensive discussion of the tensions between TCEs and copyright law, see Christoph Beat Graber, 'Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights', in Fiona Macmillan (ed), *New Directions in Copyright Law*, Vol. 5, Cheltenham, UK: Edward Elgar, 2007, pp. 45-71, especially at pp. 55-56.

¹²⁴ Creative New Zealand, 'Statement on *Toi Iho*TM', *News* (21 October 2009), available online at http://www.creativenz.govt.nz/funding/toi_iho%E2%84%A2_maori_made_mark.

¹²⁵ *Ibid.*

¹²⁶ New Zealand Labour Party, 'Axing of *Toi Iho* Brand a Backwards Step', *Press Release* (22 October 2009), available online at <http://www.scoop.co.nz/stories/PA0910/S00342.htm>.

¹²⁷ NZPA, 'Māori Craft Brand to Go', *The Nelson Mail* (23 December 2009), available online at <http://www.stuff.co.nz/nelson-mail/features/arts/3189952/Maori-craft-brand-to-go>.

This has led to Māori artists attempting to take control of the mark themselves.¹²⁸ Aroha Mead sees the opportunity for the mark to be managed by Māori themselves as meaning that it is a “time for a new energy, new enthusiasm and Toi Iho being managed by people who genuinely care about authenticity and quality of Māori arts and don’t just see it as another ‘job’.”¹²⁹ A Transition toi iho Foundation made up of Māori artists has been created to ensure that the trade marks continue.¹³⁰ Elizabeth Ellis, a member of the Foundation, stated that she was disappointed by Creative New Zealand’s decisions, as “[w]e, Māori, regard [toi iho] as a living entity, as an icon for Māori creativity and as a positive initiative for high quality Māori art. It is not like a bureaucratic project that can be easily discarded.”¹³¹

(c) The Public Domain

At the heart of the issue of appropriation of Indigenous cultural heritage is the Western intellectual property concept of the “public domain” and the fact that this is often not recognised by Indigenous peoples.¹³² Under Western laws, all information, knowledge and expressions eventually enter the public domain, except those kept secret. This is so even if protected by intellectual property or a related right. Once something enters the public domain, it is considered to be open for use by all. This is not the case in *Tikanga Māori*, under which certain things may be publically known, but never open to use by all. However, free from intellectual property protection, these are considered to be part of the public domain of the Western world. This divorce of concepts can be illustrated through the customary use of the *moko*, compared to its appropriation. A *moko* is a facial tattoo, worn by both women and men, but which historically acted as an identifier of men.¹³³ A *moko* shows one’s social and political rank and status, which means that the wearer’s position of power and authority can be instantly recognised from his *moko*.¹³⁴ Moreover, ancestry is indicated on each side of the face and, thus, descent is, traditionally, an absolute requirement before a *moko* can be undertaken. For example, if one side of a person’s ancestry is not of rank or descent, that side of the face would have no *moko* design. Thus, even though it is a well-known aspect of Māori culture and in the public domain, its use must conform with *Tikanga Māori*. Even Eva Rickard, a strong and respected Māori-rights advocate, did not feel that she had earned the *mana* to be bestowed a *moko* until one year before her death.¹³⁵ Yet, fashion designers Thierry Mugler and Jean Paul Gaultier both used *moko* to promote their clothing lines, on the

¹²⁸ Creative New Zealand, ‘Expressions of Interest in Toi Iho™ Sought’, (25 February 2010), available online at http://www.creativenz.govt.nz/who_we_are/news/articletype/articleview/articleid/453/expressionsof-interest-in-toi-iho-sought; and Māori News and Indigenous Views, ‘Māori Artists Set on Reclaiming Toi Iho Trademark’, *TangataWhenua.com* (14 December 2009), available at <http://news.tangatawhenua.com/archives/2344>.

¹²⁹ Māori News and Indigenous Views, *ibid.*

¹³⁰ Hardie, *supra* note 114.

¹³¹ Hardie, *supra* note 114.

¹³² Silke von Lewinski, ‘Introduction’, in von Lewinski (ed.), *supra* note 105, pp. 1-5, at p. 2.

¹³³ See Te Papa, Museum of New Zealand, ‘Tā Moko - A History on Skin’, available at <http://www.tepapa.govt.nz/Education/OnlineResources/Moko/Pages/overview.aspx>.

¹³⁴ See Palmer and Tano, *supra* note 46.

¹³⁵ Ward, *supra* note 42.

catwalk and in advertisements, respectively.¹³⁶ In response to Māori outrage,¹³⁷ a spokesperson for Thierry Mugler stated: “You should be happy to have a tribute to your country and your people”,¹³⁸ completely overlooking the fact that the reason for the anger was the breach of *Tikanga Māori* and that a “tribute” is of no interest to the Māori.¹³⁹

Though issues relating to information in the public domain exist for both national and international appropriations, they appear to be more prevalent in the latter. This is arguably due to the fact that Māori are often proud (or at least more accepting) when aspects of their cultural heritage become part of the New Zealand culture and, thus, the New Zealand public domain. Consequently, the threshold for offence is sometimes different depending on whether appropriation is national or international. In other words, though mere use internationally may be deemed inappropriate, something more may be required to be so in New Zealand. This is the case with the *Ka Mate haka* (“the haka”, the famous Māori war-dance), where non-satirical use by New Zealanders is normally acceptable, whereas any non-New Zealand use is not.¹⁴⁰

It is clear that any rights given to Indigenous peoples over their cultural heritage will encroach upon the public domain. Limiting public use of published expressions, information and ideas is not new to intellectual property. For example, a fundamental premise of patent law is the publication of the idea behind the invention in exchange for protection, which then limits public use of that information, and copyright systems protect original expressions from being copied, even though published. However, a central ground for having intellectual property protection is that it encourages creation and invention that otherwise would not occur or would be kept secret, justifying the restrictions placed on public use. This ground may not be relevant for the protection of Indigenous cultural heritage. Furthermore, as classical intellectual property protections exist to promote creativity, invention and innovation and ultimately enhance the public domain and benefit the public,¹⁴¹ they are always limited in either time or scope, or both. These limitations are usually exactly why classical forms of intellectual property, even if granted, are not suitable to meet the interests of Indigenous peoples. Therefore, any protection afforded to Indigenous peoples that limits the public domain must be on different grounds than those of classical intellectual property. An example of such a justification could be the social and economic benefits to the Māori.

¹³⁶ Ibid; and Public Opinions, ‘Your Say: Cheeky French Steal Moko’, *Stuff.co.nz* (13 September 2007), available at <http://www.stuff.co.nz/blogs/opinion/your-say/40874>.

¹³⁷ Former MP Tukuroirangi Morgan called it “rude and ignorant”; Māori studies expert Ngahua Te Awekotuku stated that “[b]y taking our arts they claim to celebrate our genius. I assume we are supposed to feel flattered”; and MP Willie Jackson said “I’m just getting tired of it. People with no understanding using bits of our culture as it suits them without having any knowledge of us.” See Ward, *supra* note 42.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ For an international non-satirical use of the haka that was deemed offensive, see Ellen Connolly, ‘Māori Win Battle to Control All Blacks’ Haka Ritual’, *The Guardian UK* (12 February 2009), available online at <http://www.guardian.co.uk/world/2009/feb/12/new-zealand-haka-Maoris>, who discusses the use of the haka in the Hollywood film “Forever Strong”.

¹⁴¹ This is particularly with copyright and patents. See Cornish and Llewelyn, *supra* note 113, at paras 3.36-3.53, especially paras 3.49-3.51; and Susy Frankel and Geoff McLay, *Intellectual Property in New Zealand*, Wellington: LexisNexis Butterworths, 2002, pp. 161-162.

3.4 LOOKING TO THE FUTURE

The Māori need to be given self-determination over their cultural heritage to ensure their cultural identity, cultural integrity and socioeconomic development and maintenance. Although there are schemes to moderate the use of Māori art and culture, such as on registered trade marks and in relation to the Māori made trade marks, protection from appropriation is by no means guaranteed. There are no positive rights given to the Māori. Rather, the protections offered to the Māori over their cultural heritage, including those proposed in the Patents Bill, are only defensive rights. However, on 20 April 2010, the New Zealand Government announced its support of the UN Declaration on the Rights of Indigenous Peoples, after opposing it in September 2007, when adopted by the General Assembly.¹⁴² Though non-binding, the Declaration recognises the rights of Indigenous peoples to self-determination over their cultural heritage. The effects of this announcement and of other international laws and agreements on the Māori warrant further discussion; however, this lies outside of the purpose of this paper. It is enough to note that the existing regimes are not sufficient to meet the bar of self-determination.

