

## NEW ZEALAND

### Response to Question 1 :

#### Trademarks

There are currently no specific provisions contained in New Zealand's intellectual property laws specifically directed to the protection of traditional knowledge. Aspects of traditional knowledge are, however, protected to an extent by intellectual property laws generally. For example, traditional literary or artistic works may qualify for protection as copyright works under the Copyright Act 1994. Certain works might also be registrable as registered designs under the Designs Act 1953.

A new Trade Marks Bill, currently being considered by Parliament, will if enacted allow the Commissioner of Trade Marks to refuse to register a trademark where its use or registration would be likely to offend a significant section of the community, including Maori<sup>1</sup>. This provision would provide additional protection to some expressions of traditional knowledge by preventing the inappropriate registration of marks based on Maori text or imagery.

The Trade Marks Bill also provides that persons who are culturally aggrieved have standing to seek a declaration that a registered trademark is invalid because it is likely to offend a significant section of the community, including Maori.

To assist the Commissioner's consideration of whether a mark might be considered offensive to Maori, the Bill provides for the establishment of an advisory committee. The role of the advisory committee would be to advise whether the use or registration of a mark derivative of Maori text or imagery would be or is likely to be offensive to Maori.

While the above amendments have yet to be brought into effect (dependent on the Parliamentary process), the Intellectual Property Office has existing processes for the examination of trademarks containing Maori text and imagery. Where it has been determined that a trademark is of significance to a particular iwi (tribe), hapu (sub-tribe) or other Maori group, it is usually considered appropriate to require an applicant to seek consent from the relevant Maori authority (section 19 of the Trade Marks Act requires consent to registration in certain cases).

For example, where a trademark consists of or includes Maori words that are an iwi or hapu name, the name of a site of significance to a particular Maori group, or part of a traditional Maori proverbial saying, applicants will be advised that registration of the trademark "would appear" to be deceptive under Section 16 of the Trade Marks Act<sup>2</sup>, as consumers may assume there is a connection between the applicant and its goods or services and the iwi or hapu concerned. Applicants are further advised in such cases that objection to registration may be overcome if consent of the relevant Maori authority is obtained. Any consent given is included as a condition of registration. Similar objections may be raised concerning devices with particular cultural or spiritual significance to Maori.

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<sup>1</sup>This response makes reference to the term "Maori". For the purpose of this document "Maori" is used to refer to the indigenous people of New Zealand.

<sup>2</sup>Section 16(1) of the Trade Marks Act 1953 provides "It shall not be lawful to register as a trademark or part of a trademark any scandalous matter or any matter the use of which would be likely to deceive or cause confusion or would be contrary to law or morality or would otherwise be disentitled to protection in a Court of Justice".

## Patents

New Zealand is also considering how aspects of the Patents Act 1953 might (where appropriate) be modified to address Maori concerns and interests. A comprehensive review of the Act is taking place, which will include consideration of exceptions to patentability. Public consultation will be undertaken this year which will among other things, seek to ascertain views on the issues of interest to Maori, such as how patent examiners might be made aware of traditional knowledge which constitutes prior art.

Also in the patents area, the Government has agreed in principle to one of the recommendations of the Royal Commission on Genetic Modification<sup>3</sup> that a "Maori Consultative Committee" be established<sup>4</sup>. The precise role and functions of the Committee are, however, yet to be determined and are expected to be the subject of consultation as part of the review of the Patents Act more generally. Also in response to a recommendation of the Royal Commission on Genetic Modification, the Government has agreed that the Patents Act be amended by adding a specific exclusion to the patentability of human beings and the biological processes for its generation. This can in part be seen as a response to concerns raised by Maori about the patentability of human beings.

As with trademarks, the Intellectual Property Office has developed guidelines for patent examiners concerning patent applications of significance to Maori. The guidelines target inventions relating to, using or derived from indigenous flora and fauna, Maori individuals or groups, indigenous micro-organisms (including viruses, bacteria, fungi, algae where any line of research resulted from any traditional or local knowledge), and indigenous material derived from an inorganic source where research resulted from any traditional or local knowledge.

If an application falls into one of the above criteria an examiner is required to assess whether it is appropriate to raise an objection to registration under section 17 of the Patents Act (which allows the Commissioner of Patents to refuse an application where the use of the invention in question would be contrary to morality). In making this assessment, examiners are directed to consider the extent to which the application may have special cultural or spiritual significance for Maori, and whether or not the application is likely to be considered culturally offensive. Where an application may reasonably be considered to fall under section 17, applicants are to be advised accordingly and given the opportunity to obtain the consent of the competent Maori authority.

## Plant Varieties

A review of the Plant Variety Rights Act 1987 is currently being considered. The purpose of the review is to determine whether the 1987 Act provides adequate protection for new plant varieties. The Government's obligations under the Treaty of Waitangi, and Maori concerns regarding the exploitation of indigenous flora will be taken into account.