So far, in this paper, the needs and interests of the Māori have been assessed in a very general way, as simply a need to reclaim and benefit from their cultural heritage. In the remainder of the paper, the role of Māori culture in New Zealand and its appropriation are assessed to discuss particular issues relating to their needs and interests and, thus, what any potential solution will need to principally attend to.

4. MĀORI CULTURE IN CONTEMPORARY NEW ZEALAND

4.1 THE MĀORI POPULATION IN NUMBERS

The most recent Census, in 2006, showed that the Māori population (via descent) increased by almost 30 per cent over fifteen years.¹⁴³ In New Zealand, 14.6 per cent of the population self-identified as being ethnically Māori. Of these, 52.8 per cent identified only as Māori and 42.2 per cent identified as being Māori and European. The number of Māori by descent was greater, at 17.7 per cent of the population.¹⁴⁴ Thus, the Māori are a minority in New Zealand, the majority being classified as “European or other”¹⁴⁵ and having a population over four times as large as that of the Māori. The relative position of these two ethnic groups has been projected to 2026 as remaining similar, with the Māori ethnic group being around a quarter that of the

¹⁴² John Key (Prime Minister), ‘National Government to Support UN Rights Declaration’, *Press Release: New Zealand Government* (20 April 2010), available online at <http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>; and Pita Sharples (Māori Party Co-leader), ‘Supporting UN Declaration Restores NZ’s Mana’, *Press Release: New Zealand Government* (20 April 2010), available online at <http://www.beehive.govt.nz/release/supporting+un+declaration+restores+nz039s+mana>.

¹⁴³ ‘QuickStats About Māori’, *supra* note 15, at p.2.

¹⁴⁴ *Ibid*, at p.9.

¹⁴⁵ “Other” includes English, Dutch, British, Australian and “New Zealander” (a term new to the 2006 Census).

majority ethnic group.¹⁴⁶ However, the number of Indigenous people is not insignificant. As the second largest ethnic population, their numbers are certainly large enough to impact political elections and to be considered and not be ignored in important government decisions.

4.2 MĀORI CULTURE IN MODERN-DAY NEW ZEALAND

4.2.1 From the Perspective of the Māori

Population numbers aside, there are many other factors that need to be considered when discussing the relevance of Māori cultural heritage in New Zealand. Firstly, as has already been mentioned, many Māori no longer affiliate with their ancestral tribes, nor do they practice what is considered to be Māori culture. Many have been fully assimilated into “mainstream” New Zealand. Part of the reason for this is historical, as Māori culture was often suppressed either legally or through strict enforcement of certain policies.¹⁴⁷ For example, the Tohunga Suppression Act 1907 expressly denied Māori the freedom to practice their culture by outlawing the spiritual and educational role of *tohunga* (priests or experts in Māori medicine and spirituality). The ancient art of *moko* (facial tattoos) was almost lost as a consequence of its repression by Pākehā missionaries and colonial governments.¹⁴⁸ Stories of children being physically punished by school teachers for speaking in *te reo Māori* throughout the nineteenth and twentieth centuries are also common.¹⁴⁹

As recognised by the New Zealand Ministry of Culture and Heritage, “[o]ne of the essential components of any culture is the language in which it is communicated. The degree to which Māori is spoken, both by Māori and non-Māori, is a measure of the extent to which Māori culture permeates New Zealand society and is valued by it.”¹⁵⁰ *Te reo Māori* is *taonga* (sacred).¹⁵¹ However, in 2006, only 23.7 per cent of Māori (and 4.1 per cent of the general population) could hold a conversation about everyday things in *te reo Māori*, even though it was the second most common language after English, in New Zealand.¹⁵² Furthermore, the number of fluent speakers is significantly less¹⁵³ and the statistics reflect that knowledge of *te reo Māori*

¹⁴⁶ Statistics New Zealand, ‘National Ethnic Population Projections: 2006 (base) - 2026’, *New Zealand Census 2006* (2008), at pp. 4-5.

¹⁴⁷ Such as the removal of *iwi* from their land, when a large part of Māori identity was traditionally tied to their land, and by promoting a single New Zealand identity; see Taima Moeke-Pickering, ‘Māori Identity Within Whanau: A Review of Literature’, Hamilton, New Zealand: University of Waikato, 1996, at p. 2 and 4-5, available online at <http://researchcommons.waikato.ac.nz/bitstream/10289/464/1/content.pdf>. For an in-depth discussion on policies and law that have affected Māori cultural practices, see David Williams, *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*, Wellington: Waitangi Tribunal, 2001.

¹⁴⁸ Ward, *supra* note 42. It was also due to the trade of *mokomokai* (dried, *moko*-tattooed heads), which acted as a disincentive to have a *moko*, as many Māori men feared being killed for their heads if they received a *moko*; see Palmer and Tano, *supra* note 46.

¹⁴⁹ Kōrero Māori, ‘Whakapapa Reo Māori - Short History of Māori Language’, *The Maori Language Commission*, available at <http://www.korero.Maori.nz/forlearners/history>.

¹⁵⁰ MCH, ‘Cultural Indicators’, *supra* note 71, at p. 42. See also Te Puni Kōkiri, *supra* note 88.

¹⁵¹ Statistics New Zealand, *Māori Social Survey Discussion Document*, *supra* note 67, at p. 17.

¹⁵² ‘QuickStats About Māori’, *supra* note 15, at p. 5; and Statistics New Zealand, ‘QuickStats About Culture and Identity’, *New Zealand Census 2006* (2006), at p. 10.

¹⁵³ Kōrero Māori, *supra* note 149.

is decreasing with the newer generations. Just under half (48.7 per cent) of Māori aged 65 years and over could hold a conversation in *te reo Māori*. Whereas, this was only the case for one-quarter of Māori aged between 15 to 64 years and only just over one in six Māori aged under 15 years. Of the Māori by descent, a total of 102,366 people (15.9 per cent) did not know their *iwi*.¹⁵⁴ However, there is some evidence that there is an increasing recognition, among Māori, of the importance of *te reo Māori*.¹⁵⁵

Another reason for the loss of cultural heritage in most Māori is urbanisation. In 1956, nearly two-thirds of Māori lived in rural areas. Fifty years later, 84.4 per cent of Māori usually living in New Zealand lived in urban areas,¹⁵⁶ aiding in the loss of historical ties, such as their *whakapapa* and *iwi*. Ironically, when most Māori lived in rural New Zealand, Indigenous issues were more easily set aside and ignored by the greater population. The urbanisation of much of the Māori population was one of the major factors behind why such concerns came to the foreground.

Finally, there is no one Māori perspective or Māori reality. There is evidence that the social, economic and cultural realities among Māori show more differences than commonalities.¹⁵⁷ Thus, in some cases, discussions over the contemporary Māori viewpoint and Māori versus non-Māori comparisons are somewhat meaningless.

Though, in many cases, the loss of touch with traditional Māori culture is not the fault of the individuals, it does raise questions about what Māori cultural heritage even means in contemporary New Zealand. What do the Māori actually seek to protect and promote? And who would receive the benefits of such protection or promotion? Such questions tie in closely with the debate over the legal definition of Māori, which also mirrors concerns as to Māori identity. That there is a scarcity of data relating to the Māori identity and what Māori culture means in modern-day New Zealand has also been recognised by the current Government, who are now seeking to correct this.¹⁵⁸

4.2.2 From the Perspective of New Zealand as a Whole

With respect to New Zealand culture at large, “Māori culture is valued for the contribution it makes to New Zealand’s identity”,¹⁵⁹ which includes how it impacts the national identity and social, cultural and economic outcomes.¹⁶⁰ The Ministry of Culture and Heritage recently stated that “[d]efining a national identity is not a simple matter”.¹⁶¹ The Ministry reasoned that this is due to the cultural diversity

¹⁵⁴ ‘QuickStats About Māori’, supra note 15, at p.9.

¹⁵⁵ Iain McGregor, ‘Traditional Māori Values More Important Than Ever’, *Waikato Times* (29 October 2007), available online at <http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/5797>.

¹⁵⁶ ‘QuickStats About Māori’, supra note 15, at p. 3.

¹⁵⁷ Statistics New Zealand, *Māori Social Survey Discussion Document*, supra note 67, at p. 8.

¹⁵⁸ Statistics New Zealand, ‘Draft for Consultation’, supra note 100, at p. 13 and 29-32; Wereta and Bishop, supra note 60, at p. 6.

¹⁵⁹ MCH, ‘Cultural Indicators’, supra note 71, at p. 41.

¹⁶⁰ Statistics New Zealand, ‘Draft for Consultation’, supra note 100, at p. 31. This Draft also discusses how there is currently insufficient data on the impact on Māori culture on non-Māori New Zealanders (at pp. 27 and 32).

¹⁶¹ MCH, ‘Cultural Indicators’, supra note 71, at p. 41. See also Scott Hammond, ‘Family Dreams of Total Māori Immersion’, *The Marlborough Express* (31 July 2009), available online at <http://www.stuff.co.nz/marlborough-express/features/Maori-language-week/2707626/Familydreams-of-total-Maori-immersion/>.

existent in New Zealand, which means that, in self-identifying, the Nation emphasises aspects and expressions of culture that are not normally found in other countries. This is consistent with the discursion above, regarding cultural identity, which concluded that cultural identity is a means by which groups differentiate themselves from others. As Māori culture is unique to New Zealand and forms part of the Nation's identity in the outside world, it makes up a high proportion of those aspects and expressions. That Māori culture is increasingly becoming a part of New Zealand culture, as a whole, is undisputable.¹⁶² However, it is questionable how deep this inheritance goes and whether, in fact, it is usually only superficial and "kitschy", rather than a true appreciation and undertaking of *Tikanga Māori*. As discussed above, cultural identity is determined by shared practices and the "meaning" recognised in these practices. The different "meanings" taken from shared practices derived from Māori culture by Māori and non-Māori arguably fractures the New Zealand identity, creating tensions between the two groups.

In 2002, on average per year, per adult: *maraes* (sacred places)¹⁶³ were visited 1.2 times; Māori performing arts attended between 0.4-0.5 times, *wāhi taonga* (treasured places)¹⁶⁴ frequented 0.4 times; and *taonga*¹⁶⁵ was viewed between 0.3-0.4 times.¹⁶⁶ These can be compared to attendances to popular live music and visits to art galleries and museums, both of which were frequented approximately 1.5 times per year, per adult.¹⁶⁷ Furthermore, though the Māori TV channel began broadcasting in 2004, it was only in 2008 that viewing reached a level such that the channel's viewing percentage share (the lowest at 0.6 per cent) could be measured.¹⁶⁸ In 2008, there were 15,965 New Zealand shows, performances and exhibitions. Of these, only 682 were Māori performing arts, making up just over 4 per cent.¹⁶⁹ All of these sets of statistics reflect the relatively low interest in Māori culture, in New Zealand. That this is the case has resulted in such comments such as that Māori culture is "globally hot, locally not".¹⁷⁰ Additionally, the most important factor in creating a sense of national identity, in 2008, was not the country's shared history or race relations and cultural diversity, but landscape and the environment (21 per cent), followed by culture and cultural activities (17 per cent), which includes aspects of Māori culture, such as those mentioned earlier in this paragraph.¹⁷¹

Interestingly, though the Ministry of Culture and Heritage has yet to collect data on the matter, it considers an important indicator of the "social cohesion" in New Zealand to be the non-Māori attendance at Māori cultural events. The rationale for

¹⁶² McGregor, supra note 155. See also Susy Frankel and Megan Richardson, 'Cultural Property and "the Public Domain": Case Studies from New Zealand and Australia', in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Austin, Boston, Chicago, New York, The Netherlands: Wolters Kluwer, 2009, pp. 275-292, at p. 277.

¹⁶³ These serve both a religious and social purpose in pre-Christian Polynesian societies.

¹⁶⁴ Historical sites or places of great Māori significance.

¹⁶⁵ In this context, *taonga* means corporeal treasures. But, *taonga* includes intangible treasures.

¹⁶⁶ MCH, 'Cultural Indicators', supra note 71, at p. 27. For more information, see Brian Pink and Martin Matthews, *A Measure of Culture: Cultural eExperiences and Cultural Spending in New Zealand*, Wellington: Statistics New Zealand and Ministry of Culture and Heritage, 2003.

¹⁶⁷ Ibid, at p. 27.

¹⁶⁸ Ibid, p. 51.

¹⁶⁹ Ibid, p. 57.

¹⁷⁰ Hammond, supra note 161.

¹⁷¹ MCH, 'Cultural Indicators', supra note 71, at p. 55.

this is that social cohesion can be measured by the degree to which people belong to different groups and communities in society and the degree to which those groups interact with one another.¹⁷² The Ministry stated that “arts, culture and heritage events and activities are a means by which New Zealanders can communicate across social, economic, cultural and ethnic groups”.¹⁷³ This was attributed to the fact that participation in such groups creates a sense of belonging for individuals and that contacts at a collective level provide individuals with “a sense of awareness and tolerance for both the different and the common perspectives of others.”¹⁷⁴ Hence, cultural events and activities are able to act as points at which people from diverse cultural backgrounds can interact positively.

Thus, there is recognition by the New Zealand Government that an understanding and appreciation of Māori culture is important for the overall social cohesion of all its citizens. Furthermore, an acknowledgement for the conflict between maintaining social cohesiveness and the benefits of cultural diversity has also been demonstrated.¹⁷⁵

4.3 APPROPRIATION OF MĀORI CULTURE IN NEW ZEALAND

At the junction between Māori and Pākehā identities, are crossovers of objects and ideas of the Indigenous people, sometimes argued to be misappropriation. The author believes that whether there is indeed “*misappropriation*”, as such, is not clear. This is for two reasons. The first is that the term denotes some form of illegal action, when often the law of the land does not protect the interests of the Indigenous people in the way that they desire from such appropriation. Secondly, the range of views across an Indigenous people is by no means homogenous and it is often the case that some will view non-Māori use of Māori culture offensive, whereas others may be proud of the dissemination and others again may not so much be offended by the appropriation as by the fact that they did not receive any benefits therefrom. More often than not, what the rest of society considers as the “Māori view” is whatever is “shouted” the loudest, which in most cases are the views of prominent Māori figures and leaders and those considered to be at the forefront of the debate in Māori rights. Due to the impossibility of representing every view, for the purposes of this paper, the “Māori view” will reflect this.

In many ways, the appropriation signifies the relevance of Māori culture in New Zealand today and a growing mainstream interest and, in fact, growing mainstream identification with Māori culture. In the following paragraphs, an examination takes place, over-viewing some recent appropriations that highlight four common problems that arise, in New Zealand. Namely, issues when an aspect of Māori culture has become part of mainstream culture, tensions between respecting Māori culture and allowing for free political speech, the problems associated with difficulties in objectively determining whether offence might be caused and issues relating to there being no single Māori opinion. International appropriations are

¹⁷² Ibid, at p. 67. See also Statistics New Zealand, ‘Draft for Consultation’, supra note 100, at p. 13.

¹⁷³ MCH, ‘Cultural Indicators’, supra note 71, at p. 67.

¹⁷⁴ Ibid, at p. 67.

¹⁷⁵ Statistics New Zealand, ‘Draft for Consultation’, supra note 100, at p. 13.

discussed in the following section. Through this discourse, it is intended that what the Māori actually seek and particular issues thereto are clarified.

4.3.1 The Integration of Māori Culture into New Zealand Culture

The most well-known case of appropriation of Māori culture is over the use - either simple or satirical - of the haka. Its misappropriation serves as a good example of the integration of aspects of Māori culture into the general national culture and how this can make it difficult to draw the line for what should or should not be protected as being “Māori”, if such protection or rights are to be recognised. This particular haka is the war-dance used by the New Zealand All Blacks, since 1905,¹⁷⁶ and has over this time become a symbol, not only of the All Blacks, but of New Zealand and all its people.¹⁷⁷ In 2000, the Ngāti Toa Tribe threatened to trade mark the haka, creating much argument in New Zealand over who “owns” the haka. Ownership of the haka was not only argued over between the Ngāti Toa Tribe and the rest of New Zealand, but there was also dispute between three tribes as to which of them the haka was actually associated with.¹⁷⁸ Ngāti Toa are the descendants of warrior chief Te Rauparaha, who authored the haka, in 1821, after narrowly escaping enemies from the Ngāti Te Aho Tribe.¹⁷⁹

The chairman of the New Zealand Rugby Union, at the time, and also a Māori, stated that this would “reduce the spontaneity that the haka means to people”,¹⁸⁰ referring to the use of the haka by New Zealanders to support its sports teams and to celebrate successes. He further stated that the haka “is a treasure which [has] been handed down to use, to enhance and hand on”.¹⁸¹ By 2005, it was clear that the Tribe’s intention was not to prevent the All Blacks using the haka - who had the consent of the *iwi* to use it - but to prevent any other unauthorised use, such as commercial organisations who use the haka to market their products.¹⁸² Furthermore, a spokesman for Ngāti Toa, Taku Parai, stated that the *iwi* did not object to widespread public use of the haka and the average New Zealander performing it: “For all New Zealanders who wish to participate and use the haka - not a problem. But when it comes to commercial activity we feel strongly that we need to be sitting down at the table.”¹⁸³ For example, the use of the haka by strippers in a night club, in Auckland, angered the *iwi*, whose representatives called it “totally inappropriate”.¹⁸⁴ In another example, upset was caused when a video was created for a bakery award,

¹⁷⁶ BBC Asia-Pacific, ‘All Blacks Fight to Keep Haka’, *BBC News UK* (16 June 2000), available online at <http://news.bbc.co.uk/2/hi/asia-pacific/793975.stm>.

¹⁷⁷ Frankel and Richardson, *supra* note 162, at p. 280. Interestingly, the Ngai Tahu Tribe find the haka offensive, due to the brutality of its author towards them. See Jonathan Milne, ‘Iwi Threaten to Place Trademark on All Black Haka’, *New Zealand Herald* (22 May 2005), available online at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10126807.

¹⁷⁸ BBC Asia-Pacific, ‘All Blacks Fight to Keep Haka’, *supra* note 176.

¹⁷⁹ Milne, *supra* note 177.

¹⁸⁰ BBC Asia-Pacific, ‘All Blacks Fight to Keep Haka’, *supra* note 176.

¹⁸¹ *Ibid.*

¹⁸² Milne, *supra* note 177. See also Megan Richardson, ‘The Haka, Vintage Cheese and Buzzy Bee: Trade Mark Law The New Zealand Way’ (2001) *European Intellectual Property Review*, 23 (4), pp. 207-210, at p. 207.

¹⁸³ Patrick Crewdson, ‘Iwi Claim to All Black Haka Turned Down’, *New Zealand Herald* (2 July 2006), available online at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10389347.

¹⁸⁴ Milne, *supra* note 177.

by the Bakery Industry Association of New Zealand, which depicted gingerbread cookie men performing the haka, with high-pitched, squeaky voices, before being crushed by a sack of white flour.¹⁸⁵ Though not intended by its creators, many Māori found the video to be inappropriate and culturally offensive.

After a long battle with the Intellectual Property Office of New Zealand (IPONZ), Ngāti Toa's application for a trade mark was rejected, as the haka was widely recognised in New Zealand and abroad as representing New Zealand as a whole and not a particular trader. The application was also rejected because of who filed the application. Originally, this was an individual Ngāti Toa member, who later passed on the application to a Trust representing the Ngāti Toa people. IPONZ stated that it was a "legally scandalous" matter, because the Trust did not necessarily represent all Ngāti Toa people and registration had the potential to offend some descendants of Te Rauparaha.¹⁸⁶ This issue of representation is a recurring one in discussions over Indigenous rights and the recognition of collective identity.¹⁸⁷ The inability of Western property concepts to deal with collective identities is highlighted by Parai's response that it did not matter in whose name the application had been lodged, as all Ngāti Toa are "one and the same people".¹⁸⁸

However, in 2009, the Government came to an agreement with the Tribe, recognising the significance of the haka to Ngāti Toa.¹⁸⁹ The agreement does not confer to Ngāti Toa full ownership rights, in the sense of receiving royalties from performances or the right to veto its use. Prime Minister John Key said that the issue was about "cultural redress" and was not financial.¹⁹⁰ But, it is an "expectation of the Tribe" that "the primary objective of this redress is to prevent the misappropriation and culturally inappropriate use or performance of the haka 'Ka Mate'".¹⁹¹ In doing this, a balance is to be struck between the "rights and interests of Ngāti Toa, users, and the broader public" and there must be a "safeguarding [of] legitimate third party interests and the interests of the general public".¹⁹² The exact means of protecting Ngāti Toa's interests in the haka have not yet been decided upon.¹⁹³ This means that any use of the haka for commercial reasons should recognise the tribe's cultural interests. However, John Key was clear in indicating that the All Blacks' use would not be considered as commercial exploitation and their use would not be prevented nor monetarily constrained.¹⁹⁴

¹⁸⁵ Mike Knott, 'Gingerbread Haka Causes Upset', *North Shore Times* (31 July 2007), available online at <http://www.stuff.co.nz/national/14479>.

¹⁸⁶ Crewdson, *supra* note 183.

¹⁸⁷ Peter-Tobias Stoll and Anja von Hahn, 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law', in von Lewinski (ed.), *supra* note 106, pp. 7-57, at pp. 17-20.

¹⁸⁸ Crewdson, *supra* note 183.

¹⁸⁹ Ngāti Toa Rangatira, 'Letter of Agreement', *Office of Treaty Settlements* (11 February 2009), at para 39, available online at <http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CNgatiToaofferletter.pdf>; and BBC Asia-Pacific, 'New Zealand Māori Win Haka Fight', *BBC News UK* (11 February 2009), available online at <http://news.bbc.co.uk/2/hi/asia-pacific/7882775.stm>.

¹⁹⁰ Martin Kay and Katherine Newton, 'Haka Seals Ka Mate Deal', *The Dominion Post* (11 February 2009), available online at <http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/1397833/Haka-seals-Ka-Mate-deal>.

¹⁹¹ Ngāti Toa Rangatira, *supra* note 189, at para. 41-42.

¹⁹² *Ibid*, at para. 40.

¹⁹³ Kay and Newton, *supra* note 190.

¹⁹⁴ Connolly, *supra* note 140.

The result from the negotiations with the Government is encouraging, in the sense that there is a clear recognition of the positive rights that Māori maybe entitled to with regard to aspects of their cultural heritage. Moreover, the interests of the greater public and the requirement of balancing the competing interests are also acknowledged (as it was by IPONZ). However, the wide and nebulous wording of the agreement and the fact that exactly how the haka should be protected has not been decided indicates that it is not simple to define what should fall into the auspice of the protection. Furthermore, requiring direct negotiations with the Government for each aspect of cultural heritage sought to be protected seems to be inefficient in time and resources. No doubt, in this particular situation, the negotiations only took place due to the great public interest in the haka, and no government would be willing to negotiate over each aspect of culture for which protection is desired. Therefore, it is argued that there needs to be a more general and procedurally structured approach, allowing the Māori or *iwi* to more readily claim for and assert their rights over their cultural heritage.

4.3.2 Political Free Speech & Fundamental Rights

The *moko* is another aspect of Māori cultural heritage, which often causes debate. Here, its appropriation is used to demonstrate the fine line between potentially protecting one people's culture and inhibiting another's political free speech. As discussed above, not all Māori can have a *moko* and those that do have the requisite qualities have different *moko*, depending on their *mana*, identity and ancestry. There are numerous international examples of misuse of the *moko*,¹⁹⁵ however, recently in New Zealand, controversy arose over a portrait of Queen Elizabeth II (the current Monarch) with a *moko* on her chin, which was painted by a Pākehā, Barry Ross Smith.¹⁹⁶ The particular *moko* is only worn by people from Tuhoe of the Chief's bloodline. The use of the *moko* outside of *Tikanga Māori* was considered to be offensive and also an insult to the Queen. However, the artist had not intended this. Rather, he stated that it represented the "self determination" of New Zealand from England. The artist continued that the signing of the Treaty of Waitangi created a new race and the Queen of that new race needed a *moko*. The same artist additionally made a self-portrait with a full facial *moko* to symbolise the merging of the two equal cultures.

The issue of the freedom of expression of non-Indigenous people and where the line should be drawn between ensuring non-offence or self-determination and allowing for free political speech, in itself, elicits problems of the clash of the two cultures, where one culture may more greatly value the underlying meaning of the *moko* (or any other aspect of their cultural heritage), whereas the other places more value in free speech (or another basic right). Western legal systems have always heavily favoured free political speech, with the effect that the existing law is unable to take into account the interests of Indigenous peoples and their desire for non-offence. The situation also begs the question of whether the same offence would have

¹⁹⁵ Ward, *supra* note 42.

¹⁹⁶ Jonathon Howe, 'Queen with Moko Portrait Draws Complaints', *Manuwatu Standard* (17 December 2009), available online at <http://www.stuff.co.nz/national/3171317/Portrait-draws-complaints>.

been felt had the artist himself been Māori, or if that sole fact would make the painting a valid political statement from the Māori point of view.

Closely related to this are issues relating to the parodying and satirical use of Māori cultural heritage. For example, there are many situations where the haka has been performed or shown satirically, often purely for commercial reasons.¹⁹⁷ To the Māori (and indeed all New Zealanders, generally), the haka is something which holds much *mana* and pride and is not something to have fun poked at. Of course, it is likely that the users do not consider the cultural implications towards the Māori. Indeed, in the Western view, parody is not normally frowned upon, but is often promoted and considered an intelligent form of debate on social or political issues. In many copyright systems, parody and satire are exceptions to infringement,¹⁹⁸ reflecting how highly the right of freedom of expression is valued. Though a full analysis is beyond the frame of this paper, it is important to note that these examples illustrate that the protection of Māori cultural heritage could potentially cross policy-set, intellectual property boundaries. Such concerns are relevant in the consideration of any limitations placed on rights proposed for Indigenous peoples, with regard to their cultural heritage.

Although these particular examples are only illustrative of the potential of limiting free speech, it is not difficult to perceive that there could easily be other instances where other human rights could also be constrained, if complete cultural control were given to the Māori. For example, as with the *Ka Mate* haka, certain aspects of Māori cultural expressions may be (from a Western perspective) discriminatory against women. The larger issue of how to limit any cultural protection afforded to Indigenous peoples, and whether it is somehow contradictory to do so with Western limitations, is outside of the confines of this paper.¹⁹⁹ Suffice it to say that any proposed protection over Māori cultural heritage will need to be weighed against, not only the interests of the greater public in the culture itself, but also the human rights of both Māori and non-Māori alike.

¹⁹⁷ For example, the "Handbag Haka" (BBC Asia-Pacific, 'New Zealand Ire at "Handbag Haka"', *BBC News UK* (6 July 2006), available online at <http://news.bbc.co.uk/2/hi/asia-pacific/5153506.stm>; Peter Lewis, 'Handbag Haka Ads Outrage All Blacks', *ABC Australia* (6 July 2006), available online at <http://www.abc.net.au/news/stories/2006/07/06/1680430.htm>; and Frankel and Richardson, *supra* note 162, at p. 282.) and an Italian Fiat car advertisement (Newstalk ZB, 'Italian Female Haka', *News and Talkback Radio Station* (4 July 2006), available at <http://www.newstalkzb.co.nz/newsdetail1.asp?storyID=99040>; and Frankel and Richardson, *supra* note 162, at p. 282).

¹⁹⁸ Such as in Australia (Copyright Act 1968 ss 41A and 103AA). There is also the requirement that use be 'fair'. The satire/parody exception was also being considered in New Zealand; see Judith Tizard (former Associate Commerce Minister), 'Commissioning Rule to be Repealed and Parody Satire Review Announced', *Press Release: New Zealand Government* (23 September 2008), available online at <http://www.beehive.govt.nz/release/commissioning+rule+be+repealed+and+parody+satire+review+announced>. The intention to make this review was, however, indicated by the prior Labour-led Government, who also stated that a discussion paper on the subject would be released in December 2008. However, the November 2008 elections resulted in a change in government, after which no such discussion paper was released and it appears that the new National-led Government is not pursuing this review.

¹⁹⁹ This issue is discussed in Christoph B. Graber, 'Using Human Rights to Tackle Fragmentation in the Field of Traditional Cultural Expressions: an Institutional Approach', in Christoph B. Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional cultural Expressions in a Digital Environment*, Cheltenham, UK: Edward Elgar, 2008. pp. 96-120, at pp. 115-117.

4.3.3 Pre-Determining Offence: Māori Representatives and “Experts”

As an outsider, it is difficult to gauge whether appropriation will or will not cause offence. For example, in 2007, the “Miss Indianz” (Miss India of New Zealand) wore a sari with traditional Māori patterns, in the formal section of the competition.²⁰⁰ The outfit had previously been shown at a Pacific fashion show and, when worn for the competition, was found to showcase “rich Kiwi Indian culture”. There was no controversy over this use, raising the question of why this was the case. In other words, why was it okay for a New Zealand teenager of Indian descent to win a Miss India competition wearing a sari with Māori designs on it, whereas the use of the similar patterns on the Air New Zealand outfits (discussed in the following paragraphs) was deemed offensive to some? The author here is not trying to argue that the use of Māori designs on the sari were or should have also been offensive, but rather to indicate that it does not seem possible to answer these questions in an objective manner and it appears that whether or not something will cause offence cannot be absolutely defined, but must be judged on a case-by-case basis. In other words, some kind of self-determination over cultural heritage is required.

The difficulties in gauging whether offence will be caused are not necessarily resolved simply through consultation, due to issues relating to: (1) deciding who is able to represent the Māori; and (2) the diverging opinions of Māori “experts” and leaders. This is illustrated here through discussion relating to non-Māori use of the *koru* (also known as the *pitau*). The *koru* is one of the fundamental motifs of Māori customary art and can be seen on their *whakairo rakau* (wood carving), *whakairo kohatu* (stone carving), *whakairo iwi* (bone carving), *kowhaiwhai* (scroll painting) and *ta moko* (Māori tattooing).²⁰¹ It is “based on the shape of an unfurling fern frond. Its circular shape conveys the idea of perpetual movement, and its inward coil suggests a return to the point of origin. The *koru* therefore symbolises the way in which life both changes and stays the same.”²⁰² The *koru* has become associated with the Māori and, since the 1980s, it has been questioned whether it is appropriate for non-Māori to use the image. There are many non-Māori uses of the *koru* that have raised concerns with Māori, resulting in comments being made publicly by Māori leaders and “experts”.

The most well-known controversies over the *koru* involve *Air New Zealand*, the country’s national carrier.²⁰³ Air New Zealand has used the *koru* on the tail of its planes since 1973 and it has since become a sign of the airline. Recently, Air New Zealand released new uniforms, which were heavily covered in different *koru*.²⁰⁴ Created by a well-known New Zealand designer, Trelise Cooper, the new uniforms were stated to be disrespectful of Māori cultural symbols, by Rawiri Taonui (Head of the Canterbury University Māori and Indigenous School). Taonui stated that they

²⁰⁰ Jason Oxenham, ‘Teen Named Culture Queen’, *Central Leader* (16 October 2007), available online at <http://www.stuff.co.nz/auckland/28376>.

²⁰¹ IPONZ, ‘Proposed Amendments to the Practice Guidelines: Pitau (Koru)’, supra note 108.

²⁰² Te Ahukaramū Charles Royal, ‘Māori Creation Traditions: The Koru’, *Te Ara - the Encyclopedia of New Zealand* (4 March 2009), available at <http://www.teara.govt.nz/en/Maori-creation-traditions/1/1>. For a discussion on the multiple meanings of the *koru*, see Frankel and Richardson, supra note 162, at pp. 283-285.

²⁰³ For example, see Service and Food Workers Union, ‘Air NZ Claims Property Rights Over Koru’, *Press Release* (29 November 2006), available online at <http://www.scoop.co.nz/stories/PO0611/S00424.htm>.

²⁰⁴ Sam Sachdeva (The Press), ‘Thrown-Together Uniforms Disrespect Māori’, *stuff.co.nz National* (29 January 2010), available at <http://www.stuff.co.nz/national/3272904/Thrown-together-uniforms-disrespect-Maori>.

were “too busy and inelegant” and obviously drawn by someone with no appreciation of the culture and who did not “understand the deeper symbolism”.²⁰⁵ The different *koru* had different meanings and their random and cluttered mixture was offensive. Importantly, Taonui specifically stated that there was nothing wrong with using the *koru* and other symbols on clothing, provided it was done “with elegance” and done by someone who appreciates the meaning behind the symbols.²⁰⁶ Furthermore, he said that businesses should consult with Māori before using symbols of special significance to them.²⁰⁷

However, Ngapuhi tribal leader David Rankin condemned Taonui’s statements, claiming that they showed “gross disrespect” and that Taonui “clearly has no concept of the role and function of these designs in our culture”.²⁰⁸ Rankin further stated that he saw Taonui’s comments as lacking in humbleness, an “embarrassment” and as “grandstanding”, as Air New Zealand had been in consultation with the Māori Language Commission and other Māori experts in the relevant area, and Taonui should have consulted his elders before making his “outburst”.²⁰⁹ Furthermore, a leading Māori clothing designer found that the uniforms did not breach *Tikanga Māori* and were not offensive. Instead, Charmaine Love (Kia Kaha designer) welcomed the new approach to the Māori designs and stated that such use is up to the designer’s personal taste.²¹⁰

Being Head of the Māori and Indigenous School at one of New Zealand’s largest universities, as an outsider to the Māori world, one could expect that Taonui would be a reliable source on such matters. The diverging opinions of Taonui, Rankin and Love, all prominent Māori figures, reinforces the supposition that there is no one Māori perspective, making it difficult as an outsider to gauge what should or should not be appropriate and who to ask for an expert opinion. This difficulty is not easy to solve, as differing opinions will always exist. The decision of who is able to represent the interests of Māori should most sensibly be left in the hands of the Māori themselves. But, it is clear that there is a need for a more transparent means for potential users of Māori cultural heritage to determine whether their actions would breach *Tikanga Māori*. In other words, there needs to be more clarity as to who potential users of Māori cultural heritage may seek advice from and absolve themselves from controversy.

4.4 SUMMARY

In New Zealand, a main issue with the appropriation of Māori cultural heritage relates to the fact that many aspects of this culture have been integrated into national mainstream culture. As a result, certain proposals to protect Māori cultural heritage may impinge on the cultural interests and identity of non-Māori New Zealanders. The fundamental rights of New Zealand non-Māori (and even Māori, from a Western

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ One News and Newstalk ZB, ‘Academic Takes Exception to Air NZ Uniform’, *TVNZ National* (29 January 2010), available at <http://tvnz.co.nz/national-news/academic-takes-exception-air-nz-uniform-3345048>.

²⁰⁹ Ibid.

²¹⁰ Ibid.

perspective) may similarly be limited. Consequently, any potential solution would have to ensure that the interests of both Māori and non-Māori are balanced.

The fact that it is difficult to determine what may or may not be deemed inappropriate use indicates that consultation prior to use is always advisable. However, as there is no one Māori view as to this, it must be clear to potential users exactly who they should consult with. Therefore, appropriate channels need to be created for clarity.

5. ISSUES RELATING TO GLOBAL USE OF MĀORI CULTURE

When Māori culture is appropriated outside of New Zealand, there are different implications. It is not potentially a sign of Māori culture forming part of the general New Zealand identity or done out of pride or affiliation for the country's history and Indigenous people. In almost all cases, such appropriation is done for commercial reasons, outside of *Tikanga Māori* and is offensive to the Māori.²¹¹ In recent years, there have been a myriad of international appropriations of Māori culture, which has offended the people. As in within New Zealand, many of the more prominent examples relate to the haka. It has repeatedly been appropriated simply because of the strength associated with it, but, performed outside of *Tikanga Māori*, it is viewed as inappropriate. Most of the problems associated with national appropriations also hold true for international appropriations. In the following, issues more particular to the latter are discussed.

5.1 DIFFICULTIES IN CONTROL INTERNATIONALLY

Though it cannot be said that the Māori have a strong control over the use and trade of their cultural heritage within New Zealand, such as to prevent appropriation, it is fair to state that this control is further depressed outside of the jurisdiction of the New Zealand Crown. What is apparent is that there is no mechanism by which any Māori could prevent or officially complain about such appropriation. The international nature of the appropriations and lack of any enforceable rights, means that little results from complaints from the Māori, except perhaps some bad publicity. It could even be contended that such publicity is not necessarily negative.

This can be demonstrated by an Italian Fiat car advertisement, which used female actors, dressed in black, to perform the *Ka Mate* haka around a Fiat car on a television commercial, in Italy. The advertisement finished with a boy in the back seat poking out his tongue (the *Ka Mate* haka also finishes with a similar action). The offence was particularly great, in this situation, given that women are forbidden to perform the *Ka Mate* haka. The advertisement was popular in Italy and Fiat refused to withdraw it, even when requested by the New Zealand Foreign Affairs Minister, Brad Tattersfield. The Ministry of Foreign Affairs had tried to convince the producers to change the advertisement, due to its cultural insensitivity towards the Māori, but this was not achieved. The Minister stated that they wanted the haka either to be

²¹¹ Michael Field, 'Harawira Warned Over Making Money On Flag', *stuff.co.nz with NZPA* (4 February 2010), available at <http://www.stuff.co.nz/national/3293982/Harawira-warned-over-making-money-on-flag>.

performed by a Māori group, or to have another haka designed for the women to perform. That Fiat refused to comply even with the requests of the New Zealand Government indicates that had the Māori themselves complained it no doubt would have fallen on deaf ears. Fiat's declination of the opportunity to run its marketing campaign in a non-offensive manner, as asked for by the Ministry of Foreign Affairs, makes it evident that a multinational procedure is required to ensure that the needs and interests of Indigenous peoples are better met.

5.2 WHAT IS MĀORI CONSULTATION OR CONSENT?

There are situations where it is difficult to discern whether or not there has been Māori consultation or consent. This lack of clarity is particularly prevalent from the perspective of the so-called "misappropriators", who may believe that they have sought and obtained permission and are, thus, not causing offence. It is easily perceivable that these difficulties are greater for non-New Zealanders, who likely have very little understanding of Māori tribal and social systems.

For example, a BBC One promotional campaign featured a Welsh rugby team performing a haka, led by a Māori player Joe Hutley.²¹² The team included three other Māori players. New Zealand lawyer and Māori-rights activist Maui Solomon stated that it was ironic that the BBC:²¹³

... "an icon of colonialism" - should choose the haka to promote itself [...] the Western culture, having all their own stories, are starting to mine indigenous stories for their appeal. *That's what I find objectionable - if they're just taking it for granted, if they're not acknowledging the guardians of that knowledge and that culture.*

Hutley, however, argued that he had the right to teach his culture to anyone that he pleased and that he had explained the cultural significance to the players, director and producer. He continued, stating that "[w]e're not doing anything derogatory towards Māori culture. I refuse to get to the point where you have to go and ask someone. I'm just as entitled to it as the next person – as long as it's done correctly".²¹⁴

As with the national situation, the disparity of opinion among different Māori and the uncertainty faced by those wishing to use aspects of Māori cultural heritage correctly and possibly with consent favours the creation of a transparent procedure, through which such users can comply and ensure their non-culpability.

5.3 SUMMARY

A particular problem with international appropriations of Māori cultural heritage is that they are very difficult to prevent, even if sought by the New Zealand Government. With the haka, the current New Zealand Prime Minister and Ngāti Toa chief negotiator, Matiu Rei, agreed that it was extremely difficult to prevent

²¹² TVNZ, supra note 41.

²¹³ Ward, supra note 42 (emphasis added).

²¹⁴ Ibid. A similar situation when English Premier club Everton commissioned a team of Māori dancers to perform the "Everton Haka"; see Rebecca Palmer, 'A Stolen Hi Ha Hi Haka', *The Dominion Post* (8 August 2009), available online at <http://www.stuff.co.nz/sport/2731957/A-stolen-hi-ha-hi-haka/>.

commercial use of the haka overseas.²¹⁵ Furthermore as with national appropriations, it is difficult to know who to consult with and who can represent the Māori. Internationally, this is arguably an even greater problem, as the users likely have little knowledge of the Māori social system.

6. EXTRAPOLATING WHAT THE MĀORI SEEK TO PROTECT

As is clear from these national and international examples of appropriation, exactly what the Māori want, with respect to their cultural heritage, is not obviously definable. It does not appear that the Māori want to “own” their cultural heritage, in the Western sense of ownership. In many situations, such as with the haka, they appear to be proud of the fact that it has become a part of mainstream culture and a symbol of New Zealand as a people. A commonly held view is that Māori culture is not limited to use by only Māori, after all “[w]e’re all New Zealanders”.²¹⁶ At first glance, it appears that it is only when their culture is used in an offensive way, against *Tikanga Māori*, that they seek to limit its use and that the interest to be the only ones to commercially use and trade their cultural heritage, and to benefit economically from such use, is not the primary concern. However, if one looks deeper, it is apparent that control or self-determination over their cultural heritage is at the heart of what they seek. It is clear from the examples that there are some aspects of Māori culture that are simply not tradeable, whereas there are others that are under certain conditions. But, as a non-Māori it is difficult to foresee what will or will not be offensive, particularly at the international level.²¹⁷ Furthermore, the preference for consultation (for example, with the haka and as discussed further below), so that potential users are given non-offensive options, rather than a simple desire to restrict all non-Māori use and trade, is an acknowledgement by the Māori of the economic value of using their cultural heritage in trade. Therefore, who decides on tradeability and terms thereof must be the Māori, to ensure non-offence and that they receive the benefits of such trade.

7. ATTEMPTS AT GETTING IT RIGHT

There are examples of when commercial entities either undertook the correct procedures or made amends when the impropriety of their actions was made clear to them. These are outlined in the following paragraphs.

²¹⁵ Kay and Newton, *supra* note 190.

²¹⁶ ‘Tohu Wines’ Chief Executive James Wheeler, quoted in Janes, *supra* note 43.

²¹⁷ For another example, see Reuters, ‘Avatar Language “Based on Māori”’, *The Dominion Post* (21 January 2010), available online at <http://www.stuff.co.nz/entertainment/3248154/Avatar-language-based-on-Maori>; and Charlie Gates (The Press), ‘Avatar Recycles Indigenous “Stereotypes”’, *stuff.co.nz Entertainment* (1 January 2010), available at <http://www.stuff.co.nz/entertainment/film/3201437/Avatar-recycles-indigenous-stereotypes>.

7.1 CONSULTATION

An often cited example of positive consultation is that which took place, in 2005, between international computer game manufacturer Playstation and Ngāti Toa. The haka was allowed to be used in a rugby game in exchange for providing *iwi* scholarships.²¹⁸ Another famous example involved the use of Māori names for Lego's Bionicle action figures. The game involved a group of imaginary "Tahunga" inhabitants of "Mata Nui" island, ruled by the evil beast "Makuta". Six heroes called the Toa sought to liberate the island. In the storyline, Lego used a myriad of Māori and Pacific Island names, one of which was the aforementioned Māori word *Tohunga* (priest). The story showed a "remarkable resemblance" to traditional stories from Easter Island, the people from which are closely related to the Māori.²¹⁹ Maui Solomon represented three Māori tribes and stated that "[i]t was an unauthorized use of traditional names and language, and it was an inappropriate use ... There had been no consultation, no prior informed consent. And it's a trivialization ... So there are cultural and moral issues."²²⁰ One protester of the use stated that it was an example of "the ongoing story of western domination".²²¹ However, this situation was resolved through negotiations between Lego and many Māori groups. Lego agreed to stop using the word *Tohunga* and to refrain from introducing any new Māori words in the second-generation Bionicles.²²²

Ideally, consultation should take place before the actual use of the cultural heritage, rather than afterwards. Requiring that the offended parties complain before consultation is initiated (if it is initiated) places Indigenous peoples in a very defensive position, whereas pre-consultation would create a more positive role with overtones of cultural self-determination. The showing of understanding and respect of the origins of the cultural heritage through pre-consultation, even without benefit sharing, is a great step towards meeting the interests of Indigenous peoples.

7.2 SELF-REGULATION AND ITS LIMITS

Resulting from the consultation discussed above, Lego agreed to set up a code of conduct for toy manufacturers wanting to use Indigenous culture in their products, but this does not appear to have come to fruition.²²³ It is unfortunate that Lego does

²¹⁸ Milne, supra note 177.

²¹⁹ BBC Asia-Pacific, 'Lego Game Irks Māoris', *BBC News UK* (31 May 2001), available online at <http://news.bbc.co.uk/2/hi/asia-pacific/1362435.stm>.

²²⁰ Kim Griggs, 'Lego Site Irks Māori Sympathizer', *Wired* (21 November 2002), available online at <http://www.wired.com/culture/lifestyle/news/2002/11/56451>. In total, there were over ten words used, which were challenged, including *pohatu* (stone), *kanohi* (mask) and *whenua* (earth). As a result of the use of the Māori words, a website for fans of the game was hacked and verbally attacked.

²²¹ Ibid.

²²² Andrew Osborn, 'Māoris Win Lego Battle', *The Guardian UK* (31 October 2001), available online at <http://www.guardian.co.uk/world/2001/oct/31/andrewosborn>. It was not a full victory, as current versions of the game were not withdrawn.

²²³ See BBC Asia-Pacific, 'Lego Game Irks', supra note 219; and The Lego Group 'The Lego Group Code of Conduct: Version 4.0', available online at http://cache.lego.com/downloads/info/Codeofconduct/CODEOFCONDUCT_English.pdf.

not appear to have followed through with its agreement, as it potentially could have been a good example of how self-regulation of an industry could sometimes be a possible approach in respecting the interests of Indigenous peoples.

Even had Lego set up a code, self-regulation of an industry has many limits. The most important of which is that there is no recourse for their enforcement, either nationally or internationally. Thus, such a code would be merely aspirational. Furthermore, getting an entire industry to agree to follow a code is by no means an easy feat.

7.3 WITHDRAWAL OF OFFENSIVE USE

There are also occasions where companies have withdrawn their use when advised of its impropriety. Unlike Fiat, Bass Breweries, a British producer of an alcoholic fruit drink “Reef”, responded positively to requests from the New Zealand High Commission, in London, when the Commission requested that a “culturally offensive” advertisement be withdrawn.²²⁴ The advertisement featured bikini-clad woman performing a haka on a beach, followed by the suggestion that drinkers “go native”. The advertisement was considered “demeaning and racist”. Additionally, upon learning of the Māori outrage at the sale of “Māori Mix” cigarettes from Philip Morris, in Israel, the product-line was ended and the head of the tobacco company issued an apology to the Māori. The use of the brand name was extremely controversial and more so due to the fact that smoking is the largest killer of the Māori people.²²⁵

Though in the final three examples, the international companies stopped the actions that were considered to be inappropriate, and these are positive results, the more relevant point is possibly that the insult should not have been caused in the first place, putting the Māori in a defensive position. This could have been prevented had there been pre-consultation.

8. A POSSIBLE SOLUTION

Any proposed solution must meet the interest of the Māori to have some level of control over their cultural heritage, such as to prevent offensive use and ensure they benefit from its trade or non-trade. The only solution seems to be to always consult with Māori before appropriating aspects of their cultural heritage. In other words, prior informed consent may be necessary.²²⁶ Solomon stated (with regard to the Lego Bionicles) that it was not that the use of Māori words for future corporate ventures was never allowable, but the owners of that knowledge need to be consulted: “It’s

²²⁴ Keith Perry, ‘War Dance Over Alcopop TV Ad’, *The Guardian UK* (11 December 2000), available online at <http://www.guardian.co.uk/media/2000/dec/11/advertising.uknews/print>.

²²⁵ See Jon Stokes, ‘Tobacco Giant Apologises to Māori’, *New Zealand Herald* (29 April 2006), available online at http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10379513; and ‘One News, ‘Disgust Over “Māori” Brand Cigarettes’, *TVNZ Health* (12 December 2005), available at <http://tvnz.co.nz/content/638858>.

²²⁶ The concept of prior informed consent (PIC) is not new in the debate to protect Indigenous cultural heritage and knowledge. See, for example, the TK and TCE WIPO Draft Provisions, *supra* note 5.

not saying it can't be used under any circumstances. It's a question of respect and following a proper process."²²⁷ As shown by the negotiations with Playstation and the statement by the Foreign Affairs Minister (that the haka could be performed by the Māori or a haka could be designed for the Italian women), there are likely solutions that will please both parties. In the least, the Māori will feel more comfortable with the outcome if they have been included in the decision-making process.

Hence, it is suggested that consultation is best achieved through the formation of a body of representatives (regardless of form, for example a trust or governmental department), with whom both national and international users of Māori cultural heritage can consult and perhaps even obtain permission from. This body would represent the interests of all Māori, thereby endowing some form of cultural self-determination. As the example involving the Air New Zealand uniforms demonstrated, there is no one Māori opinion. This raises the question: exactly who should be consulted? It is not difficult to decide when it is just use of a single discrete piece of culture, such as the *Ka Mate* haka, which has a clear owner. Confusion arises when it is a general aspect of the cultural heritage that use is sought for, such as any haka. Therefore, any solution involving a group of experts requires the inclusion of many Māori opinions, representing a broad range of Māori interests and *iwi*. Exactly who would make up this body of people is arguably best left to the Māori themselves, who are likely more knowledgeable on who is able to represent their views. Furthermore, self-selection would be more in line with the concept of self-determination and should ultimately result in less questioning of government action.

There must also be representation of the greater public interests to address the fact that certain aspects of Māori culture have become integrated into mainstream New Zealand culture and to ensure that human rights (such as free political speech) are respected. Having such representation sits well with the current perspective that the Crown and the Māori are in a "Partnership".²²⁸

Finally, to ensure that these efforts are not frustrated by appropriations outside of New Zealand, an international dimension would also be required. The exact structure of such an international procedure is worthy of further dissemination, outside of the confines of this paper. In the same vein, it is notable that the question of the intellectual property implications from making consultation with the proposed body compulsory (at least within New Zealand) is also an important question, well worth its own discursion.

9. CONCLUSION

This discourse has shown that who the Māori are, as an ethnic group and people of New Zealand, is not easy to define. This is in part due to the fact that, pre-colonisation, the Māori did not exist as one ethnic race, but were tribal. It is further complicated by the differentiation between those that are genealogically Māori and those that self-identify as being Māori. This difficulty in defining a single Māori identity is reflected in the myriad of varying views of what cultural heritage should

²²⁷ Griggs, *supra* note 220.

²²⁸ See above, section entitled "The Treaty of Waitangi and Its Guarantees".

or should not be traded or shared, and whether offence is felt when an aspect of Māori culture is appropriated. Furthermore, Māori culture now pervades most New Zealander's sense of identity, making it again difficult to articulate exactly what should be protectable Māori culture, as opposed to what has become so integrated into New Zealand culture, that to define it as Māori only, would remove some of the average New Zealander's sense of identity.

Generally, from what has been said by Māori leaders and academics on the events of appropriation, it can be observed that what the Māori seek to prevent is not purely the use of their culture, but "offensive" use which is not in accordance with *Tikanga Māori*. It does not appear that the Māori seek "ownership" of their cultural heritage, in the Western construct of the word, and when "ownership" is sought under Western mechanisms, it is often because it is the only means to protect their interests. Furthermore, it is clear that the Māori are aware of the economic value of their cultural heritage and also wish to benefit from this.

The Treaty of Waitangi guarantees the Māori the right to their *taonga* and, in recent years, successive governments have invested in encouraging the preservation, progress and trade of many forms of Māori culture. However, there exists no mechanism to ensure that Māori cultural heritage is not misappropriated. Therefore, though there exists support for Māori culture and, thus, identity, cultural integrity and self-determination are by no means ensured. It has yet to be seen whether the recent announcement of support for the UN Declaration on the Rights of Indigenous peoples will work towards this end.

Ultimately, it is desirable that use of aspects of Māori cultural heritage should be made after consultation and done so within *Tikanga Māori*. Moreover, a requirement of consultation seems to sit with the finding that it is otherwise difficult to judge what will or will not be offensive use. Therefore, there needs to be some form of cultural self-determination, as overly explicit laws and definitions of what should or should not be protectable would not meet the needs and interests of the Māori. This could be achieved through the creation of a body or organisation, to which potential users of Māori culture could apply or seek advice for such use. This body would need to be representative of the diverse interests of different Māori groups and would, further, need to have a mechanism of balance to ensure that the interests of the general public are not too far impeded and, additionally, that human rights are not obstructed. Though such a system may serve the national interests of the Māori, it would lack any teeth if there were not also an international dimension. Therefore, it is proposed that there additionally needs to be an international procedure, to ensure that Indigenous peoples can benefit from the use and trade of their cultural heritage.

An important interconnected result of such respect of Māori culture is the maintenance of the Māori sense of identity. Currently, the Māori perform poorly in statistics indicative of their well-being. It is argued herein that support of the maintenance, development and trade of their cultural heritage would assist in bettering the position of the Māori, in both a social and economic sense. This would not only be a consequence of the increased potential of income from the trade of cultural services or products, which would take advantage of the current global interest in Indigenous cultures, but would additionally be due to the effect that encouraging cultural identity has on improving social well-being, which has on-flow effects, fortifying the economic outcome further.

Glossary

Ahi kā	The “long burning fire of occupation” (Mead, Hirini (1997), <i>Landmarks, Bridges and Visions: Aspects of Māori Culture</i> , Wellington: Victoria University Press, at p. 264). Traditionally it applied only to land, but the contemporary view is that this concept can extend beyond just land, and is about meeting one’s tribal obligations and maintain their connections to the Māori world (Kāretu, T. (1990), ‘The Clue to Identity’, <i>New Zealand Geographic</i> , 5, 112-117, p. 112).
Atua	Gods.
Haka	Māori posture dance.
Hapū	A sub-division of <i>iwi</i> . Membership is determined by genealogical descent and a hapū is made up of a number of <i>whānau</i> .
Iwi	These are Māori tribes, consisting of several related <i>hapū</i> (clans or descent groups).
Kaitiakitanga	Māori stewardship or guardianship over their lands, villages and treasures. The conservation ethic embodied in the practice of <i>Kaitiakitanga</i> is important for the sustainable management of natural and physical resources. The use, management, and control of these resources are carried out to the mutual benefit of people and resources.
Karakia	Incantations and prayers.
Koru	A shape based on an unfurling fern frond, common in Māori designs and art work.
Kowhaiwhai	Māori scroll painting.
Mana	This is authority, control, influence, power, prestige, psychic force. There are three forms of <i>mana</i> : <i>mana atua</i> - God given power; <i>mana tūpuna</i> - power from ancestors; <i>mana tangata</i> - authority from personal attributes. (See Mutu, Margaret (2003), <i>Te Whanau Moana: Nga kaupapa me nga tikanga/ Customs and Protocols - The Teachings of McCully Matiu</i> , Auckland: Redbooks, p. 156).
Manākitanga	Nurturing relationships and looking after people.
Māoritanga	A term which conceptualises “Māoriness” and encapsulates elements of traditional Māori expressions considered to be essential to Māori culture.
Marae	Sacred places, which serve both a religious and social purpose in pre-Christian Polynesian societies.

Moko	Māori facial tattoo.
Ngā taonga tūturu	Objects that relate to Māori culture, history or society
Noa	To be free of <i>Tapu</i> . The <i>tapu</i> of <i>taonga</i> sometimes needs to be removed temporarily before people can make use of them. <i>Karakia</i> are important for the removal of <i>tapu</i> from <i>taonga</i> , rendering them <i>noa</i> .
Pākehā	A name used to refer to non-Māori, usually of European descent.
Pitau	See koru.
Rangātiratanga	See Tino rangātiratanga.
Ta moko	The art of Māori tattooing.
Tāngata Whenua	A term sometimes used by the Māori to self-identify. In its broadest sense, it means “people of the land”.
Tangi	Funeral service.
Taniko	Māori weaving.
Taonga	Treasures or highly prized possessions or holdings; sacred.
Tapu	To be sacred (the opposite of <i>noa</i>). People, objects or places can be <i>tapu</i> . All <i>taonga</i> are <i>tapu</i> .
Te ao Māori	A Māori world view. Literally “the Māori world”.
Te reo Māori	The Māori language.
Tikanga Māori	“Māori tools of thought and understanding that help organise behaviour” (Mead, Hirini (2003), <i>Tikanga Māori: Living by Māori Values</i> , Wellington: Huia Publishers, at p. 12), or a “Māori way of doing things” (New Zealand Law Commission (2001), <i>Māori Custom and Values in New Zealand Law</i> , Wellington: NZLC, at p. 17). They are subject to interpretation, there are tribal variations and there is a fluidity in their application.
Tino rangātiratanga	Sovereignty, chieftanship, self-determination.
Tohunga	Priests; experts in Māori medicine and spirituality.
Utu	This is about reciprocity in relationships and the balancing of social relationships.
Wahi tapu	Sacred places, “in the traditional, spiritual, religious, ritual, or mythological sense” (Historic Places Act 1993).
Whakairo iwi	Māori bone carving.
Whakairo kohatu	Māori stone carving.

Whakairo rakau	Māori wood carving.
Whānau	This means extended family and includes anyone connected by blood, not matter how distantly connected.
Whakapapa	Whakapapa represents more than lineage and genealogy, but also connects Māori existence to the atua (gods), creation and all life and represents the inheritance Māori receive from descent. It encompasses the view of existence itself and the relationship between this and the natural world.
Whanaungatanga	This is one of the most pervasive Māori values and it stresses the importance of maintaining relationships, or creating meaningful relationships with people. The nature of this kinship relationship determines people's rights, responsibilities, and obligations in relation to the use, management, and control of <i>taonga</i> of the natural world. <i>Whanaungatanga</i> determines rights and use, and responsibility to sustainably manage particular resources.