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<sup>3</sup> The Royal Commission on Genetic Modification was established to look into and report on the issues surrounding genetic modification in New Zealand. The Commission's warrant asked that, among other things, it investigate and hear views on the intellectual property issues involved, now and in the future, in relation to the use in New Zealand of genetic modification, genetically modified organisms and products.

<sup>4</sup> The Royal Commission on Genetic Modification recommended that the "Maori Consultative Committee" develop procedures for assessing patent applications, and facilitate consultation with the Maori community where appropriate.

Measures such as those contained in the Trade Marks Bill are not able or intended to address the concerns of Maori about the use and protection of their "cultural and intellectual property". They do, however, seek to provide some practical measures that will contribute to this objective.

We are not aware of case law or practical examples in the industrial property or copyright areas which demonstrate the ability of the existing New Zealand intellectual property regime to protect traditional knowledge (see, however, reference to "Maori Made Mark" in response to question 26). While a search of the Intellectual Property Office's database reveals a number of patents (either granted or under examination) involving traditional uses of indigenous flora and fauna, these records do not contain information relating to the ethnicity of the applicant. Similarly, with trademarks, while all applications involving Maori text and imagery are flagged as type "Maori" there is no record of the ethnicity of the applicant<sup>5</sup>.

Response to Question 2: New Zealand has not introduced any specific (*suigeneris*) law providing for intellectual property protection of traditional knowledge. New Zealand considers, however, that the consideration of *suigeneris* models for the protection of traditional knowledge is both necessary and important. New Zealand is currently undertaking scoping work on both legislative and non-legislative mechanisms for domestic protection of traditional knowledge. It is expected that discussion with Maori on these issues will take place this year. New Zealand considers that further and ongoing discussion with Maori is fundamental to the development of domestic models. Such a discussion must also precede any New Zealand input into an international scheme of *suigeneris* protection for traditional knowledge.

As no *suigeneris* measures currently exist, New Zealand has not answered questions 3 -25.

Response to Questions 3 to 25: Not Applicable.

Response to Question 26: New Zealand does not provide assistance to traditional knowledge holders to acquire, exercise, manage and enforce rights in traditional knowledge in the form of targeted education or training, financial assistance, reduced filing or maintenance fees, or enforcement.

In the trademarks area, the Government, through the Maori Arts Board of the Arts Council of New Zealand ("Creative New Zealand"), has funded the development of the "Maori Made Mark". The Maori Made Mark is a mark of authenticity and quality, which will indicate to consumers that the creator of works is of Maori descent and produces work of a particular quality. Creative New Zealand is the current owner of the trademark. It is anticipated that once the mark is well established it will be transferred to an autonomous Maori entity.

The Maori Made Mark was developed in response to concerns raised by Maori regarding the protection of cultural and intellectual property rights, the misuse and abuse of Maori concepts, styles and imagery and the lack of commercial benefits accruing back to Maori. The Mark is considered by many as an interim means of providing limited protection

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<sup>5</sup>The Intellectual Property Office of New Zealand receives on average, about 2200 trademark applications per month. Of these, on average, around 12 contain Maori text and imagery. There are approximately 900 registered trademarks and 170 pending applications which contain Maori text and imagery.

to Maori cultural property, by decreasing the market for copy - cat works produced by non - Maori.

Response to Question 27 : New Zealand considers that the generally perceived constraints of intellectual property laws relating to novel contribution, duration, identification of an owner, and the lack of a protective imperative are reasons that existing intellectual property laws do not provide the level of protection for traditional knowledge that Maori, and other indigenous peoples, seek (as that is not their purpose).

The following is a practical example of current intellectual property rights not providing the protections which Maori seek. A Maori business sought patent and plant variety right protection for an indigenous plant (and a process for the extraction of its oil) with traditional healing properties. Patent protection was not available for the process used to extract oil from the plant as the method was common knowledge. A plant variety right was not available as the plant concerned grew naturally. The applicant brought this matter to the attention of the Waitangi Tribunal<sup>6</sup>. He noted that the only possible legal protection available would be to develop a plant variety with similar medicinal qualities. This option was not, however, acceptable to the applicant on the ground that it would require genetic modification which the applicant considered to be unethical and culturally offensive. The possibility of identifying (and later patenting) the active molecules in the oil extracted from the plant was found to be prohibitively expensive. The applicant suggested that the ideal solution is for the Government to develop legislation to prohibit ownership (by third parties) of the indigenous plant concerned and the associated traditional medicinal knowledge.

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<sup>6</sup> The Waitangi Tribunal is a specialist tribunal charged with hearing the claims of Maori against the Crown in respect of their rights under the Treaty of Waitangi which imposed rights and obligations on both Maori and the Crown in anticipation of the formal British settlement of New Zealand. MALAYSIA

Response to Questions 1 and 2 : None

Response to Questions 3 to 25 : Not applicable.

Response to Question 26 : None

Response to Question 27 : At present, there is no specific law for the protection of traditional knowledge in Malaysia. Therefore, we are unable to provide general information or comments on perceived limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge.